

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES, "SMC" JAIPUR

डा० एस. सीता लक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 1132/JP/2019  
निर्धारणवर्ष/AssessmentYears :2016-17

Smt. Priyanka Agarwal Flat No. 6 & 7, Guest House, Multimetals Limited, Kansua Road, Heavy Indi Area, Kota.	बनाम Vs.	DCIT, Central Circle, Kota.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AKIPM8881 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby :Shri Mahendra Gargieya (Adv.)&  
Shri Devang Gargiya (Adv.)  
राजस्व की ओरसे / Revenue by: Ms. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 03/11/2022  
उदघोषणा की तारीख / Date of Pronouncement: 30/11/2022

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee against the order of the learned Commissioner of Income Tax (Appeals)-2 Udaipur [hereinafter referred to as "CIT(A)"] dated 28.06.2019 for the assessment years 2016-17, which in turn arises from the order passed by the Deputy Commissioner of Income Tax, Central

Circle, Kota passed under Section 143(3) r.w.s. 153B(i)(b) of the Income Tax Act, 1961 (in short 'the Act') dated 27.12.2017.

2. The assessee has raised the following grounds:-

*“1. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in upholding the validity of order passed by the ld. AO.*

*2. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in sustaining penalty of Rs. 66,748/- u/s 271AAB of the Act.*

*3. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in recording various observations in the appellate order are contrary to the provisions of the law and also against the law decided by the Hon'ble Courts.*

*4. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in not considering the explanation and judicial decisions referred by the appellant.*

*5. That the petitioner may kindly be permitted to raise any additional or alternative grounds at or before the time of hearing.*

*6. The petitioner prays for justice & relief.”*

3. The assessee has raised additional ground of appeal :-

*“That the show cause notice issued u/s 274 r/w 271AAB(i) of the Act, is quite vague and did not at all specify the specific clause of S. 271AAB of the Act under which the penalty was initiated i.e. whether it is for clause (a) or clause (b) or clause(c) of section 271AAB(1) because the conditions for imposing the penalty*

*under each such clauses are separate. The impugned penalty based on such a notice being contrary to the provisions of law & facts kindly be quashed.”*

4. Brief facts of the case are that the assessee is a Salaried person deriving income from salary income from M/s Multimedia Limited and income from other various sources. A search & seizure operation u/s 132 of the Act was carried out at the residence of the assessee on dated 02.07.2015. The AO issued notice u/s 142(1) dated 11.04.2016 & 06.01.2017 to the assessee, in compliance of which ROI was filed on 16.01.2017 for A.Y. 2016-17 declaring total income of Rs. 24,67,900/- (including surrendered income of Rs. 2,22,492/-). The AO completed the assessment u/s 143(3) r.w.s. 153B (1)(b) on 27.12.2017 accepting total income as offered by the assessee. The assessee did not file any appeal against the said assessment order u/s 143(3) dated 27.12.2017.

5. The AO initiated penalty proceedings u/s 271AAB, and therefore, SCN u/s 274 r/w 27AAB was issued on 27.12.2017 for imposing penalty. The assessee, in response, however the AO not feeling satisfactory, imposed penalty @ 30% of Rs. 66,748/- on the assessed undisclosed income of Rs. 2,22,492/- vide order dated 26.06.2018 holding as under:-

1. The Penalty u/s 271AAB is mandatory in nature.
2. That in the present case all essential requirements of invoking S.271AAB are satisfied.
3. The assessee failed to explain source of income satisfactorily and could not produce any documents in his favour.
4. Assessee would not have declared this income in absence of search
6. Before the Id. CIT(A), the assessee has reiterated its arguments. The Id. CIT(A) for the reasons stated in his order has rejected the arguments and submissions made by the assessee. The Id. CIT(A) has confirmed the action of the AO by observing as under:-

*“5. I have considered the submission of the assessee and the relevant findings of the AO as given in the order of under appeal*

*5.1 The penalty has been levied in respect of unexplained cash of Rs.2,22,492/- found during search. Therefore, the income of Rs.2,22,492/-falls within the definition of undisclosed income as given in clause c of Expl. to S. 271AAB.*

*5.2 The argument of the assessee that penalty under S. 271AAB is not mandatory is found to be supported by the judicial authorities cited and is therefore acceptable in principle., but the said principle does not apply in the facts of the instant case because as discussed in the preceding Para in the instant case income of Rs.2,22,492/- in respect of which*

*penalty u/s 271AAB has been levied, falls within the definition of 'undisclosed income' as given in clause (c) of Expl. to S. 271AAB penalty u/s BFA(2).*

*5.3 Further, levy of penalty by the A.O. under clause © of Section 271AAB(1) is also found to be correct as discussed in the following sub paras.*

*5.31 Section 271AAB, Sub section (1), provides for levy of penalty at three different rates on undisclosed income (as defined in the section) of "specified previous years" (as defined in the section) 10% in cases falling under clause (a) 20% in cases falling under clause (b) and 30% in cases not falling under clause 9a) or (b).*

*5.3.2 For a case to fall under clause (a) or (b), one of the conditions is that taxes alongwith interest. On the undisclosed income admitted during search must be paid on or before the "specified date" and the return of income declaring the undisclosed income is furnished on or before the "specified date". The term "specified date" has been defined in explanation to section 271AAB, as "the due date of furnishing of return of income under sub section (1) jof 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. Thus, the statute is unambiguous that for a case to fall under clause (a) or (b) of section 271AAB(1), one of the conditions to the satisfied is that the assessee has furnished the return of income declaring the undisclosed in is furnished on or before the due date u/s 139(1).*

*5.3.3b In the instant case, the return of income was not filed on the due date for filing return of income u/s 139(1) but belatedly on 16.01.2017, therefore penalty has rightly been levied by the A.O. under clause © of Section 271AAB, i.e. at 30% of "undisclosed income.*

*5.4 In view of the above discussion penalty of Rs. 66,748/- levied by the AO u/s 271AAB(1)(c), is hereby confirmed.*

*In the result, the appeal is dismissed."*

7. The ld. AR for assessee submitted a detailed written submissions which are as under:-

“GOA- 1 &5: Impugned penalty imposed u/s 271AAB against the provision of law as the subjected amount is not *undisclosed income*:

1. Assessment and penalty - separate proceedings:

1.1 It is pertinent to note that the AO has levied the impugned penalties only on the basis of findings recorded by the AO in the assessment orders. It is by now well settled that assessment and penalty proceedings are separate and distinct from each other. The order imposing penalty is quasi-criminal in nature and, thus, the burden lay on the department to establish that the assessee had concealed his income. Since the burden of proof in penalty proceeding varies from that in the assessment proceeding, a finding in the assessment proceeding that a particular receipt is income or that a deduction has wrongly been claimed intentionally, can't automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceeding. In the penalty proceedings, thus, the AO is bound to bring positive material showing intentional concealment. Also therefore, all the evidences filed & explanation submitted require a consideration afresh. The basic difference between the assessment proceedings and in the penalty proceedings is that whereas in the penalty proceedings, the evidence has to be again evaluated differently and with a view to conclusively ascertain the earning of the undisclosed income beyond any doubt, however, in the assessment proceedings even if the evidence is not conclusive, the income may be assessed. For imposing penalty, the AO must conclusively prove the earning of the undisclosed income. However, in this case, the AO merely alleged but failed to bring any material whatsoever by making independent inquires to support the imposition of the impugned penalty.

1.2 It is submitted that impugned penalty u/s 271AAB has been imposed by the AO mainly on account of the so called admission made by the assessee during the course of the search in the statement recorded u/s 132(4) on dated 02.07.2015 (CIT(A) order pg. 3)

At the outset it is submitted that a bare reading of S.271AAB goes to show very clearly that it uses the word '*may*' which implies that the discretion has been conferred upon the AO to decide as to whether a penalty under that provision has to be levied or not and if

yes then under which clause. For this purpose, the AO is required to examine the merits of each case and cannot blindly rely upon the fact of income surrendered by the assessee. No undisclosed income at all existed what to talk of imposition of penalty w.r.t thereto. This way, it can't be said that penalty u/s 271AAB is automatic as agreed by the CIT (A) also.

2.1 Surrendered Income not always undisclosed income: Further the said provision has specifically defined what *undisclosed income* means vide Expl. (c) to the provision. Therefore, unless the AO successfully brings the assessed income / surrendered income within the four walls of said definition, he is not empowered to impose penalty as per Expl. (c) to S.271AAB(1). In this case the assessee declared income of Rs24,67,900/- (which includes surrendered income of Rs. 2,22,492/-) on dated 16.01.2017. Therefore, the question whether the income disclosed by the assessee is "*undisclosed income*" in terms of the definition u/s 271AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the said income in the return of income filed u/s 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of S. 271AAB that the said income disclosed by the assessee in the statement u/s 132(4) is an "*undisclosed income*" as per the definition provided u/s 271AAB. Therefore, the AO in the proceedings u/s 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive at the conclusion that the income disclosed by the assessee falls in the definition of "*undisclosed income*" as stipulated in the expl. to the said section.

2.2 AO failed to prove "*undisclosed income*" as per S. 271AAB : Neither the AO nor the CIT(A) have discussed as to how the income surrendered by the assessee is "*undisclosed income*" as per definition provided in the Expl. to S. 271AAB(1) of the Act.

2.3 On Facts, no undisclosed income applying the available judicial guideline: Applying the judicial guideline on the facts of the present case, it can be very well demonstrated that in this case there was no undisclosed income and the AO blindly relied upon the so called admission of the surrender which was made / obtained by the revenue to make the search a success. As a matter of fact, a careful and honest reading of the seized documents / assets etc. viz-a-viz the explanation given by the assessee during the course of the very statement recorded u/s 132(4) itself on 02.07.2015, will make it evidently

clear that there was no occasion at all to make any admission of income. In fact, despite there being the source explained, the figures were stressed to meet with the target of the surrender to be obtained by the search team. A perusal of the statement recorded u/s 132(4) would also give a clear picture that firstly, no incriminating material were found during the search and secondly, the assessee has on, on all occasions, has voluntarily surrendered the income, by simply accepting the figure as stated by the search team in their question.

As a matter of fact the assessee herself in reply to question No. 7 (reproduced at Pg. 3 of CIT(A) Order) explained the source of income by stating that out of the cash surrendered during search Rs. 50,000 was withdrawn from the bank account of the assessee and Rs. 1,00,000 was withdrawn by the husband of the assessee. The remaining amount was past saving and amount received gift on various occasions.

The authorities below have neither disputed or disapproved the fact by the assessee.

Therefore, as per the specific definition of undisclosed income in Expl. (c) to S. 271AAB, the amount of Rs.2,22,492 being the cash available as a consequence of past savings and gift on various occasions, cannot be considered as undisclosed income, for the simple and admitted reason that the sources of income was explained by the assessee herself in the statement recorded u/s 132(4) which was nowhere disputed or disapproved by the AO.

3.1 Additional Income only: That the income declared by the assessee at the best is additional income and not undisclosed income. This fact is quite evident from the statement recorded u/s 132(4), which was offered to buy peace of mind. It may be submitted that the AO has nowhere alleged that the assessee had intentfully tried to hide the income.

#### 4. Supporting case laws:

Covered issue: 10.1 In factsimilarpapers/dairy was seized in the case of Padam Chand Pungliya vs. ACIT (2019) 201 TTJ 307(JP) (DPB \_\_\_\_),whereupon it washeld as under:

*“Disclosure of additional income in the statement recorded under s. 132(4) itself is not sufficient to levy the penalty under s. 271AAB until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the Explanation to s. 271AAB(1). Since the assessee has offered the said income in the return of income filed*

*under s. 139(1), the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a precondition for invoking the provisions of s. 271AAB that the said income disclosed by the assessee in the statement under s. 132(4) is an undisclosed income as per the definition provided under s. 271AAB. In the proceedings under s. 271AAB, the AO has to examine all the facts of the case as well as the basis of the surrender and then arrive at the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the Explanation to the said section. Therefore, the contention of the Departmental Representative that the levy of penalty under s. 271AAB is mandatory is not sustainable as the AO has to first issue a show-cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact whether all the conditions provided under s. 271AAB are satisfied.—Ravi Mathur vs. Dy. CIT (ITA No. 969/Jp/2017, dt. 13th June, 2018) followed.”*

4.1 Ravi Mathur vs. Dy. CIT in ITA No. 969/JP/2017 dated 13.06.2018

4.2 Dinesh Kumar Agarwal vs. ACIT in ITA Nos. 855 & 856/JP/2017 dated 24.07.2018.

4.3 Raja Ram Maheshwari vs. DCIT in ITA No. 992/JP/2017 dated 10.01.2019.

4.4 M/s. Rambhajo's vs. ACIT in ITA No. 991/JP/2017 dated 11.01.2019.

4.5 Rajendra Kumar Gupta vs. DCIT in ITA No. 359/JP/2017 dated 18.01.2019.

Cases on *other document*

4.6 DCIT vs. Subhas Chandra Agarwala & Sons (HUF) [2018] 91 taxmann.com 442 (Kol) it was held as under:

*“Assessee submitted that it was for first time that he was doing unsystematic speculative activity which earned income and, it was brought under head 'Income from other sources', and so, accordingly, he was not required to maintain books of account as stipulated in section 44AA or section 44AA(2)(ii) - Further, assessee's speculative transactions had been found to be recorded in 'other documents' which were retrieved from assessee's accountant's drawer and based on that assessee declared Rs. 2 crores during search and later returned income of Rs. 2 crores as income under head 'Income from other sources' which were accepted by Assessing Officer - Whether therefore, commodity profit recorded in other document maintained by assessee which was*

*retrieved during search could not be termed as 'undisclosed Income' under section 271AAB and thus levy of penalty was unjustified”.*

4.7 ACIT vs. Marvel Associates [2018] 92 taxmann.com 109 (Visakhapatnam) it was held in para 9 as under:

*“Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material. In the instant case a loose sheet was found according to the A.O., it was incriminating material evidencing the undisclosed income. X xxxx 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. Therefore, we are unable to accept the contention of the revenue that the loose sheet found during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of Ajay Sharma v. Dy. CIT [2013] 30 taxmann.com 109 held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee.” X xxxxxx .*

5. Cases cited by the revenue are not applicable.

6. Submission filed before Id. CIT(A), are also relied upon.

In view of the above facts and judicial guideline, the impugned penalties deserve to be deleted in full.

Additional GOA : Invalid Notice u/s 274 : Vague and Non-specific.

Facts and Submissions:

1. From a perusal of the show cause notice issued u/s 274 r/w S. 271AAB dated 27.12.2017, it is not at all clear as to for what precise charge, the appellant was asked to show cause viz. whether the charge is with regards to clause (a), clause (b) or clause (c). Rather the AO has simply mentioned “*deliberately concealed the correct and true income*”. Thus, he has not specified the default of the assessee in terms of clause (a) to (c) of section 271AAB of the Act. The said impugned SCN is issued in a routine manner without mentioning under which precise clause of S. 271AAB(1) of the Act, the assessee is found liable for penalty. This has left the assessee hanging in confusion, as to on which limb the AO proposes to impose the said penalty and hence, seeking reply.

2. Covered issue: It is submitted that the AO did not appreciate that the different charges specified in the S. 271AAB carry different connotations. Notably, this Hon’ble Bench, when found deficiency in the Show Cause Notice u/s 274 r/w 271AAB to the effect that the AO did not specify the precise default and charge (viz 10% or 20% or 30% of the undisclosed income), repeatedly held that such SCN was deficient and did not meet with the specific requirement of the law as propounded in the case of Manjunatha Cotton & Ginning Factory (supra) & SSA Emerald Meadows and hence quashed the impugned penalties. Kindly refer Shri Padam Chand Pungaliya vs. ACIT (2019) 201 TTJ 307 (JP) wherein the Hon’ble ITAT discussed this issue at internal page 13 para 5.1 onward and following the decisions in the case of Ravi Mathur vs. DCIT in ITA No. 969/JP/2017 vide order dated 13.06.2018 and DCIT vs. Shri R. Elangovan (Chennai bench) and after reproducing the SCN u/s 274, finally held at internal page 22 as under:

*“Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB are very vague and silent about the default of the assessee and further the amount of undisclosed income on which the penalty was proposed to be levied. Even the Hon’ble Jurisdictional High Court in case of Shevata Construction Co. Pvt. Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016 has concurred with the view taken by Hon’ble Karnataka High Court*

*in case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Karnataka) which was subsequently upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242 taxman 180 (SC). Accordingly, following the decision of the Coordinate Bench as well as Hon'ble Jurisdictional High Court, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and consequently the order passed under section 271AAB is not sustainable and liable to be quashed."*

2.1 Again very recently, this Hon'ble ITAT in the case of LaxmanNainani vs DCIT [2020] 80 ITR (Trib) 1 (Jp.) and Vimal Chand Surana vs. DCIT in ITA No. 304/JP/2018 vide order dated 30.05.2019 has again taken a similar view, mainly following Shri Padam Chand Pungaliya vs. ACIT (supra). Operative part of the order is at internal pg. 5 pr. 6 onwards. The Hon'ble ITAT, even while considering the contrary decisions cited by the Revenue (Sandeep Chandak, Rajendra Kumar Gupta, RajaramMaheshwari), finally held at internal pg. 14 as under:

*"... Therefore, in view of a series of decisions as well as decision of Hon'ble Jurisdictional High Court, we hold that the show cause notice issued by the AO without specifying the default and ground for which the penalty under section 271AAB was proposed to be levied renders the initiation of penalty proceedings invalid and consequently the order passed under section 271AAB of the Act is liable to be quashed...."*

2.2 Ashish Kumar Kanodia vs. ACIT (2019) 33 NYPTTJ 445 (JP) holding that

*"Penalty under s. 271AAB—Undisclosed income for purposes of s. 271AAB—Cash advances recorded in diary found in search—Cash advances given to various persons found noted in a diary recovered in the course of such which were declared as income in the return could not be treated as undisclosed income attracting penalty under s.271AAB"*

2.3 Arun Kala vs. DCIT (2019) 33 NYPTTJ 756 (JP), held as under:

*"Penalty under s. 271AAB—Validity—Notice issued without application of mind—Caption of notice not mentioning correct section for levy of penalty, default for which show-cause notice was issued not specified but the pre-typed notice"*

*mentioning defaults relating to various provisions initiation of proceedings for penalty under s. 271AAB suffered from various defects not curable in law”*

2.4 B. D. Mundra & Sons vs. DCIT in ITA No. 826/JP/2019 dated 25/10/2019 held as under:

*“9. We thus find that the Assessing officer in the aforesaid show-cause notice dated 31.12.2010 has initiated the penalty proceedings "for concealed the particulars of income or furnished inaccurate particulars of such income" and subsequently, while passing the penalty order, the Assessing officer has levied penalty for furnishing inaccurate particulars of income. We therefore find that though the Assessing officer has not initiated the penalty on a specific charge, however, while levying the penalty, the Assessing officer has levied the penalty for furnishing of inaccurate particulars of income. At the same time, it is also noted on perusal of the penalty order that the finding so given is not specific to three separate disallowances and the Assessing Officer has merely gone by the order of the Tribunal in the quantum proceedings ITA No. 826/JP/2019 B. D. Mundra & Sons, Kota Vs. DCIT, Kota where additions have been sustained and has not given any specific finding as to how the disallowances so made and sustained results in furnishing of inaccurate particulars of income. In case of Shweta construction (supra), the Hon'ble Rajasthan High Court has held that the Assessing officer has to give a specific notice while initiating the penalty proceedings itself. In the instant case, the show-cause notice is not specific as to the charge for levy of penalty which shows non-application of mind by the Assessing officer and hence, respectfully following the decision of the Hon'ble Rajasthan High Court, the consequent penalty order cannot be sustained. In the result, the penalty so levied by the Assessing officer is directed to be deleted.”*

2.5 Also kindly refer M/s K.P. Singh Bhadoria Contractor vs DCIT in ITA. No. 312/JP/2018 dated 07.08.2018, M/s Airen Metals Pvt. Ltd. Vs. The ACIT in ITA No. 820/JP/2016 dated 22.10.2019 163 DTR 201 (DPB) & Shri Chandmal Kumawat, Jaipur vs. ITO (2017) 58 TW 1.

3. It is submitted that in the above decisions the only stress was upon the SCN wherein only, the occasion arise for the first time for the assessee to reply towards the Show Cause as to why penalty be not imposed w.r.t one or w.r.t both the offences. But by not becoming specific in inviting a reply from the assessee, it is a gross violation of the principles of natural justice and therefore the Hon'ble Courts have treated such a notice to

be vague and nullity and consequently the impugned penalty based thereon, has also been held to be without jurisdiction. On the other hand, however, the time of the completion of the assessment, it is only the initiation by the AO in the assessment order, when the assessee is not called upon to show cause against the very initiation hence, whether the penalty was initiated on one limb or the other or both the limbs, is irrelevant. Otherwise also, no appeal lay against the very initiation.

Therefore, the law which is now well settled, is only and only w.r.t the vagueness in the SCN and there is no reference at all to the findings recorded or the initiation of the penalty proceeding in the assessment order. Therefore, to refer the initiation in the assessment order by the authorities to justify the imposition of penalty is complete misreading and misinterpretation of law of the land.

Therefore, the impugned penalty deserves to be deleted.”

8. We have considered the Written Submission filed by the AR for the assessee and perused the orders of the authorities and the material available on record.

The ld. AR for the assessee raised additional ground of appeal before us. The additional ground of appeal raised by the ld. AR for the assessee was purely a legal ground of appeal which do not require any fresh investigation of fact inasmuch as the same is available before us.

9. The ld. AR for the assessee has challenged the show cause notice issued u/s 274 read with section 271AAB(1) of the Act did not specify clause of section 271AAB of the Act under which the penalty was initiated i.e. whether it is for clause (a) or (b) or which clause (c) of section 271AAB(1).

10. On contra, the ld. Sr. DR raised objection that the additional ground of appeal cannot be raised which was not raised before the ld. CIT(A) taking into consideration of the above facts and circumstances. Since the ground which was raised by the assessee is purely legal nature and challenging the notices itself. We allow the additional ground of appeal. We allow and admit additional ground of appeal.

11. Going into merits of the case, we observe that the Assessing Officer has initiated the penalty u/s 271AAB(1) of the Act on undisclosed income of Rs. 2,22,492/- by way of notice u/s 274 read with section 271AAB(1)(c) of the Act. The ld. AR for the assessee contended that the notices issued was in vague.

*“The total income of the assessee in the status of Individual for Assessment Year 2016-17 relevant to Previous Year 2015-16 is assessed at Rs. 24,67,900/- u/s 143(3) r.w.s 153B(1)(b) of the Act. The form ITNS-150 showing calculation of tax and interest chargeable, if any, is attached herewith and forms a part of this Order. A notice of demand u/s 156 of the Act and challan for payment of tax, if payable, is hereby issued. Penalty u/s 271AAB(1)(c) of the Income Tax Act is initiated on undisclosed income of Rs. 2,22,492/- by way of issue of notice u/s 274 r.w.s 271AAB(1)(c) of the Income Tax Act. Penalty notice u/s 274 r.w.s 271AAB(1)(c) of the Act issued accordingly.”*

12. The ld. Sr. DR on other hand supported the orders of lower authorities and submitted that the charge is clearly mentioned as undisclosed income was declared after such and written was filed belatedly and the ld. Sr. DR relied upon the case of Manjula Cotton Mills .The ld. Sr. DR strongly relied upon the orders of the ld. CIT(A). He took us to the orders of ld. CIT(A) in Paragraph 5.1 to 5.4 as under:-

*“5.1 The penalty has been levied in respect of unexplained cash of Rs. 2,22,492/- found during search. Therefore the income of Rs. 2,22,492/- falls within the definition of undisclosed income as given in clause (c) of Explanation to Section-271AAB.*

*5.2 The argument of the assessee that penalty u/s 271AAB is not mandatory is found to be supported by the judicial authorities cited, and is therefore acceptable in principle, but the said principle does not apply in the facts of the instant case, because, as discussed in the preceding Para, in the instant case, income of Rs. 2,22,492/-, in respect of which penalty u/s 271AAB has been levied, falls within the definition of “undisclosed income” as given in clause (c) of Explanation to Section 271AAB penalty u/s BFA(2).*

*5.3 Further, levy of penalty by the A.O under clause (c) of Section 271AAB(1) is also found to be correct as discussed in the following sub paras.*

*5.3.1 Section 271AAB, sub section (1), provides for levy of penalty at three different rates on "undisclosed income (as defined in the section) of "specified previous years (“as defined in the section): 10% in cases falling under clause (a), 20% in cases falling under clause (b) and, 30% in cases not falling under clause (a) or (b).*

*5.3.2 For a case to fall under clause (a) or (b), one of the conditions is that taxes alongwith interest on the undisclosed income admitted during search, must be paid on or before the 'specified date and the return of income declaring the undisclosed income is furnished on or before the "specified date. The term "specified date" has been defined in Explanation to Section 271AAB, as "the due date of furnishing of return of income under subsection (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 Thus, the statute is unambiguous that for a case to fall under clause (a) or (b) of Section 271AAB(1), one of the conditions to be satisfied is that the assessee has furnished the return of income declaring the undisclosed income is furnished on or before the due date u/s 139(1).*

*5.3.3 In the instant case, the return of income was not filed on the due date for filing return of income u/s 139(1) but belatedly on 16.01.2017, therefore, penalty has rightly been levied by the AO under clause (c) of Section 271AAB, i.e, at 30% of undisclosed income. ”*

13. Taking into facts and circumstances of the case it is an evident from the show cause notice u/s 274 read with section 271AAB of the Act that the Assessing Officer was not clear i.e whether it is for the clause (a) or clause (b) or clause (c) of

section 271AAB(1) of the Act. Where the Id. CIT(A) and the AO failed to note that the surrendered income is not always undisclosed income. In the present case the assessee declared income of Rs. 24,67,900/- which includes surrendered income of Rs. 2,24,492/- on 16.01.2017. Therefore, there is no any doubt or question whether the income disclosed by the assessee is undisclosed income in the terms of definition u/s 271AAB(1) of the Act has to be considered.

14. Further on perusal of the statement recorded u/s 132(4) of the Act, we observe that the income incriminating materials were found during the search is admitted and the assessee on all occasions has voluntarily surrendered income by simply accepting the figure has stated by the search team. The Id. CIT(A) and the AO failed to note that the assessee herself has explained the source of income by stating that out of cash surrender during the search at Rs. 50,000/- was withdrawn from the bank account of the assessee and Rs. 1,00,000/- was withdrawn by husband of the assessee and the remaining was past savings. We observe that as per the specific definition of undisclosed income in explanation (c) to section 271AAB of the Act., the amount of Rs. 2,22,492/- being the cash available as consequences of her saving and gifts on various occasions cannot be considered as

undisclosed income and the source of income explained by the assessee herself. In the statement recorded u/s 132(4) of the Act was not disputed or disproved by the AO.

We have gone through the citation which was relied by the Id. AR for the assessee and the Id. AR for the assessee has placed strong reliance of the order passed by this Bench which are of identical nature in the case of Shri Mahaveer Prasad Agarwal vs. DCIT, Kota in ITA No. 1218/JP/2019 dated 02/06/2022 as under:-

*“It is evident from the show cause notice issued under section 274 read with section 271AAB (APB Page 1) that the AO was not clear as to on what precise charge the appellant was asked to show cause, whether the assessee shall pay by way of penalty under clause (a), (b) or (c) of section 271AAB. The AO has just mentioned “deliberately concealed the true income”. Thus the AO without mentioning specific default of the assessee in terms of clause (a), (b) or (c) of section 271AAB of the Act, the show cause notice issued in routine manner cannot be considered a valid notice in the eyes of law and accordingly the levy of penalty against the assessee is held to be void ab initio. Further, the assessee has substantiated the undisclosed cash available, as to the extent of surrendered income of Rs. 8,73,000/-.*

15. In view of the above, considering the peculiar facts, the grievance of the assessee is accepted as genuine and as such the order of the Id. CIT(A) sustaining the penalty is hereby quashed.”

Therefore, all the grounds of appeal is allowed.

Order pronounced in the open court on 30/11/2022.

Sd/-

(राठोड कमलेश जयन्तभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)  
(Dr. S. Seethalakshmi)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 30/11/2022

\*Santosh

आदेश की प्रतिलिपिअग्रेहित / Copy of the order forwarded to:

1. The Appellant- Smt.Priyanka Agarwal, Kota,
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle, Kota.
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 1132/JP/2019)

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar