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

श्रीसंदीपगोसाई,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 353/JP/2022
निर्धारणवर्ष/AssessmentYear :2013-14

Shri Paras Mal Jain 535, Tiwari Ji Ka Bagh Adrash Nagar, Jaipur	बनाम Vs.	The DCIT Central Circle-1 Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ABTPJ 9660 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri S.R. Sharma, CA
राजस्व की ओर से/Revenue by: Ms. Chanchal Meena, Addl. CIT-DR

सुनवाई की तारीख/Date of Hearing : 29/03/2023
उदघोषणा की तारीख/Date of Pronouncement: 22/06/2023

आदेश/ORDER

PER SANDEEP GOSAIN, JM

The assessee has filed an appeal against the order of the ld. CIT(A)-4 Jaipur dated 29-07-2022 for the assessment year 2013-14 raising therein following ground of appeal.

> ''1. That the ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs.2.50 lacs imposed by the AO u/s 271AAB of the Act.
>
> 2. That the ld. CIT(A) is wrong and has erred in law in confirming the said penalty of Rs.2.50 lacs u/s 271AAB of the Act holding that it is mandatory in nature and not discretionary and so AO is correct in law while imposing penalty on assessee.

3. That the ld. CIT(A) is wrong and has erred in law in confirming the said penalty of Rs.2.50 lacs u/s 271AAB imposed by the AO although the notice issued by AO for initiating the penalty u/s 271AAB of the I.T. Act, 1961 is not in accordance with law and not being specifically pointing out the default for which the AO sought to impose penalty u/s 271AAB.

4. That the ld. CIT(A) is wrong in confirming penalty of Rs.2.50 lacs u/s 271AAB of the Act in as much the penalty was levied by AO simply on the basis that the assessee admitted the income of Rs.2.50 lacs and disclosed in the return without proving that the said income was ‘’undisclosed income’’ of assessee within the meaning of Section 271AAB of the I.T. Act, 1961

2.1 Brief facts of the case are that the assessee is engaged in business manufacturing, trading and export of precious &semi precious stones from last several years. A search u/s 132 of the I.T. Act, 1961 took place at residence and business premises of assessee 23-05-2013. In course of search, the assessee surrendered an income of Rs.25,00,000/-on account of land advance which he admitted as his additional business income for current year. The assessee filed original return on 29-09-2013 declaring total income of Rs. 89,40,360/- which included said additional income of Rs.25,00,000/- offered to tax in course of search. The assessment u/s 143 (3) r.w.s. 153B (1) (b) of I. T. Act, 1961 was completed on 21-03-2016 after disallowance of expenses on account of personal element/unverifiable expenses. The A.O. simultaneously initiated penalty

proceedings u/s 271AAB of the Act. The A.O. thereafter took penalty proceedings initiated by him u/s 271AAB by issuing fresh show cause notice(s) to which assessee filed his explanation. The explanation filed by assessee has been held by A.O. as not sustainable at all and levied a penalty of Rs.2,50,000/- on assessee.

2.2 The assessee filed appeal before the ld. CIT (A) against said penalty order and in course of hearing filed written submissions which is reproduced in appeal order of ld. CIT (A). The Ld. CIT(A) in his order dated 29-07-2022 after considering reply filed by assessee confirmed the penalty levied by AO. The Ld. CIT (A) thus dismissed the appeal filed by assessee.

2.3 During the course of hearing, the ld. AR of the assessee prayed that the lower authorities have erred in sustaining the penalty of Rs.2.50 lacs u/s 271AAB of the Act for which the ld. AR of the assessee filed a detailed written submission concerning the issue in question.

> ‘’The groundwise submission of assessee are as under: -
>
> (1) **<u>The ground no.1and 3 are interlinked hence a combined submission is made here under:-</u>**
>
> The Ld. A.O. has levied impugned penalty u/s 271AAB(1)(a)of the I T Act, 1961. In this connection it is submitted that the section 271AAB of Act has three limbs as specified in Section i.e. 271AAB (1) (a), (b) & (c) and the notice dated 21-03-2016 sent to assessee alongwith assessment order does not specify in which limb the penalty sought to be levied and only mentioning of Section271AAB in notice do not satisfy the requirement of law. The language of the said notice issued is***“Whereas in the course of assessment proceedings before me for the A.Y. 2013-14 it appears to***

me that as per section 274 and 275 read with section 271AAB of the I T Act you are liable for penalty on assessed undisclosed income.

The Ld. A.O. thereafter issued another show cause notice dated 17-08-2016by changing only date of notice stating the same wordings of earlier notice dated 21-03-2016 that ***""Whereas in the course of assessment proceedings before me for the A.Y. 2013-14 it appears to me that as per section 274 and 275 read with section 271AAB of the I T Act you are liable for penalty on assessed undisclosed income."***

Again, a third show cause notice dated 07-09-2018 was issued having the same wordings of earlier notice(s). The assessee after receiving this notice filed his explanation on 14-09-2018. The Ld. A.O. on receipt of explanation of assessee passed the penalty order on 23-03-2020.

It is verifiable that all the three notices were issued in a routine manner without mentioning under which clause of section 271AAB of the Act the assessee is liable for penalty. It submitted that section 271AAB(1) has three clauses (a) to (c) and each clause of sub-section (1) to sec. 271AAB provides the circumstances and violation attracting the penalty @ 10% or 20% or 30% of undisclosed income of specified previous year. The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice are violated. On the basis of such proceeding, no penalty could be imposed on the assessee. Thus, there is no application of mind at the time of issuing the show cause notice as the show cause notice issued by the AO do not specify the undisclosed income on which the assessee is required to show cause. Even the AO has not given any ground for levy of penalty for which the assessee could put his defense. Thus, in the absence of specific charge against the assessee, he was not in a position to counter the show cause notice issued by the AO as well as his cogent reply to the show cause notice. Though the AO while passing the impugned order has imposed the penalty as per clause (a) of section 271AAB(1) of the Act, however, no such ground was specified in the show cause notice issued under section 271AAB read with section 274 of the Act.

In this respect Reliance is placed on the judgement of Hon'ble Karnataka High Court in the case of **CIT Vs. M/s SSA's EMERALD MEADOWS reported in 2015 (11) TMI 1620 - , wherein Hon'ble Court has held that: -**

"3. *The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271 (1) (c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271 (1) (c) of the Act, the penalty proceedings had been initiated i.e. whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee has relied on the decision of the Division Bench of this Court rendered in the case of*

COMMISSIONER OF INCOME TAX – VS – MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgement of the Division Bench of this Court, we are of the opinion, no substantial question of law arised in this appeal for determination by this Court. The appeal is accordingly dismissed."

The department has filed SLP in Hon'ble Supreme Court which has been dismissed. Therefore, Hon'ble Supreme Court has approved the findings made by Hon'ble Karnataka High Court in the case of **CIT Vs. SSA's Emerald Meadows And CIT Vs Manjunatha Cotton &Ginnign Factory & others [2013] 359 ITR 565.**

Hon'ble Karnataka High Court in the case of **Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka)** after referring to the decision of Hon'ble Supreme Court in the case of T. Ashok Pai (Supra) held as under: -

> *"……. Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The Standard proforma without striking of the relevant clauses will lead to an inference as to non application of mind…..?*

The **Hon'ble ITAT, Jaipur Bench, Jaipur in the case of Anuj Mathur Vs DCIT, CC-4, Jaipur (ITA No. 971/JP/17) held that** "*As regards the validity of notice under section 274 for want of specifying the ground and default, we find that when the basic condition of the undisclosed income not recorded in the books of accounts does not exists, then the same has to be specified by the AO in the show cause notice and further the AO is required to give a finding while imposing the penalty under section 271AAB. Even if the AO is satisfied and come to the conclusion that the assessee has not recorded the undisclosed income in the books of accounts or in the other documents / record maintained in normal course relating to specified previous year, the show cause notice shall also specify the default committed by the assessee to attract the penalty @ 10% or 20% or 30% of the undisclosed income. There is no dispute that the AO has not specified the default and charge against the assessee*

which necessitated the levy of penalty under section 271AAB of the Act. Consequently, the assessee was not given an opportunity to explain his case for specific default attracting the levy of penalty in terms of clauses (a) to (c) of section 271AAB(1) of the Act. In view of the above the show cause notice issued by the AO in the case of assesee is not sustainable.

The appellant also relied on the following decision:-

i. DCIT vs. Shri R. Elangovan in ITA No. 1199/CHNY/2017 dated 05-04-2018 :

The Hon'ble Tribunal in the said case while considering the validity of show cause notice and initiation of proceedings under section 271AAB and following the decision of Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (supra) as well as the decision of Hon'ble Supreme Court dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242 Taxman 150 (SC) held that the notice issued under section 274 read with section 271AAB of the Act not specifying the ground and clauses for levy of penalty was not valid and consequently the penalty order was set aside.

(ii) **Hon'ble Jurisdictional High Court in the case of Sheveta Construction Co. Pvt. Ltd. in DBIT Appeal No. 534/2008 dated 06.12.2016 wherein the Hon'ble High Court at Para 9 of its order held as under: -**

"…… Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observation made in the said judgement, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing officer in the assessment order it is held that the A.O. has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order ...." (Emphasis Supplied).

ii. **Narayana Heihts& Towers, Vs. I.T.O. Ward – 2- 4 Jaipur ITA No. 1033/JP/2016**

(iv) **The ITAT, Jaipur Bench, Jaipur in case of *Lal Chand Mittal Vs. DCIT (ITA No. 772/JP/2016* order dated 29-12-2011** and various other cases decided by it held that on the basis of such notice issued by sending printed where only all the ground of section 271 (1) (c) are mentioned or where show cause notice u/s 271 (1) (c) for imposing of penalty without specifying the limb for reasons to impose penalty whether for concealment of income or furnish inaccurate particulars of income is not as per law and assessing officer did not have any jurisdiction to impose penalty u/s 271 (1) (c). In the case(s) *Radha Mohan Maheshwari Vs. DCIT (ITA No. 773/JP/2013) Mohd. Sharif Khan Vs. DCIT (ITA No. 441/JP/2014) Shankar Lal Khandelwal Vs. DCIT (ITA No. 878/JP/2013)Murari Lal Mittal (ITA No. 334/JP/2015 order dated 9-11-2016 and Mridula Agarwal (ITA No. 176/JP/2016)* the Hon'ble Bench upheld the same view.

(v) The Hon'ble ITAT, Jaipur Bench, Jaipur in a recent case of Gopal Das Sonkia*Vs. DCIT, CC-2, Jaipur (ITA No. 306/JP/2018)* order dated 11-04-2019 held that "*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.*

(VI)* The Hon'ble ITAT, Jaipur Bench, Jaipur in a recent case of Mukund Sharan Goyal *Vs. DCIT, CC-2, Jaipur (ITA No. 293/JP/2018)* order dated 23-09-2019 held that "On similar facts, the Tribunal has already decided this issue 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. Following the earlier orders and taking a consistent view, we hold that when the AO has failed to specify the default attracting the levy of penalty in terms of clauses (a) to (c) of section 271AAB(1) of the Act, the said show cause notice suffers from***

illegality and consequently the order passed by the AO under section 271AAB is not sustainable and liable to be quashed."

Thus, it is submitted that notice issued u/s 271AAB by Ld. A.O. to assessee is wrong and bad in law and consequently the penalty levied u/s 271AAB (1) (a) is also wrong and bad in law which deserves to be deleted.

(2) **Ground No..2**

That the Ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs 250000 u/s 271AAB of the Act by holding that it is mandatory in nature and not discretionary and so assessing officer is correct in law while imposing penalty on appellant.

In this connection it is submitted that Section 271AAB starts with the phrase that 'The Assessing officer may' thus while "may" permits the assessing officer to give direction to impose penalty or not, the use of word "shall" does not leave any discretion relating to levy of penalty. In this respect reliance is placed on the judgement of Hon'ble Supreme Court in case of *CIT Vs Smt. P.K. Noorjahan (1999) 237 ITR 0570* wherein Supreme Court held that word 'may' give discretion to A.O. in the matter and said discretion has to be exercised keeping in view the facts and circumstances of the particular case judicially. The fact that the minimum is prescribed does not mean that penalty must necessarily be imposed in every case falling within sub-s (1). Shah, acting CJ said in *Hindustan Steel Ltd. v State of Orissa 83 ITR 26*. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty. The discretion of the A.O. to levy or not to levy a penalty is still preserved by this section, it must be exercised judicially and on a consideration of all the relevant circumstances. Recently the ITAT Kolkata Bench in case of *DCIT Vs. Manish Agarwal (2018) 92 taxmann.com 81* held *"We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak v. CIT [2017] 55 ITR (Trib.) 209 (Luck.) while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word "may" not "shall". "May" cannot be equated with "shall" especially in penalty proceeding. Using the word "may" in our opinion, gives a discretion to the A.O. to levy the penalty or not to levy, even if the assessee has made the default under the said provision."* In case of *ACIT Vs. Marval Associates the Visakhapatnam Tribunal (2018) 92 taxman.com 109/ (2018) 170 ITD 353* it was held *"Careful reading of section 271AAB of the Act, the words used are 'A.O. may direct' and 'the assessee shall pay by way of penalty'. Similar words are*

used section 158BFA (2) of the Act. The word may direct indicates the discretion to the A.O. 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.

*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. 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."*The penalty order u/s 271AAB is an appealable order u/s 246A before CIT (A). If the penalty u/s 271AAB had been mandatory there would have not been provision of appeal u/s 246A.

The Ld. A.O. and CIT(A) are therefore, wrong and has erred in law in holding that assessee is liable for penalty u/s 271AAB of the I Tact, 1961.

(3) **Ground No. 4:-**

That the Ld CIT(A) is also wrong and erred in law in confirming penalty of Rs 2,50,000 u/s 271AAB of the Act in as much as the penalty is levied by assessing officer simply on the basis that the assessee admitted the income of Rs 25,00,000 and disclosed in the return without proving that the said income disclosed was an undisclosed income of assessee within the meaning of section 271AAB of the IT Act,1961.

It is submitted that in the case of search u/s 132 of the Act carried out in assessee's business premises no incriminating material was found during the search The surrender of current year additional business income by assessee of Rs.25,00,000/- was just to buy peace by assessee. Thus, it is only by admission of assessee on which the assessee declared and included the said amount in return of income filed as his

additional business income of current year and paid tax thereon. The Ld. A.O. also accepted the declared income as business income of current year except petty disallowance of expenses. Thus, there is no *iota* of evidence that surrendered income was undisclosed income. The reliance is placed on the judgement in case of *ACITVs. Marval Associate (2018) 170 ITD 353.* In the said judgement it was held that 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 accounts 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.

Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132 (4). The A.O. must establish that there is undisclosed income on the basis of incriminating material. It is so specifically held by ITAT, Visakhapatnam Bench in ACIT Vs. Marval Associates supra.

The Ld. A.O. taking the admission of income by assessee as undisclosed income of assessee. In search authorities did not find any undisclosed asset, any other undisclosed income. 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 which has not been declared by the assessee. The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AB of the Act**. In the case of assessee also Ld. A.O. has not established that the income disclosed by**

assessee in return filed is undisclosed income of assessee within the meaning of Section 271AAB and unless that is established by Ld. A.O. no penalty u/s 271AAB can be imposed on assessee.

In the course of search the assessee has offered additional business income of Rs.25,00,000/- on account of alleged land advances.It is submitted that during the course of search Ann. AS Exhibit -2 page no. 1 to 5 was found. In the said Annexure on page no.1 two entries of Rs.5 Lakh and 20 Lakh on the date of 19-01-2013 and 30-03-2013 were mentioned. Copy of said seized papers are enclosed.

The assessee in the course of search specifically stated in his statement u/s 132 (4) and 131 of the I T Act, 1961 that said amount of Rs.25 Lakh Crore Lakh is declared as current year business income buy piece and avoid long litigation with department. Thus, it is a dumb written paper. **Further the officers of search proceedings and Ld. A.O. also accepted that the same is dumb written names, places and figures as no further enquiry/investigation was made. The Ld AO has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of current year.Therefore, merely on the basis of surrender made in the search statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB. Thus, it is only by admission of assessee on which the assessee included the said amount in return filed as his income of current year and paid tax thereon.** There is no *iota* of evidence that surrendered income was undisclosed income. Further the department has carried out search and seizure operations on the assessee group and during the course of search, the department has not found any evidence, which shows that the assessee was having any undisclosed income. The revenue authorities have exerted undue pressure and obtained the surrender of income from the assessee.

The CBDT in this regard issued a circular F.No.286/2/2003-IT(Inv.) dated 10-03-2003 and has expressed its concern about the practice of confession of additional income during the course of search and seizure proceedings and, therefore, clarified that the confession during the course of search and survey operation do not serve any useful purpose. There should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department.

For ready reference the said circular is reproduced herein below:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE & COMPANY AFFAIRS
DEPARTMENT OF REVENUE

CENTRAL BOARD OF DIRECT TAXES
Room No. 254/North Block, New Delhi, the 10th March, 2003
To
All Chief Commissioners of Income Tax, (Cadre Contra)
&
All Directors General of Income Tax Inv.

Subject : Confession of additional Income during the course of search & seizure and survey operation -regarding

"Instances have come to the notice of the Board where assessee have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.
Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders."

The Board has again issued a Circular dated 18th December, 2014 and advised the taxing authorities to avoid obtaining admission of undisclosed income under coercion/undue influence.

The Hon'ble jurisdictional ITAT, Jaipur Bench, Jaipur in case of Mukund Sharan Goyal *Vs. DCIT, CC-2, Jaipur (ITA No. 293/JP/2018*order dated 23-09-2019*)*whereinHon'ble Bench held as under:-

We have considered the rival submissions as well as the relevant material on record. During the course of search and seizure action under section 132 of the IT Act, a pocket diary was found and seized containing the entries of advances for land. The heading of these entries is Land Advance in the name of certain persons. However, neither any particulars of those persons are mentioned nor the particulars of the land for which the alleged advance is given is mentioned in the seized material. The entries are only certain names, dates and amount. Even from the names mentioned in the diary, the identity of these persons cannot be ascertained. Similarly the details of the land are also not given in the seized material. Thus in the absence of corresponding asset being the land acquired by the assessee or any document executed between the parties for acquiring of the land, these entries itself do not represent the undisclosed income. As per the definition provided in the Explanation to section 271AAB, if the assessee has acquired an asset which is detected during the course of search and not found recorded in the books of account then the said asset would be considered as undisclosed income but in the absence of the asset it is the mere noting in the diary

which appears to be made in one go and in the names of some fictitious persons without having the minimum particulars of identity. The department has not even tried to ascertain the identity of these persons found in the seized material as no question was asked during the statement recorded under section 132(4) of the Act. Similarly, no attempt was made to identify the particulars of the land for which the alleged entries of advances are recorded in the seized document. Thus prima facie it appears that these papers are the seized material being a pocket diary contains some artificial entries in the names of artificial persons. The entries in itself do not reveal the realistic 37 ITA No. 293/JP/2018 Shri Mukund Sharan Goyal, Jaipur. transaction in the absence of the minimum particulars and details either of the persons or the land. An identical issue has been considered by the Coordinate Bench of this Tribunal in case of M/s. Rambhajo's vs. ACIT (supra) as well as Shri Rajendra Kumar Gupta vs. DCIT (supra). Subsequently, the Tribunal in case of Shri Padam Chand Punliya vs. ACIT (supra) has also considered this issue in para 8 as under :-

Para 8…….

Accordingly, in view of the facts and circumstances of the case as well as the decision of the Coordinate Bench of this Tribunal in the case of Rajendra Kumar Gupta vs. DCIT (supra), we hold that the entries in the seized documents representing the expenditure on account of construction of the house and purchase of other assets as well as advances in the absence of the real transactions do not constitute the undisclosed income of the assessee as defined in the explanation to section 271AAB of the Act. Accordingly, the penalty levied under section 271AAB in respect of the said amount is not sustainable and liable to be set aside."

Further in a recent judgment **of Hon'ble jurisdictional ITAT, Jaipur Bench, Jaipur in case of *Rajendra Kumar Gupta Vs. DCIT, CC-2, Jaipur (ITA No. 359/JP/2017* order dated 18-01-2019 *)***whereinHon'ble Bench held as under:-

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

under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of assessee. Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statue book and have therefore to be applied in the context of provisions wherein they have been brought on the statue book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the A.O. has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132 (4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserves to be set-aside."

The above findings of law in the said judgment squarely applies in case of assessee on the facts of the case.

3. It is thus submitted that the additional business income declared in the income tax return filed u/s 139 (1) of the Income Tax Act, 1961, cannot be

treated as "Undisclosed Income" within the specific meaning given in section 271AAB. The Department carried out search and seizure operations over assessee group and during the course of the search, the Department has not found any evidence of unaccounted purchase/sales or source of undisclosed income. The disclosure of additional income was bona-fide disclosure by the assessee to avoid prolonged litigation. During the course of assessment proceedings, the Ld. A.O. could not prove any source of undisclosed income of the assessee. The Ld. A.O. completed the assessment u/s 143 (3) of Income Tax Act and merely on the basis of search statement, the additional business income was accepted. The additional income declared in return of income of the assessee is based on the search statement in order to avoid prolonged litigation.

It is submitted that the authorities of search have exerted undue pressure and obtained the surrender of income from the assessee. Attention was drawn towards Board's Circular dated 10th March, 2003 wherein the Board has expressed its concern about the practice of confession of additional income during the course of search and seizure proceedings and, therefore, clarified that the confession during the course of search and survey operation do not serve any useful purpose. There should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. The Board has again issued a Circular dated 18th December, 2014 and advised the taxing authorities to avoid obtaining admission of undisclosed income under coercion/undue influence. Except the statement under section 132 (4), there is no undisclosed income in the case of the assessee. The assessee was forced to admit and surrender the income in the statement recorded under section 132 (4). The provisions of section 271AAB clearly requires that such undisclosed income to be substantiated and, therefore, the assessee is required to specify the manner in which such income has been derived and further substantiate the same furnishing material available with him. In the absence of any record or material to show any undisclosed source of income, the entire disclosure on papers is to avoid undue harassment and unwanted litigation.

It is submitted that there was no undisclosed income in the hands of the assessee,The income of Rs.2,50,000/- surrendered in search statement was shown as current year business income. The Ld. A.O. has not determined it as income from other sources u/s 69 of Income Tax Act in the assessment but accepted as business income of current year.

The assessee place reliance on following judgement of Hon'ble Jurisdictional ITAT, Jaipur Bench, Jaipur on the above submissions:-

a) Ravi Mathur Vs DCIT, CC-4, Jaipur (ITA No. 969/JP/2017) dated 13-06-2018.

b) Shyam Sunder Khandelwal Vs. DCIT, CC-2, Jaipur (ITA No. 307/JP/2018) dated 11-04-2019.

c) Suraj Mal Bansal (HUF) Vs. DCIT, CC-3, Jaipur (ITA No. 124/JP/2018) dated 08-04-2019.
d) Vimal Chand Surana Vs. DCIT, CC-2, Jaipur (ITA No. 304/JP/2018) dated 30-05-2019.

It is thus submitted that as there is no undisclosed income within the meaning of section 271AAB which is either admitted by assessee or determined by A.O. in assessment. Thus, the penalty of Rs.2,50,000/- imposed by Ld. A.O. and confirmed by Ld CIT(A) u/s 271AAB (1) (a) is wrong, unjust and bad in law which deserves to be deleted. The appellant prays accordingly.

2.4 On the other hand, the ld. DR supported the order of the ld. CIT(A).

2.5 We have heard both the parties and perused the materials available on record. Brief facts of the case are that the assessee is engaged in business manufacturing, trading and export of precious & semi precious stones from last several years. A search u/s 132 of the I.T. Act, 1961 took place at residence and business premises of assessee 23-05-2013. In course of search, the assessee surrendered an income of Rs.25,00,000/-on account of land advance which he admitted as his additional business income for current year. The assessee filed original return on 29-09-2013 declaring total income of Rs. 89,40,360/- which

included said additional income of Rs.25,00,000/- offered to tax in course of search. The assessment u/s 143 (3) r.w.s. 153B (1) (b) of I. T. Act, 1961 was completed on 21-03-2016 after disallowance of expenses on account of personal element/unverifiable expenses. The A.O. simultaneously initiated penalty proceedings u/s 271AAB of the Act. The A.O. thereafter took penalty proceedings initiated by him u/s 271AAB by issuing fresh show cause notice(s) to which assessee filed his explanation. The explanation filed by assessee has been held by A.O. as not sustainable at all and levied a penalty of Rs.2,50,000/- on assessee.The assessee filed appeal before the ld. CIT (A) against said penalty order and in course of hearing filed written submissions which is reproduced in appeal order of ld. CIT (A). The Ld. CIT(A) in his order dated 29-07-2022 after considering reply filed by assessee confirmed the penalty levied by AO. The Ld. CIT (A) thus dismissed the appeal filed by assessee. It is noted from the records that the Department had carried out the search and seizure operation on the assessee group and thus did not find any evidence which could show that the assessee was having undisclosed income and the ld. AR submitted that the revenue authorities had exerted undue pressure and obtained surrender of income from the assessee. It is worthwhile to mention that CBDT Circular F.No.286/2/2003-IT(Inv.) dated 10-03-2003 indicates that practice of confession of additional income during search and seizure operation does not serve any useful purpose and there should be concentration on

collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. The Bench noted that the Board Circular dated 10-03-2003 (supra) submitted by the ld. AR assessee through its written submission has merit. We have taken into consideration the case laws cited by both the parties and also kept in mind the citations as mentioned by the ld. CIT(A) in his order, however, we find that the recent judgement of ITAT Jaipur Bench in the case of Rajendra Kumar Gupta vs DCIT in ITA No. 359/JP/2017 dated 18-01-2019 finds favour in the case of the assessee as the Bench has discussed the issue in its order very elaborately and judiciously and the relevant extract of the same is reproduced as under:-

> *"2.1 During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs. 82,80,000. Referring to the statement of the assessee in respect of these notings recorded u/s 132 (4), Ld. CIT (A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed income u/s 271AAB, the said cash advances cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable particle or thing. Whether it can then be said that such undisclosed cash represents income by way of any entry in books of account or other documents or transactions found in the course of a search under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of assessee. Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an*

advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statue book and have therefore to be applied in the context of provisions wherein they have been brought on the statue book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the A.O. has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132 (4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserves to be set-aside."

Respectfully following the above decision in the case of Rajendra Kumar Gupta (supra) and in view of the above deliberation that the income surrendered is not an undisclosed income as specified in Explanation © of Section 271AAB of the Act, therefore, we do not concur with the findings

of the ld. CIT(A) as the ld. AR of the assessee has very explicitly narrated the case in his written submission countering the decision taken by the ld. CIT(A) in his order. Thus, the grounds of appeal raised by the assessee in his appeal are allowed

3.0 In the result, the appeal of the assesee is allowed .

Order pronounced in the open court on 22/06/2023.

Sd/- Sd/-

(राठोडकमलेश**जयन्तभाई**) (संदीप गोसाई)
(Rathod Kamlesh Jayantbhai) (Sandeep Gosain)
लेखासदस्य / Accountant Member न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 22 /06/2023
*Mishra
आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:
1. The Appellant- Shri Paras Mal Jain, Jaipur
2. प्रत्यर्थी / The Respondent- The DCIT, Central Circle-1, Jaipur
3. आयकरआयुक्त / The ld CIT
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 353/JP/2022)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar