आयकर अपीलीय अधिकरण
गुवाहाटी पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
GUWAHATI BENCH AT KOLKATA

[वर्चुअल कोर्ट]
[Virtual Court]

डॉ. मनीष बोरड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before
DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SRI SONJOY SARMA, JUDICIAL MEMBER

I.T.A. Nos.: 133, 134 & 135/GTY/2020
Assessment Years: 2014-15, 2015-16 & 2016-17

ACIT, Circle-1, Guwahati.....Appellant

Vs.

M/s. Hitech Construction.....Respondent
[PAN: AADFH 5351 C]

Appearances by:

Sh. N.T. Sherpa, JCIT, appeared on behalf of the Revenue.

Sh. Kishor Jain, FCA, appeared on behalf of the Assessee.

Date of concluding the hearing : February 2nd, 2023
Date of pronouncing the order : April 13th, 2023

ORDER

Per Manish Borad, Accountant Member:

The above captioned appeals filed by the Revenue pertaining to the Assessment Years (in short "AY") 2014-15, 2015-16 & 2016-17 are directed against separate orders passed u/s 250 of the

Income Tax Act, 1961 (in short the "Act") by ld. Commissioner of Income-tax (Appeals), Guwahati-2, Guwahati [in short ld. "CIT(A)"] dated 27.02.2020.

2. The Revenue is in appeal before the Tribunal raising the following grounds:

I.T.A. No.: 133/GTY/2020:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.

2. That on the facts and in the circumstances of the case and in law, Ld CIT (A) erred in deleting the penalty of Rs 75,56,113/-imposed u/s 271(l)(c) of the IT Act, 1961 hereby disregarding the provision contained in explanation 5A to clause (c) of sub-section(l) of section 271 of the IT Act, 1961 and hence the impugned order of the Ld. CIT(A) is liable to be quashed and the order of the Assessing Officer be restored.

3. The Appellant craves the leave to add/modify/alter any of the ground during the course of hearing /pendency of appeal."

I.T.A. No.: 134/GTY/2020:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.

2. That on the facts and in the circumstances of the case and in law, Ld CIT (A) erred in deleting the penalty of Rs 74,79,177/-imposed u/s 271(l)(c) of the IT Act, 1961 hereby disregarding the provision contained in explanation 5A to clause (c) of sub-section(1) of section 271 of the IT Act, 1961 and hence the impugned order of the Ld. CIT(A) is liable to be quashed and the order of the Assessing Officer be restored.

3. The Appellant craves the leave to add/modify/alter any of the ground during the course of hearing /pendency of appeal."

I.T.A. No.: 135/GTY/2020:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.

2. That on the facts and in the circumstances of the case and in law, Ld CIT (A) erred in deleting the penalty of Rs 51,39,219/-imposed u/s 271AAB(1)(a) of the IT Act, 1961 hereby disregarding the provision contained in section 271AAB(1)(a) of the IT Act, 1961 and hence the impugned order of the Ld. CIT(A) is liable to be quashed and the order of the Assessing Officer be restored.

3. The Appellant craves the leave to add/modify/alter any of the ground during the course of hearing /pendency of appeal."

3. As the issues raised in these appeals are common and the facts are identical, therefore, as agreed by both the parties, they are heard together and disposed off by way of this common order for the sake of convenience and brevity. From perusal of the grounds, we notice that ITA No. 133 & 134/GTY/2020 are against the deletion of penalty levied by ld. AO u/s 271(1)(c) of the Act and ITA No. 135/GTY/2020 is against the deletion of penalty levied by ld. AO u/s 271AAB(1)(a) of the Act.

4. Facts in brief commonly applicable to all the three appeals are that a search and seizure action u/s 132 of the Act was conducted in the case of M/s. Hightech Constructions Group on 04.10.2016. Subsequently, the proceedings initiated u/s 153A of the Act and notices issued for filing the return. Though the assessee had already filed the original return of income u/s 139 of the Act, however, in compliance to the notice u/s 153A of the Act returns were again filed. For AY 2014-15 & AY 2015-16 the regular return of income filed u/s 139 of the Act declaring the income at Rs. 7,04,58,179/- & Rs. 9,05,12,240/-. However, in the return filed u/s 153A of the Act the assessee declared income at Rs.

9,26,88,580/- & Rs. 11,25,16,290/- for AY 2014-15 & AY 2015-16 respectively. Thus, the assessee declared additional income of Rs. 2,22,30,401/- & Rs. 2,20,04,050/- in the return filed in compliance to the notice u/s 153A of the Act. Ld. AO completed the assessment u/s 143(3) r.w.s. 153A of the Act accepting the income declared by the assessee. However, penalty proceedings were initiated u/s 271(1)(c) of the Act and vide penalty order dated 28.06.2019 penalty of Rs. 75,56,113/- & Rs. 74,79,177/- levied for AY 2014-15 & AY 2015-16 respectively.

5. As far as AY 2016-17 is concerned the regular return was not filed since the assessee was subjected to search and the return in compliance to the notice u/s 153A of the Act was filed on 09.03.2018 declaring income of Rs. 10,60,36,420/- which *inter alia* included disclosure of Rs. 4 Cr on account of investment in land and Rs. 1,13,92,190/- on account of investment in stock of raw material and work-in-progress. For this year also ld. AO accepted the returned income but initiated penalty u/s 271AAB(1)(a) of the Act and vide order dated 28.06.2019 levied penalty at Rs. 51,39,219/-.

6. Aggrieved, the assessee preferred appeal before ld. CIT(A) and placed reliance on judicial pronouncements in its favour squarely applicable on its case and succeeded as ld. CIT(A) deleted the impugned penalty levied for AY 2014-15, AY 2015-16 & AY 2016-17.

7. Aggrieved, the Revenue is now in appeal before this Tribunal. Ld. D/R vehemently argued supporting the order of ld. AO.

8. On the other hand, ld. Counsel for the assessee heavily relied on the finding of ld. CIT(A) as well as the judgments and decisions referred therein.

9. We have heard rival contentions and perused the records placed before us. Revenue is aggrieved with the finding of ld. CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act for AY 2014-15 & AY 2015-16 and penalty levied 271AAB(1)(a) of the Act for AY 2016-17. As far as penalty levied u/s 271(1)(c) of the Act for AY 2014-15 & AY 2015-16 is concerned we find that ld. CIT(A) has deleted the penalty observing as follows (relevant extract):

> *"It has been contended by the Appellant that the impugned penalty has been imposed merely on the basis of estimated addition and that taxes were paid on the same by the Appellant to avoid litigation and to buy mental peace. It is also clear that no incriminating material regarding the purported additional income was found by the department during the course of search and seizure operations conducted by the department. Despite this very important fact, the Appellant chose to offer such income for tax. It is also clear that such income was offered for tax by the Appellant only by way of a statement/letter of the Appellant on the free will and admission of the Appellant as evident from the relevant assessment order. Thus, it can be said that the offer of the said income for tax by the Appellant was purely voluntary. It is also clear that after such additional income was offered for tax by the Appellant through the said statement of the Appellant, honouring the statement so made and offering such income for tax, no retraction of such statement was made by the Appellant either before the Investigation Wing or before the A0. Even at the time of filing the return of income under Section 153A of the Act, after the date of search, the Appellant, dutifully declared such income in the said return and paid the admitted taxes on the same. It is also a relevant fact that in many cases, under subsequent legal counsel, the statements made by various assessees are retracted. Thus, no such intention transpires on the part of the Appellant to retract the voluntary statement so made. Thus, no intention transpires on the part of the Appellant to not pay the amount of tax due to the exchequer. The law on Section 153A/153C is settled (read Judgment*

of Hon'ble Delhi high court in the case of Kabul Chawla) that no additions during the assessments pertaining to search cases can be made on any account until and unless some incriminating material on that account has been recovered by the Department. It is a settled proposition and requires no authority to bring home the contention that no penalty can be levied when the additions have been made merely on estimated basis. It cannot be said that the Appellant did not have access or could not have had to appropriate legal advice. Despite that there was no intention on the part of the Appellant to contest the additions pertaining to the income offered to tax, sans any incriminating material and not pay the amount of tax due to the exchequer.

In this regard, it would also be relevant to peruse Section 271(1)(c) of the Income Tax Act, 1961, which is reproduced as hereunder:

"271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or] Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or..... he may direct that such person shall pay by way of penalty, ..."

Thus it is clear that Section 271 uses the word "'may" and not "shall". The word "may" cannot be equated with "shall" especially in penalty proceedings. Using the word may which is discretionary in nature, gives a discretion to the assessing officer to levy or not to levy the penalty even if the assessee had made some default under the said provision. Whether any penalty should be imposed for failure to perform a statutory obligation is a matter of discretion to be exercised judicially and on consideration of all relevant circumstances.

It may be stated that words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. Even if it is assumed that the word "shall" had been used in the aforesaid provision, the word "shall" is also not always decisive. Regard must be made to the context, subject matter and the object of the statutory provision in question in determining whether the same is "mandatory" or "directory". No universal principle of law can be laid in that behalf as to whether a particular provision or enactment shall be considered "mandatory" or "directory". It is the duty of the Court to try to get at

the real intention of the legislature by carefully analyzing the whole scope of the statute or the section or the phrase under consideration. As stated earlier, the question as to whether the statute or the provision is "mandatory" or "directory", depends upon the language in which the intent is couched. However, in this case, the words "may" has been used which undoubtedly gives a judicial discretion to the Ld. AO to impose the penalty but only after judicially exercising the discretion of imposing the penalty on consideration of all relevant circumstances and evidences on record.

Looking at the conspectus of the case of the Appellant, wherein, no incriminating material found by the Department during the course of search and seizure operation has been referred in the relevant assessment order as well as in the impugned penalty order, such income was offered for tax by the Appellant voluntarily through the statement recorded, honoring the statement so made the Appellant offered such income for tax, no retraction of such statement was made by the Appellant, the Appellant dutifully declared such income in the subsequent return under section 153A and paid the admitted taxes on the same, it cannot be said that there transpired any intention on the part of the Appellant of hiding any such income from the Department or to not pay the amount of tax due to the exchequer or that the conduct of the Appellant was contumacious and there was an intention to evade any tax. In that scenario, the discretion which vested in the AO for imposition of penalty should have been exercised in favour of the Appellant.

It is settled law that any imposition of penalty under the Income Tax Act, 1961 is discretionary and not mandatory and whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion to be exercised judicially and on consideration of all relevant circumstances. Thus, penalty should not be imposed mechanically but must be based on the facts and circumstances of each case.

It is also an admitted position of law that penalty proceedings are distinct and separate from assessment proceedings. The Hon'ble Calcutta High Court in the case of Durga Kamal Rice Mills Vs. CIT [(2004) 265 ITR 25 (Cal.)] has held that quantum proceedings are different from penal proceedings. The Hon'ble Kerala High Court in the case of CIT vs. P.K. Narayanan [(1999) 238 ITR 905 (Ker.)] has held that despite the addition being confirmed by Tribunal in quantum proceedings, the penalty can still be deleted by the Tribunal, if the facts so justify.

Penalty can be based on the material which was used by the Ld. A0 while making the assessment. Even if there is a legal proposition that penalty was an additional tax imposed on an assessee for his contumacious conduct and, therefore, was no different from tax, this tax must have evidence to back up its imposition justified by the contumacious conduct of the taxpayer. In the instant case, nothing from record remotely reflects the "contumacious" conduct of the Appellant making the instant case a fit case for imposition of penalty. In the case at hand, no evidence regarding the factum of tax being concealed with a motive to evade taxes was unearthed by the Ld. AO or the Investigation Wing of the Department. There was not even any false explanation given by the Appellant which was suggestive of the fact that the Appellant wanted to deliberately evade any taxes. Even though it cannot be said that the penal proceedings under the Income-tax Act, 1961 are in the nature of criminal proceedings and a higher degree of probability of the assessee being guilty of the charge needs to be applied in the case of penalty proceedings, but it can be certainly said that penalty would definitely need a different approach than what is required in the case of assessment proceedings. The facts and circumstances of an Appellant's case in a penal proceedings need to be looked and judged at from a different point of view altogether than the one which is done in the case of assessment proceedings. Suppose there is a case of a law abiding taxpayer who inadvertently omits to pay due taxes on a particular receipt. No doubt he is liable for paying the due taxes on that receipt but should he be additionally penalized for his inadvertence just because the Act stipulates the imposition of penalty? That is a difficult question to answer. There can be mechanical imposition of tax on a particular receipt or expense which should have been taxed but there cannot be a mechanical imposition of penalty in such a situation. This also leads to the matter of explanations given by the assessees in support of their contentions. Even if any assessee is not able to establish, by satisfactory evidence, the source of any income, it does not mean that the explanation furnished was false or that the assessee is guilty of deliberate suppression. Generally, a 'penalty' means a sum of money recoverable in a summary manner, for breach of some statutory provision. A penalty is provided for by a statute to punish a contravention of a statute or the doing of something which is prohibited by the statute. In order to enforce the mandatory provisions of a statute, the Legislature may impose sanctions of either of two kinds i.e. either declare it as an "offence" under the general law of crimes and make the person guilty of such offence punishable

judicially or lternatively provide that the contravention will be punishable extra-judicially, by the prescribed administrative authority by way of a penalty. Any penalty falls in the latter case. So a penalty may have slight affinity to a criminal offence in the sense that there is an offence in the broader sense, namely, a contravention of the mandate of the law and there is a punishment provided for such offence and the charge for which the punishment is awarded is that the statute has been contravened, either by doing what was prohibited or by omitting to do what was required to be done by the statute. Offence is used to refer to what is punishable as a "crime" on prosecution before a Court of Law, but in the case of what is popularly known as a "statutory offence", there is nevertheless an offence which is punishable by the law, though by a different tribunal or an administrative authority. Thus, anything "penal" comprises "not only prosecutions and sentences for crimes and misdemeanour, but all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and all judgments for such penalties." In the case of an statutory offence, if the assessee must furnish a return and that with correct particulars of his income and if he further conceals the particulars or deliberately furnishes inaccurate particulars or tries to hide any income, then only a penalty prescribed in the statute is attracted. It may safely be concluded that the "additional tax" imposed by way of penalty is nothing but a punishment for a statutory offence and that instead of judicial punishment, the statute prescribes for a penalty being awarded by the Revenue authority in question. In the case of a statutory penalty, the proceeding to make such imposition is, however, not a penal or criminal proceeding. However, in the case of a penalty, in accordance with the principles of natural justice, the person charged must have a reasonable opportunity of meeting such charge and the onus of establishing the ingredients of the penalty lies on the authority seeking to punish the person and that a penalty cannot be awarded unless this onus is discharged by the authority.

In this case, it cannot be said that the Appellant deliberately concealed the particulars of income or deliberately furnished inaccurate particulars of income or had hidden any of its income, Even from the assessment order, it does not appear that the Appellant had deliberately concealed his income or furnished inaccurate particulars of income or hide any of its income. No evidence of concealment of particulars of income or furnishing of inaccurate particulars of income has been adduced, either by the Ld. AO during the course of

assessment proceedings or by the Investigation Wing of the Income Tax Department in their investigations prior to the assessment proceedings, which could conclusively prove concealment of particulars of income or furnishing of inaccurate particulars of income by the Appellant. In the impugned penalty order or the assessment order, there is no shred of reference to any incriminating material whatsoever which was seized or recovered by the Investigation Wing either during the course of search proceedings or even later at the time of recording of the Statement under Section 132(4) of the Income Tax Act, 1961 and which was used by the Ld. AO for framing the assessment order and making the additions in the assessment order. The entire construction of the assessment order rests only on the bald edifice of a Statement recorded under Section 132(4) of the Income Tax Act, 1961 in which the Appellant voluntarily and suo-motto disclosed the income. To sustain any penalty tangible evidence has to be brought on record to foist some culpability on the Appellant.

In view of the above, (a) in the absence of anything incriminating against the Appellant being on record, (b) no evidence being on record that there was any contumacious Conduct on the part of the Appellant to conceal particulars of income or an attempt to hide something or an attempt to evade taxes, (c) no incriminating evidence having been found or recovered against the Appellant during the course of search operation and (d) the bona-fides of the Appellant being evident from record by way of suo-motto disclosure without the Revenue even possessing any minutes of documentary evidence against the Appellant, there is no reason for the undersigned to sustain the penalty, which has been applied mechanically, in the instant case."

10. From perusal of the above finding of ld. CIT(A) we notice that the basis for the deletion of penalty is that no incriminating material was found or recovered during the course of search and the assessee has made the voluntary disclosure, paid due taxes and cooperated in the income tax proceedings and ld. AO failed to make out a case that the alleged penalty is on account of any incriminating material found during the course of search on the basis of which the assessee has declared additional income. At this juncture, we would like to refer to the decision of Coordinate Bench

of Ahmedabad in the case of *Guruprasad Infrastructure Pvt. Ltd. vs. DCIT [2019 (7) TMI 1549-ITAT Ahmedabad]* where the head note of this decision considering similar issues reads as follows:

> *"Penalty u/s 271(1)(c) - income returned & accepted by AO in order passed u/s 153 A r w s 143 (3) - HELD THAT:- There was no reference made to any incriminating document found during the search. Therefore, we are of the view that the addition of undisclosed income was based on the statement furnished under section 132(4) of the Act.*
>
> *At the time of the hearing, a query was raised to the Ld. DR whether the assessee disclosed the income in pursuance to the search based on the incriminating document, but he failed to bring any material on record. Therefore, in the absence of any documentary evidence, we infer that the income disclosed by the assessee was not based on the incriminating materials.*
>
> *Penalty under Explanation 5A to section 271(1)(c), the of the Act can be attracted if the assessee was found to be the owner of any money, bullion, jewellery or other valuable article or thing or any income based on any entry in any books of account or other documents or transactions.*
>
> *But, in the case on hand, there was no such allegation against the assessee either in the assessment or penalty or the CIT (A) order referring to any specific incriminating documents.*
>
> *As relying on Ajay Traders Vs. DCIT [2016 (6) TMI 422 - ITAT JAIPUR] there cannot be any penalty under explanation 5A to section 271(1)(C) of the Act until and unless the quantum addition is based on some incriminating document. Accordingly, we hold that there cannot be any penalty under section 271(1)(C) of the Act in the given facts and circumstances. - Decided in favour of assessee."*

11. Similar was the view taken by Coordinate Bench of Delhi in the case of *Rishabh Buildwell P. Ltd vs. DOT [2019 (7) TMI 383 - ITAT DELHI]* reads as under:

> *"Penalty u/s. 271(1)(c) - income disclosed by the assessee under Section 153A - assessee has filed revised returns disclosing higher income than in the original return - HELD THAT:- AO has not brought anything on record to assess any income over and above the returned*

income filed by the assessee. AO in the assessment order could not bring into fore as to how the seized material has been analyzed and to prove as to how the concealment or furnishing of inaccurate particulars of income has arisen.

Though the assessing officer has mentioned the word "Addition" it does not represent any adding up of the income but narration of the income returned by the assessee in response to notice u/s 153A of the Act

There was no addition made by the AO. There is no deeming fiction for the levy of penalty the provisions applicable whether it is an assessment u/s 153A or assessment u/s 143(3) or u/s 148 the provision essentially remain the same. In the instant case, the assessee has filed return of income declaring additional income which was accepted by the AO.

Hence, they cannot be treated as the assessee has concealed income as concealment as to be dealt by the Revenue by way of unearthing sum of the income which has been kept away from the eye of the Revenue. Furnishing of inaccurate of particulars refers to filing of material which is not in conformity with the facts or truths

The mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. Considering that the non-obstante clause under Section 153A excludes the application of, inter alia, Section 139, it is clear that the revised return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act.

No difference between returned income and the assessed income, keeping in view the fact that the Revenue has not brought any material for levy of penalty - return filed in response to notice 153A of the Act needs to be treated as returned filed u/s 139 of the Act for the purpose of assessment, we hereby delete the penalty levy u/s 271(l)(c) of the Act.

Penalty levied u/s 271AAB - Assessee has given a statement u/s 132(4) of the Act during the search and substantiated as to how the undisclosed income was derived (para 4.1 of AO), paid the taxes and filed the return. Hence, the assessee had made all the required conditions. At this juncture, it is to be adjudicated whether the levy of

penalty is automatic or not under the present circumstances, we find that the rationale given in the case of 271(1)(c) so as to the requisite conditions for levy of penalty under the Income Tax law are equally applicable to the instant year also. Hence, the penalty levied is directed to be deleted. - Assessee appeal allowed."

12. Thus, respectfully following the judicial precedence and also considering the fact that the additional income offered by the assessee in the return filed in compliance to the notice u/s 153A of the Act which partakes the character of regular income filed u/s 139 of the Act and the said additional income being not offered on the basis of any incriminating material but is the voluntary disclosure made by the assessee and there being no other legal binding precedence referred to by ld. D/R, we fail to find any infirmity in the finding of ld. CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act for AY 2014-15 & AY 2015-16, respectively. Thus, the grounds of appeal raised by the Revenue in ITA Nos. 133 & 134/GTY/2020 are dismissed.

13. Now, we take up ITA No. 135/GTY/2020 relating to the penalty u/s 271AAB(1)(a) of the Act. Ld. CIT(A) deleted the penalty observing as follows (relevant extract):

"On a perusal of the definition of "undisclosed income" as given in explanation (c) to Section 271AAB of the Income Tax Act, 1961, it is clear that unless the assessing officer establishes that there was undisclosed income on the basis of incriminating material, or undisclosed assets, penalty under Section271AAB of the Act cannot be levied.

With the above background of the Appellant's case in mind, it can be stated with certainty that the Appellant's case does not fall in the said definition of "undisclosed income" given in Explanation (c) to Section 271AAB of the Income Tax Act, 1961. In the case of the Appellant, no income of the "specified previous year" which was represented either wholly or partly by any money, bullion, jewellery or other valuable

article or thing or any entry in the books of accounts or other documents or transactions was found in course of the search under Section 132 of the Income Tax Act, 1961. Despite no incriminating document/material having been found during the course of search, the Appellant disclosed the additional income voluntarily. The same has been accepted as such by the Assessing Officer in the assessment made under Section 143(3) of the Act. It can be re-iterated that no incriminating material or any other documents or undisclosed assets, were discovered in the case of the appellant, either during the course of the search or during any post search investigation or even during the course of assessment proceedings which culminated in the assessment order under Section 143(3) of the Act.

From a bare perusal of the above provisions, it is vivid and conspicuous that the penalty under Section 271AAB can be imposed only

a. in respect of any undisclosed income,

b. which income is 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,

and

C. which are found in the course of a search under section 132.

Thus, it is clear that where the purported undisclosed income is represented by any asset which even is not found during the course of search, the corresponding income Cannot be made amenable to the rigors of the penalty under Section 271AAB of the Act.

Thus, it is clear that Section 271 uses the word "may' and not "shall". The word "may" cannot be equated with "shall" especially in penalty proceedings. Using the word "may', which is discretionary in nature, gives a discretion to the assessing officer to levy or not to levy the penalty even if the assessee had made some default under the said provision. Whether any penalty should be imposed for failure to perform a statutory obligation is a matter of discretion to be exercised judicially and on consideration of all relevant circumstances.

It may be stated that words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. Even if it is assumed that the

word 'shall' had been used in the aforesaid provision, the word "shall" is also not always decisive. Regard must be made to the context, subject matter and the object of the statutory provision in question in determining whether the same is "mandatory" or "directory", No universal principle of law can be laid in that behalf as to whether a particular provision or enactment shall be considered "mandatory" or "directory". It is the duty of the Court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or the section or the phrase under consideration. As stated earlier, the question as to whether the statute or the provision is "mandatory" or "directory", depends upon the language in which the intent is couched. However, in this case, the words "may" has been used which undoubtedly gives a judicial discretion to the Ld. AO to impose the penalty but only after judicially exercising the discretion of imposing the penalty on consideration of all relevant circumstances and evidences on record.

Looking at the conspectus of the case of the Appellant, wherein, no incriminating material found by the Department during the course of search and seizure operation has been referred in the relevant assessment order as well as in the impugned penalty order, such income was offered for tax by the Appellant voluntarily through the statement recorded, honoring the statement so made the appellant offered such income for tax, no retraction of such statement was made by the appellant, and the Appellant dutifully declared such income in the subsequent return under section 153A and paid the admitted taxes on the same,

it cannot be said that there transpired any intention on the part of the Appellant of hiding any such income from the Department or to not pay the amount of tax due to the exchequer or that the conduct of the Appellant was contumacious and there was an intention to evade any tax. In that scenario, the discretion which vested in the AO for imposition of penalty should have been exercised in favour of the Appellant.

It is settled law that any imposition of penalty under the Income Tax Act, 1961 is discretionary and not mandatory and whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion to be exercised judicially and on consideration of all relevant circumstances. Thus, penalty should not be imposed mechanically but must be based on the facts and circumstances of each case.

It is also an admitted position of law that penalty proceedings are distinct and separate from assessment proceedings. The Hon'ble Calcutta High Court in the case of Durga Kamal Rice Mills vs. CIT (2004) 265 ITR 25 (Cal.)] has held that quantum proceedings are different from penal proceedings. The Hon'ble Kerala High Court in the case of CIT vs. P.K. Narayanan [(1999) 238 ITR 905 (Ker.)] has held that despite the addition being confirmed by Tribunal in quantum proceedings, the penalty can still be deleted by the Tribunal, if the facts so justify.

Penalty can be based on the material which was used by the Ld. AO while making the assessment. Even if there is a legal proposition that penalty was an additional tax true imposed on an assessee for his contumacious conduct and, therefore, was no different from tax, this tax must have evidence to back up its imposition justified by the contumacious conduct of the taxpayer. In the instant case, nothing from record remotely reflects the "contumacious" conduct of the Appellant making the instant case a fit case for imposition of penalty. In the case at hand, no evidence regarding the factum of tax being concealed with a motive to evade taxes was unearthed by the Ld.AO or the Investigation Wing of the Department. There was not even any false explanation given by the Appellant which was suggestive of the fact that the Appellant wanted to deliberately evade any taxes. Even though it cannot be said that the penal proceedings under the Income-tax Act, 1961 are in the nature of criminal proceedings and a higher degree of probability of the assessee being guilty of the charge needs to be applied in the case of penalty proceedings, but it can be certainly said that penalty would definitely need a different approach than what is required in the case of assessment proceedings. The facts and circumstances of an Appellant's case in a penal proceedings need to be looked and judged at from a different point of view altogether than the one which is done in the case of assessment proceedings. Suppose there is a case of a law abiding taxpayer who inadvertently omits to pay due taxes on a particular receipt. No doubt he is liable for paying the due taxes on that receipt but should he be additionally penalized for his inadvertence just because the Act stipulates the imposition of penalty? That is a difficult question to answer. There can be mechanical imposition of tax on a particular receipt or expense which should have been taxed but there cannot be a mechanical imposition of penalty in such a situation. This also leads to the matter of explanations given by the assessee in support of their contentions. Even if any assessee is not able to establish, by satisfactory evidence, the source of any income, it does not mean that the explanation

furnished was false or that the assessee is guilty of deliberate suppression. Generally, a 'penalty' means a sum of money recoverable in a summary manner, for breach of some statutory provision. A penalty is provided for by a statute to punish a contravention of a statute or the doing of something which is prohibited by the statute. In order to enforce the mandatory provisions ofa statute, the Legislature may impose sanctions of either of two kinds i.e. either declare it as an "offence" under the general law of crimes and make the person guilty of such offence punishable judicially or alternatively provide that the contravention will be punishable extra-judicially, by the prescribed administrative authority by way of a penalty. Any penalty falls in the latter case. So a penalty may have slight affinity to a criminal offence in the sense that there is an offence in the broader sense, namely, a contravention of the mandate of the law and there is a punishment provided for such offence and the charge for which the punishment is awarded is that the statute has been contravened, either by doing what was prohibited or by omitting to do what was required to be done by the statute. Offence is used to refer to what is punishable as a "crime" on prosecution before a Court of Law, but in the case of what is popularly known as a "statutory offence", there is nevertheless an offence which is punishable by the law, though by a different tribunal or an administrative authority. Thus, anything "penal" comprises "not only prosecutions and sentences for crimes and misdemeanour, but all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and all judgments for such penalties." In the case of an statutory offence, if the assessee must furnish a return and that with correct particulars of his income and if he further conceals the particulars or deliberately furnishes inaccurate particulars or tries to hide any income, then only a penalty prescribed in the statute is attracted. It may safely be concluded that the "additional tax" imposed by way of penalty is nothing but a punishment for a statutory offence and that instead of judicial punishment, the statute prescribes for a penalty being awarded by the Revenue authority in question. In the case of a statutory penalty, the proceeding to make such imposition is, however, not a penal or criminal proceeding. However, in the case of a penalty, in accordance with the principles of natural justice, the person charged must have a reasonable opportunity of meting such charge and the onus of establishing the ingredients of the penalty lies on the authority seeking to punish the person and that

a penalty cannot be awarded unless this onus is discharged by the authority.

In this case, it cannot be said that the Appellant deliberately concealed the particulars of income or deliberately furnished inaccurate particulars of income or had hidden any of its income. Even from the assessment order, it does not appear that the Appellant had deliberately concealed his income or furnished inaccurate particulars of income or hide any of its income. No evidence of concealment of particulars of income or furnishing of inaccurate particulars of income has been adduced, either by the Ld.AO during the course of assessment proceedings or by the Investigation Wing of the Income Tax Department in their investigations prior to the assessment proceedings, which could conclusively prove concealment of particulars of income or furnishing of inaccurate particulars of income by the Appellant. In the impugned penalty order or the assessment order, there is no shred of reference to any incriminating material whatsoever which was seized or recovered by the Investigation Wing either during the course of search proceedings or even later at the time of recording of the Statement under Section 132(4) of the Income Tax Act, 1961 and which was used by the Ld. AO for framing the assessment order and making the additions in the assessment order. The entire construction of the assessment order rests only on the bald edifice of a statement recorded under Section 132(4) of the Income Tax Act, 1961 in which the Appellant voluntarily and suo-motto disclosed the income. To sustain any penalty tangible evidence has to be brought on record to foist some culpability on the Appellant.

In view of the above, (a) in the absence of anything incriminating against the Appellant being on record, (b) no evidence being on record that there was any contumacious conduct on the part of the Appellant to conceal particulars of income or an attempt to hide something or an attempt to evade taxes, (c) no incriminating evidence having been found or recovered against the Appellant during the course of search operation and (d) the bona-fides of the Appellant being evident from record by way of suo-motto disclosure without the Revenue even possessing any minutest of documentary evidence against the Appellant, there is no reason for the undersigned to sustain the penalty, which has been applied mechanically, in the instant case.

Further, a number of judicial pronouncements have laid down the law that no penalty under Section 271AAB can be levied where no undisclosed assets or incriminating evidence or documents are found

during the course of a search. These judicial pronouncements are enumerated below."

14. From perusal of the above finding, we notice that ld. CIT(A) deleted the impugned penalty adopting the same analogy that no incriminating material was found during the course of search and further, ld. CIT(A) has referred to the provisions of Section 271AAB of the Act wherein the penalty is to be levied on the undisclosed income but since no incriminating material was found during the course of search which can be brought into the definition of undisclosed income provided u/s 271AAB(1)(c) of the Act ld. CIT(A) held that penalty cannot be levied u/s 271AAB of the Act.

15. The above finding of ld. CIT(A) is further, supported by the decision of Coordinate Bench of *Visakhapatnam in the case of ACIT vs. Marvel Associates, [2018] 92 taxmann.com 109 (Visakhapatnam - Trib.)* wherein the Bench held as follows:

"6. Careful reading of Section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used Section158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub Section (3) of Section 271AAB of the Act, fortifies this view.

Sub Section (3) of Section 271AAB:

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

7. The legislature has included the provisions of Section 274 and Section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of Section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is

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

8. In this case, a search u/s 132 of the Act was carried out in the assessee's premises but no evidence was found during the course of search except a loose sheet which was marked as Page No.107 of Annexure A/GS/MA/1. Careful verification of the loose sheet found during the course of search shows the projections and profitability but not the actual expenditure incurred by the assessee. As submitted by the assessee before the A.O. as well as Ld. CIT(A), no other material was found during the search proceedings. Section 271AAB sub clause (c) of the Act defines undisclosed income as under:

(c) "undisclosed income" means—

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

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

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

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

9. 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. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sft. and assessee stated to have submitted in sworn statement cost per sg. feet at Rs.2200/- to Rs.2300/- per sq. feet. However neither the AO nor the Ld. CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection but not the actuals. The write up heading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as stated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the

undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee to the sale deeds. 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. Hence penalty u/s 158BFA (2) of the Act is not leviable."

16. Similar view was also taken by Coordinate Bench Visakhapatnam in the case of *ACIT vs. Mothukuri Somabrahmam [2018 (3) TMI 947-ITAT Visakhapatnam* wherein it was held as follows:

"The penalty imposed under Section 271AAB, merely on the basis of income offered under Section 132(4) was directed to be deleted by holding that no material was found during the course of search and seizure operations to establish any nexus between these bank accounts and the transactions of the Appellant. The Assessing Officer has not brought on record any such material to show that this income belonged to the Appellant. Merely because, the Appellant admitted the income u/s 132(4) it cannot be concluded that the same represented the undisclosed income of the Appellant."

17. Since the above decisions of the Coordinate Bench are squarely applicable on the facts of the instant case and ld. D/R being unable to place any binding precedence in its favour, we are inclined to hold that in the absence of incriminating material found during the course of search and the income surrendered by the assessee is voluntary in nature not having any nexus to any incriminating material found during the course of search and ld. AO has accepted the returned income filed by the assessee,

therefore, respectfully following the above referred judicial precedence, we fail to find any infirmity in the finding of ld. CIT(A) deleting the penalty levied u/s 271AAB(1)(a) of the Act for AY 2016-17. Thus, the grounds of appeal raised by the Revenue in ITA No. 135/GTY/2020 is dismissed.

18. In the result, the appeals filed by the Revenue in ITA Nos. 133, 134 & 135/GTY/2020 are dismissed.

Kolkata, the 13th April, 2023

Sd/-	*Sd/-*
[Sonjoy Sarma]	[Manish Borad]
Judicial Member	Accountant Member

Dated: 13.04.2023

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***ACIT, Circle-1, Guwahati.***
2. ***M/s. Hitech Construction, J.P Agarwalla Road, Gauripur, Dhubri, Assam-783 331.***
3. CIT(A)- Guwahati-2, Guwahati.
4. CIT-
5. CIT(DR), Guwahati Bench, Guwahati.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata