आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 168/JP/2023
निर्धारण वर्ष/Assessment Year : 2019-20.

M/s. R.P. Wood Products Pvt. Ltd., Naya Bazar, Ajmer.	बनाम Vs.	The DCIT Central Circle, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AABCR 7403 C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri C.M. Agarwal (CA)

राजस्व की ओर से/ Revenue by : Shri A.S. Nehra (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 18/04/2023
उदघोषणा की तारीख/Date of Pronouncement: 5/07/2023

आदेश/ ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 15.03.2023 of ld. CIT (A), Udaipur-2 passed under section 250 of the IT Act, 1961 for the assessment year 2019-20. The assessee has raised the following grounds :-

1. The orders passed by the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidences, facts and circumstances of the case and are therefore liable to be quashed.

2. On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in not quashing the absolutely illegal, arbitrary and ab initio void order of the AO levying penalty u/s 271AAB of the Income Tax Act on the appellant.

3. On the facts and circumstances of the case, the Ld CIT(A) has erred in law in not considering the submissions of the appellant that:

(i) Initiation of penalty by the AO without giving any reasons for initiating penalty u/s 271AAB(1A) of the Income Tax Act is bad in law.

(ii) Initiation of penalty without any specific finding in the assessment order as to the discovery, as a result of search action, of any "undisclosed income" within the meaning of clause (c) of explanation to Section 271AAB(1A) of the Income Tax Act, is bad in law.

(iii) That initiation of penalty solely on the basis of offer of additional income made for the purpose of buying peace and for avoiding further litigation is bad in law.

(iv) That initiation of penalty without directly relating the offer of additional income to any cogent material related to the appellant found during the course of search, is bad in law.

(v) That initiation of penalty when no undisclosed /unrecorded assets of the assessee company were found during the course of search which may substantiate the allegations of earning of any undisclosed income by the appellant is bad in law.

(vi) That initiation of penalty on the voluntarily offered income without any adverse findings on the duly maintained Books of accounts by the appellant even after examination of the same by the Assessing Officer and the Investigation Wing, is bad in law.

4. On the facts and circumstances of the case, the Ld CIT(A) has erred in law in not quashing the penalty imposed by the AO without specifying the default prescribed u/s 271AAB(1A) of the Income Tax Act.

4.1 Ld CIT(A) also erred in law in not quashing the penalty levied on the basis of stereotyped show cause Notice issued u/s 271 read with section 274 of the Income Tax Act which does not mention the specific default committed by the appellant rendering the appellant liable to penalty under Income Tax Act.

4.2 Ld CIT(A) also erred in law in not quashing the patently illegal penalty order when the final show cause notice issued by the AO on the basis of which penalty has been imposed mentions section 271AAB only and not any specific sub section and/or clause, sub clause of that section/sub section.

5. On the facts and circumstances of the case and in law the Ld CIT(A) erred in upholding the validity of the penalty order by observing that AO has mentioned the main section.

5.1 The Ld CIT(A) further erred in law in observing that the appellant is well aware of the clause under which its case is covered.

5.2 The Ld CIT(A) further erred in law in holding that no prejudice is caused to the appellant because of not specifying of particular clause which is completely in defiance of the Full Bench decision of the Hon'ble High Court of Bombay in the case of Mohd Farhan A Shaikh Vs DCIT Central Circle-1 Belgaum categorically holding that

prejudice is writ large on the face of the mechanical methods the Revenue adopts in sending a statutory notice.

5.3 The Ld CIT(A) further erred in holding that application of particular clause depends on facts and circumstances of the case and application of particular clause may change on fulfilling of certain conditions, and in completely ignoring that the applicability of specific clause has to be decided at the time of initiation of penalty proceedings and not thereafter.

6. On the facts and circumstances of the case and in law the Ld CIT(A) erred in holding that furnishing of revised computation of income by appellant is a corroborative evidence and thus in discharging the Revenue from the onus of bringing on record the corroborative evidence.

7. On the facts and circumstances of the case the Ld CIT(A) erred in law in upholding the penalty under clause (a) of Section 271AAB(1A) leviable at the rate of 30% against the penalty levied by the AO under clause (b) of Section 271AAB(1A) and in not quashing the entire penalty order despite finding the order of Assessing officer levying penalty under clause (b) as unsustainable in law.

7.1 Ld CIT(A) erred in law in not quashing the entire penalty order when no specific clause was mentioned in the assessment order or in the show cause notice and the specific clause of Section 271AAB(1A) invoked by the Assessing Officer at the time of levying penalty was not at all applicable to the facts of the case of the appellant.

The appellant craves leave of the Hon'ble Tribunal to amend or raise any other ground, cross objection, including any additional ground of appeal not set out in the appeal Memo.

2. The brief facts of the case are that the assessee company is engaged in the business of manufacturing of Ply Board and Laminated Sheet and trading activity (Commission basis) of wood and other allied products. A search and seizure action under section 132(1) of the IT Act, 1961 was carried out at the premises of assessee company in connection with search and seizure action in R.P. Group of cases of Ajmer on 12.09.2018. During the year under consideration, the assessee company filed his original Return of Income under section 139(1) of the IT Act declaring total income of Rs. 30,66,570/- on 22.10.2019 and subsequently revised the same on 07.03.2020 declaring total income of Rs. NIL. During the course of assessment

proceedings, for buying peace and avoiding protracted litigations with the department, the appellant furnished a revised computation of income under section 153A and offered Rs. 93,59,859/- for taxation as additional income on account of unrecorded sales made by the assessee on commission basis. The AO completed the assessment under section 143(3) of the IT Act at Rs. 93,59,859/- vide his order dated 24.05.2021 by making addition on account of undisclosed commission sales. The AO also initiated penalty proceedings under section 271AAB(1A) of the IT Act separately and accordingly issued show cause notices dated 24.05.2021 and 09.02.2022 under section 271 read with section 274 of the IT Act. In compliance to the said penalty notice, the assessee submitted explanation but the same could not find favour with the AO and he holding that the assessee is liable for imposition of penalty under section 271AAB(1A) of the IT Act, 1961 @ 60% of the undisclosed income of Rs. 93,59,859/-, imposed penalty of Rs. 56,15,915/-. Aggrieved by the impugned penalty order of the AO, the assessee preferred appeal before ld. CIT (A). The ld. CIT (A) upheld the order of the AO though allowing part relief to the assessee.

3. Being aggrieved by the order of ld. CIT (A), now the assessee has come in appeal before us.

4. Before us, the ld. A/R reiterated the submissions as made before the revenue authorities. The ld. A/R further submitted written submissions as under :

"Penalty u/s 271AAB(1A) of the Income Tax Act has been initiated in the assessment order without mandatory recording of the satisfaction by the Assessing Officer which is contrary to law as penalty u/s 271AAB is neither mandatory nor automatic and the Assessing Officer must record his satisfaction as to the committing of the mischief of that section by the Assessee. The Assessing Officer has failed in giving any specific findings as to the discovery,

either during the search or in the assessment proceedings of any "undisclosed income" within the meaning of clause (c) of explanation to Section 271AAB(1A) of the Income Tax Act

Further, initiation of penalty u/s 271AAB(1A) of the Income Tax Act has been made without specifying the particular limb i.e either clause (a) or clause (b) of Section 271AAB(1A) and is therefore not sustainable as per the settled legal position.

Initiation of penalty in respect of income included by the Assessing Officer in the total income based on offer of additional income solely for the purpose of buying peace and avoid further litigations without any independent findings is also not in accordance with law. Further, Initiation of penalty when no undisclosed /unrecorded assets of the assessee company have been found during the course of search which may substantiate the allegations of earning of any undisclosed income by the Assessee Company, is also not in accord with the letters and spirit of the said section. The appellant cannot be visited with penalty only on the basis of deaf and dumb documents with which the Assessee was confronted during the course of search as well as in the assessment proceedings and based on which the assessee offered additional income solely for giving a quietus to the irrelevant issues raised by the Department based on the said deaf and dumb documents.

The appellant also submits that initiation of penalty u/s 271AAB(1A) of the Income Tax Act in the assessment order should not be sustained as no adverse comments have been made by the Assessing Officer on the Books of accounts of the Assessee company which were also seized/impounded during the course of search & seizure proceedings and have been duly examined by the Investigation wing of the Department as well as by the Assessing Officer. Further, Assessing officer has neither rejected Books of accounts of the Assessee Company nor made any adverse remarks in relation thereto. Moreover, authenticity and reliability of the Books of accounts of the Assessee Company has duly been acknowledged and accepted by the Assessing Officer as the offer of additional income was made by computing the income on the basis of Gross Profit rate disclosed in the Books of accounts only, which has been accepted by the Assessing Officer.

For initiating penalty u/s 271AAB(1A) of the Income Tax Act, the Assessing Officer along with the Assessment order issued show cause notice which is completely vague, unspecific

and stereotyped and does not specify the default or any venal breach of the specific penal provisions of the Income Tax Act committed by the assessee. Further, Assessing Officer Central Circle-Ajmer levied the penalty under section 271AAB(1A) of the Income Tax Act when no such penalty u/s 271AAB(1) of the Income Tax Act has been provided under the statute. The penalties have been provided under various clauses to that sub section only which are meant for different type of defaults and are also levied at varied rates.

The Ld Assessing Officer has completely overlooked the fact that the offer of additional income made by the assessee during the course of assessment proceedings was simply for the purpose of buying peace and not definitely and affirmatively linked to the seized material. The Assessing Officer has failed completely in giving any independent findings as regards to the "undisclosed income" within the meaning of explanation (c) to section 271AAB (1A) of the Income Tax Act, having been found/detected as a result of search and seizure action in the case of assessee. The Assessing Officer completely failed in displacing the contentions of the assessee with positive evidences that offer of additional income was just to avoid further litigation.

The Assessing Officer levied the penalty without any application of mind and in an mechanical manner as is evident from the fact that the Ld Assessing Officer in the impugned order mentioned that the additional income was not disclosed even in the Notice issued u/s 153A of the Income Tax Act , thereby proving the mens rea on the part of the assessee, when no such notice u/s 153A was issued for the subject assessment year and no return u/s 153A of the Income Tax Act for the subject assessment year was either filed or required to be filed. Therefore, the impugned order passed by the Ld Assessing Officer is liable to be set aside for this very reason alone.

As has been submitted above, the Assessing Officer issued a stereotyped show cause notice without specifying the specific clause of section 271AAB(1A) of the income Tax Act. Moreover, in the show cause notice date 09/02/2022 on the basis of which penalty has been levied the Assessing Officer has not even mentioned the applicable sub section of section 271AAB under which penalty was proposed to be imposed. Thus , the penalty has been levied on the basis of a totally vague, unspecific and unrelated show cause notice which is grossly defective and therefore, cannot form the basis for levying penalty.

It is the settled position of law that before levying penalty , the assessee must be made aware of the specific charges against him by issuing a show cause notice specifying the exact default. Though the Ld Assessing Officer levied penalty u/s 271AAB(1A)(b) of the I.T.Act , however in the show cause notice specific section was not mentioned. Different clauses of Section 271AAB(1A) prescribe different type of defaults and even the penalties are leviable at differing rates.

As per the statutory provisions related to levy of penalties under the Income Tax Act, as explained by the Hon'ble Supreme Court and other High Courts, before levying penalty under the I.T. Act, it is mandatory that the assessee is made aware of the specific charge against him for which the assessee is going to be proceeded with by issuing a specific show cause notice in this regard. Therefore, the penalty proceedings initiated by the Ld Assessing Officer are without any application of mind, bad in law and deserve to be quashed for this reason alone. The issue whether in the absence of mentioning of specific charge i.e the specific clause of section 271AAB in the show cause notice, the penalty order can be sustained is no more res integra and has invited attention of various courts including the Apex Court on umpteen times. The position of law in this regard is now fully settled in authoritative pronouncement of various High Courts, Hon'ble Tribunal and the Hon'ble Supreme Court leaving no doubt about the illegality and un sustainability of penalty orders passed pursuant to such defective notices. Some of the latest decisions on the issue are mentioned below. However, before discussing the judicial precedents on the issue, perusal of the provisions of section 271AAB may be gainfully made :

Section 271AAB: Penalty where search has been initiated

Section 271 AAB of the income Tax Act read as under:

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President] the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,-

…….

(1A) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after

the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,-

(a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, if the assessee-

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) Substantiates the manner in which the undisclosed income was derived; and

(iii) On or before the specified date-

(A) Pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).]

(2) No penalty under the provisions of [section 270A or] clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) [or sub-section (1A)].

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.-For the purposes of this section,-

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "Specified previous year" means the previous year-

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(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.

From the bare perusal of the above provisions the following emerges;
(i) The penalty under section 271AAB is neither automatic nor mandatory but discretionary as it uses the words "AO may direct".
(ii) The discretionary penalty under section 271AAB(1A) can be levied under clause (a) @ 30% and under clause (b) @60% depending upon the default and charge against the assessee.
(iii) Existence of 'undisclosed income' within the meaning of explanation (c) to Section 271AAB is a sine qua non for levying such penalty. In case there is no undisclosed income as defined therein, no penalty u/s 271AA(1A) of the Income Tax Act can be levied.

While enacting Section 271AAB, the Legislature has consciously used the word 'may' in place of word 'shall' in the opening lines of Section 271AAB of the Act. The choice of the expression 'may' and not 'shall' in the opening Section of 271AAB shows that the Legislature did not intend to make the levy of penalty statutory, automatic and binding on the AO but the AO has been provided with ample discretion in the matter of levy of penalty.

Also, as per sub-section (3) of section 271AAB the provisions of section 274 and 275 as far as may be applied in relation to the penalty referred in this section meaning thereby that before imposing the penalty under section 271AAB, the AO must give show cause notice and an opportunity of being heard to the assessee. The requirement of giving an opportunity of being heard before imposing the penalty makes it abundantly clear that the penalty under section 271AAB is neither automatic nor mandatory and the AO has to take a decision based on the facts and circumstances of the case.

Even the quantum of penalty leviable under section 271AAB(1A) is also subject to the condition prescribed under clauses (a) to (b) of sub-section (1A) and the AO must give a finding for levy of penalty @ 30% or 60% of the undisclosed income. Thus, the AO is bound

to take a decision as to what default is committed by the assessee and which particular clause of section 271AAB(1A) is attracted on such default. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention of considering 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 said to be mandatory and it is on the basis of the facts placed before the assessing officer that Assessing Officer has to come to a judicious decision.

Therefore, first step for initiating the penalty proceedings under section 271AAB of the Act involves issuing a valid show cause notice under section 274 of the Act. To comply with this requirement the notice under section 274 should be clear enough to convey the assessee about the charge which is to be levied against it for levying the penalty for the contravention of the related provisions of the Act and thus, it is necessary that in the notice issued under section 274 of the Act the specific clause of Section 271AAB of the Act under which penalty is proposed to be imposed is conveyed to the assessee, so that assessee could meet out the charge against him. The opportunity to the assessee to meet out the specific charges against him has to be real and effective. Therefore, penalty under section 271AAB levied on the basis of defective notice cannot be sustained.

Hon'ble ITAT Indore Bench in the decision dated 05.02.2020 in ITA No 869/Ind/2018 in the case of Shri Ashok Bhatia v DCIT Central Circle-1 Indore held as under;

" Before levying penalty under section 271AAB of the Act, the Ld. A.O needs to primarily issue notice under section 274 of the Act so for initiating proceedings under section 271AAB of the Act, the Ld. A.O has to first pass through the hurdle of Section 274. In this case, three notices were issued to the assessee on 22.03.2016, 03.06.2016 and 16.09.2016, but none of the notice mention about various conditions provided under section 271 AAB. It seems that the A.O had very casually used the proforma used for issuing notice before levying penalty under section 271(1)(c) of the Act for the concealment of income or furnishing of inaccurate particulars of income. Except mentioning the Section 271AAB of the Act in the notice it does not talk anything about the other mandatory conditions of section 271AAB. Certainly such notice has a fatal error and technically is not a correct notice in the eyes of law because it intends to penalize an assessee without spelling about the charge against the assessee.

Thus, respectfully following the judgment of jurisdictional High Court in the case of PCIT V/s Kulwant Singh Bhatia [2018, Madhya Pradesh High Court], decision of Co-ordinate Bench of Chennai in the case of DCIT V/s R. Elangovan [2018, (ITAT Chennai] and Jaipur Bench in the case of Ravi Mathur Vs DCIT [2018 – ITAT Jaipur] and in the given facts and circumstances of the case wherein the matter written in the body of the notice issued under section 274 of the Act does not refer to the charges of provision of Section 271AAB of the Act makes the alleged notice defective and invalid and thus, deserves to be quashed. Since the penalty proceedings itself has been quashed the impugned penalty stands deleted. Thus assessee succeeds on legal ground challenging the validity of notice issued under section 274 r.w.s. 271AAB of the Act.

The Hon'ble Jaipur Bench of the Tribunal in the decision dated 9.04.2019 in ITA NO 969/JP/2017 in the case of Shri Ravi Mathur Vs DCIT held as under:-

"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, then also the show cause notice should specify the default committed by the assessee to attract the penalty @ 10% or 20% or 60% of the undisclosed income. In this case 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, it is held that 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.

Honble ITAT Jaipur Bench in the decision dated 05/04/2019 in ITA No 112/JP/2018 in the case of Sh Padam Chand Pungaliya Vs ACIT Central Circle-1 Jaipur while relying on its earlier decision in Ravi Mathur, held as under;

"Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB are very vague and silent about the default of the assessee and further the amount of undisclosed income on which the penalty was proposed to be levied. Even the Hon'ble Jurisdictional High Court in case of Shevata Construction Co. Pvt. Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016 has concurred with the view taken by Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Karnataka) which was subsequently upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242

taxman 180 (SC). Accordingly, following the decision of the Coordinate Bench as well as Hon'ble Jurisdictional High Court, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and consequently the order passed under section 271AAB is not sustainable and liable to be quashed."

Hon'ble ITAT Banglore Bench in the decision dated 19.10.2020 in ITA No 1590 to 1596/Bang/2019 in the case of Shri Mahendra B. Chowhan Versus ACIT Circle 1(2), Bangalore, held as under:

" In the this case, notice under section 274 of the Act, does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The argument of the department that the provisions of section 292B of the Act will cure the defect, if any, in the show cause notice cannot be accepted because the non-mentioning of the charge against the assessee in the show cause notice cannot be considered as a mistake, omission or defect, which is in substance and effect in conformity with or according to the intent and purpose of this Act. Therefore, penalty imposed got cancelled."

Hon'ble ITAT Jaipur Bench in the decision dated 30.05.2019 in ITA No 304/JP/2018 in the case of Shri Vimal Chand Surana V DCIT Central Circle-2 , Jaipur, held as undr:

" In this case certain incriminating documents containing the entries of advance, unaccounted stock at business premises as well as residence, cash at the residence of the assessee and jewellery at the residence of the assessee were found and seized. The assessee filed his return of income under section 139(1) on 2nd September, 2015 declaring total income including the surrender of additional income. It is held that the show cause notice issued by the AO without specifying the default and ground for which the penalty under section 271AAB was proposed to be levied, renders the initiation of penalty proceedings invalid and consequently the order passed under section 271AAB is liable to be quashed.

Honble ITAT Jaipur Bench in the decision dated 02/06/2022 in ITA No 1218/JP/2019 in the case of Sh Mahaveer Prasad Aggarwal Vs DCIT Central Circle Kota following the earlier decisions in the case of Ravi Mathur and Padam Chand Pungaliya deleted the penalty u/s271AAB of the Income Tax Act for defective notice u/s 274 of the Income tax Act where specific clause of the section 271AAB was not mentioned.

Kolkatta Bench of the Honble ITAT in the decision dated 30/09/2020 in ITA No 326/KOl/2020 the case of Smt Rashmi Jalan Vs ACIT Circle12(2) Kolkatta held as under:

> "11 Applying the propositions of law laid down in these case –laws to the fact of the case we have no other alternative but to hold that the penalty in question is bad in law as the show cause notice issued by the Assessing Officer does not specify the charge/s against the assessee for levy of penalty, as required by law. Thus on this ground, the penalty is quashed."

Patna Bench of the Honble ITAT in the decision dated 17/09/2020 in ITA No 61/Pat/2019 the case of Rainbow Products Pvt Ltd Vs ACIT Central Circle-1 Patna held as under:

" 8. From perusal of the above provision we observe that sub section 3 of Section 271AAB of the Act talks about issuing the notice u/s 274 of the Act. So for initiating the penalty proceedings u/s 271AAB of the Act the first step to be taken by Ld. A.O is to issue a valid notice u/s 274 of the Act. Sub-section (1) to Section 274 of the Act provides a procedure that "No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard". To comply with this requirement the notice u/s 274 should be clear enough to convey the assessee about the charge which is to be levied against him/her/it for levying the penalty for the contravention of the related provisions of the Act which in the instant case relates to not surrendering of undisclosed amount during the course of search which is subsequently admitted during the course of assessment and not challenged before the Ld. CIT(A). So it was incumbent for Ld. A.O that in the notice issued u/s 274 of the Act he should have mentioned that penalty u/s 271AAB of Clauses (a)/(b)/(c) of section 271AAB of the Act. He should have the Act may be levied @10 /20 / 30% since the assessee falls in Clauses (a) / (b) / (c) of section 271AAB of the Act. He should have further mentioned that as the assessees case falls under clause-c of section 271AAB of the Act, why she should not be visited by penalty @ 30% of the undisclosed income. Against this charge the assessee should have been given a reasonable opportunity of being heard.

Therefore, in view of the settled legal position as discussed above, the penalty imposed by the Assessing Officer without specifying the specific limb of Section 271AAB(1A) of the Income Tax Act is not sustainable in law and deserves to quashed without even going into the merits of the case."

DECISION OF THE LD CIT(A)

The Ld CIT(A) completely ignored the settled legal position in this regard and upheld the illegal order of the Assessing Officer, inter alia justifying the action of the AO on the following grounds;

i. AO has mentioned the main section.

ii. Appellant is well aware of the clause under which its case is covered.

iii. No prejudice is caused to the appellant because of not specifying of particular clause.

iv. Application of particular clause depends on facts and circumstances of the case and application of particular clause may change on fulfilling of certain conditions.

Comments on the decision of the Ld CIT(A)

Various grounds and reasons based on which the Ld CIT(A) has sustained the wholly illegal order of the Assessing Office are contrary to the settled legal position as succinctly brought out in various decisions of the Hon'ble Bench as well the Hon'ble Jurisdictional High Court cited supra. Mere mentioning of main section is not the requirement of section 271AAB(1A) of the Income Tax Act. Not specifying the specific charge in the show cause notice is a fatal defect to the sustenance of the penalty order. Again, observation of the Ld CIT(A) that the assessee is well aware of the clause under which its case is covered is in the teeth of the consistent stand taken by Hon'ble Tribunal, High Courts and the Hon'ble Supreme Court. Further observations of the Ld CIT(A) that no prejudice is caused to the appellant because of not specifying of particular clause is completely in defiance of the Full Bench decision of the Hon'ble High Court of Bombay in the case of Mohd Farhan A Shaikh Vs DCIT Central Circle-1 Belgaum wherein the Hon'ble High Court has specifically considered this argument and negated the same with a categorical affirmation that prejudice is writ large on the face of the mechanical methods, the Revenue adopts in sending a statutory notice.

Further, Ld CIT(A) observed that application of particular clause depends on facts and circumstances of the case and application of particular clause may change on fulfilling of certain conditions. This observation of the Ld CIT(A) tantamount to laying down a wholly illegal, illogical and completely whimsical interpretation of the statutory provisions of the Income Tax Act. None of the statutory provisions of the Income Tax Act are in a fluid state changing their applicability at various stages of the proceedings. Applicability of specific clause has to be decided at the time of initiation of penalty proceedings and not thereafter.

Thus, the decision of the Ld CIT(A) of sustaining the initiation and levy of penalty by Assessing Officer Central Circle-Ajmer is totally contrary to the settled legal position and statutory provision of the Act. It is therefore prayed that the wholly illegal and unsustainable order of the AO may be quashed.

SUBMISSIONS ON THE MERITS- NO PENALTY IS LEVIABLE EVEN ON MERITS

Without prejudice to the legal Grounds, it is hereby submitted that the impugned order passed by the Assessing Officer Central Circle- Ajmer imposing penalty u/s 271AAB(1A) of the Income Tax Act on the Appellant is not sustainable even on merits of the case. In the present case, the assessing officer has accepted the offer of additional income made by the assessee absolutely for the purpose of giving a quietus to the proceedings arising out of search action

and for buying peace and without bringing on record any positive material or without conducting any enquiries for corroborating the notings on loose papers if any. Thereafter said offer of additional income has been treated by the Assessing Officer as amounting to detection of undisclosed income within the meaning of explanation (c) to section 271AAB (1) of the income Tax Act without even referring to satisfaction of any condition prescribed therein.

Neither in the assessment nor in the penalty order, the Assessing Officer has referred to any document or other evidence found during the course of search which indicate towards the earning of alleged undisclosed income within the meaning of explanation (c) to Section 271AAB of the Income Tax Act by the appellant assessee. The observations of the Ld Assessing Officer in this regard are totally baseless, vague, and un substantiated.

It is settled law that for levying the penalty primary onus is on the Assessing Officer to show the existence of pre conditions of section 271AAB of the Income Tax Act, i.e carrying out of search & seizure action and detecting of undisclosed income within the meaning of explanation (c) to section 271AAB which reads as under:

" 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.

Thus, it is evident that penalty u/s 271AAB of the Act can only be levied for undisclosed income as defined above ,found during the course of search. Therefore, penalty u/s 271AAB levied by the assessing Officer ostensibly on account of discrepancies found in material seized during the course of search/survey is not sustainable. The Assessing Officer ought to have categorically brought on record the material found during the course of search indicating undisclosed income of the assessee. Since, the Assessing Officer has miserably failed to bring on record any material found during the course of search indicating undisclosed income of the assessee, and merely accepted the offer of additional income voluntarily made by the assessee, the penalty cannot be sustained.

Hon'ble ITAT Jaipur Bench in the decision dated 11 April 2019 in ITA No. 306/JP/2018 in the case of Shri Gopal Das Sonkia, Jaipur Vs DCIT Central Circle -2 Jaipur held as under:

" 5. 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 Act conducted on 15th October, 2014,the assessee disclosed income of Rs. 9,01,00,000/- in his statement made under section 132(4) of the Act. The said disclosure was made in pursuant to the entries on account of advances for land, excess cash and excess jewellery found in the seized documents. The details of the undisclosed income surrendered by the assessee are as under :-

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….It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the said income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to the said section.

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Accordingly in view of the facts and circumstances as discussed above as well as the order of the Coordinate Bench of this Tribunal, we hold that the entries in the seized documents representing the payment on account of land in the absence of the other essential facts regarding the particulars of the land as well as the persons do not constitute undisclosed income of the assessee as defined in the explanation to section 271AAB of the Act. Accordingly, the penalty levied under section 271AAB by the AO and confirmed by the ld. CIT (A) is not sustainable and liable to be deleted."

Income Tax Appellate Tribunal – Kolkata in the decision dated 01 October 2019 in ITA no 2302/Kol/2016 in the case of ACIT Central Circle-2(1),Kolkatta vs Harish Bagla held as under:

"11.1. Admittedly, the disclosure in question is based on any material found during the course of search. But the amount of Rs.3,52,70,734/- does not represent any unexplained money, jewellery, valuable article or any other asset. No such asset has been identified by the Assessing Officer in the assessment proceedings. The ld. D/R, could not also bring to our notice any such asset. As the Assessing Officer as well as the ld. D/R have failed to bring on record that the sum of Rs.3,52,70,734/- represents any entry in respect of expenses which are found to be false nor has this sum been assessed based on any document which is found to be false, sub-clause (c) & (d) of sub-section (ii) of Section 271AAB of the Act, are also not attracted, in addition to sub-clause (a) of sub-section (ii) of Section 271AAB of the Act.

12. The Chandigarh Bench of the ITAT in the case of Sandeep Bansal v. ACIT in ITA No. 1679/Chd/2017; Assessment Year 2014-15, order dt. 01/07/2019, has considered the issue and held as follows:-……

12. In view of the facts as discussed above by us that except for general surrender made by the assessee there was no incriminating material representing undisclosed income found during the course of search and, therefore, we hold that this was not a fit case for levy of penalty u/s 271AAB of the Act. We, therefore, set aside the order of the Ld.CIT(A) and direct deletion of penalty levied in the present case amounting to Rs.5.65 crores. Ground of appeal No.4 raised by the assessee is allowed."

Hon'ble ITAT Jaipur Bench in the decision dated 17.06.2019 in the case of Shri Kamal Sethia, Jaipur vs ACIT ITA No 190/JP/2018 held as under;

" 6.2 As regards the point raised by ld. AR that the expenditure by itself does not fall in the definition of undisclosed income as per Section 271AAB of the Act. We note that the Coordinate Bench of this Tribunal in case of Shri Padam Chand Pungaliya Vs ACIT (supra) while considering an identical issue as held in para 8 as under:-…..

.. 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."

Identical view has been taken by the Hon'ble Tribunal Jaipur Bench in the decision dated 22Mrach 2019, in the case of Smt. Aparna Agrawal, Kota vs Deputy Commissioner Of Income Tax Central Circle-Kota in ITA No 1438/JP/2018. The Hon'ble Bench observed as under:

" Para 4….

….. The levy of penalty under section 271AAB does not dependent on the addition made during the assessment proceedings but the conditions provided under section 271AAB are precedent for levy of penalty. The assessment order is relevant only for the purpose of limitation provided under section 275 of the IT Act whereas the penalty under section 271AAB has to be imposed only when the income disclosed by the assessee falls in the ambit of undisclosed income as defined under section 271AAB of the Act. The definition of undisclosed income contemplates various forms and the primary condition is that the income of the specified previous year represented 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 during the course of search which has 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. In the case in hand, since the surrender was made in respect of the LTCG recorded in the seized material, therefore, it is based on the entries in the other documents found during the course of search. The income in the shape of entries in other documents found during the course of search would be considered as undisclosed income if the said income has not been recorded in the books of account on or before the date of search.

Thus the Tribunal has taken a consistent view that the penalty under section 271AAB is not automatic but the AO has to take a decision as per the provisions of section 271AAB and particularly in the light of the definition of the undisclosed income as prescribed in the Explanation to section 271AAB of the Act. We further note that this Tribunal has considered this issue in case of Shri Raja Ram Maheshwari vs. DCIT vide order dated 10th January, 2019 in ITA No. 992/JP/2017 in para 12 to 14 as under……

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Hence in view of the facts and circumstances as discussed in detail in foregoing paras as well as following the earlier decision of this Tribunal, we hold that the income surrendered by the assessee in the statement recorded under section 132(4) does not fall in the ambit of definition of undisclosed income as contemplated in Explanation to section 271AAB of the Act. Accordingly, the penalty levied by the AO and sustained by the ld. CIT (A) is not sustainable and the same is deleted.

Honble ITAT Jaipur in the Decision dated 07/08/2020 in ITA No. 851/JP/2018 in the case of M/s Sumati Gems, Jaipur Vs. DCIT, Jaipur held as under:

" …Thus, we agree with the contentions of the ld AR that the levy of penalty is not mandatory in all cases but the Assessing officer has to decide based on facts and circumstances of the case. In fact, it is a consistent view of this Tribunal across various Benches that levy of penalty u/s 271AAB is not automatic in nature but the AO has the discretion and has to take a decision after arriving at the conclusion that the income disclosed by the assessee in the statement recorded U/s 132(4) of the Act is an "undisclosed income" in terms of Section 271AAB(1) r/w. explanation defining the undisclosed income. Further, where the discretion so applied by the Assessing officer has been rightly exercised or not in a particular case can be reviewed and subject to appellate remedy as so provided in the Act.

Reliance is also placed on the following decisions

Hon'ble ITAT Vishakhapatnam in the case of ACIT v. M/s. Marvel Associates (2018) 170ITD 353/194TTJ 338/ 166DTR409 (Vishakha) (Trib)

Hon'ble ITAT Kolkatta Bench in the case of ACIT v Kanwar Sain Gupta, Kolkata, ITA No.538/Kol/2017 dated 29.06.2017.

Honble ITAT Mumbai Bench decision dated 24.05.2021 in the case of Sai Samarth Enterprises Mumbai Vs CIT Central Circle-1 Thane in ITA Nos 3718, 3720, 3721/ Mum/ 2018

Decision dated 30/11/2018 by the Ranchi Bench of the Hon'ble Tribunal in the case of Smt Rinku Agarwal Jamshedpur Vs ACIT Central Circle-2 Ranchi, in ITA No. 262/Ran/2017

Honble ITAT Ahmedabad in decision dated 18/12/2019 in a batch of appeals in the cases of Mukesh D Manglani, Shri Dhanraj G Manglani , Kamlesh D Manglani , Vinodkumar A Chugh, Dhanwantiben C Darshiyani & Chunnilal P Darshiyani in ITA Nos 556/AHD/2018 to 599/Ahd/2018 deleted the penalties levied under section 271(1)(c) of the I.T.Act as well as penalties levied u/s 271AAB of the I.T.Act on the income voluntary disclosed in the returns of income. This decision has also been followed by the **Honble ITAT in its decision dated 18.02.2020 in IT(SS) A No 260/AHD /2017 in the case of Lajwantiben M Manglani Vs DCIT Central Circle-1, Baroda.**

Thus, in view of the submissions made herein above, it is evident that the impugned penalty order is not sustainable in law for the reasons detailed in the above submissions. It is therefore prayed that the absolutely illegal and arbitrary penalty order passed by the Ld Assessing Officer Central Circle- Ajmer be quashed at the earliest. It is prayed accordingly.

Comments on the observations of the Ld CIT(A)

Ld CIT(A) held that furnishing of revised computation of income by appellant is a corroborative evidence. In view of the plethora of decisions of the Hon'ble Tribunal cited above, the observations of the Ld CIT(A) are totally perverse in law. The onus of bringing on record the corroborative evidence is on the Revenue and not on the assessee. The observations of the Ld CIT(A) of discharging the Revenue from the onus of bringing on record the corroborative evidence should met by strong disapproval by the Hon'ble Bench.

Submissions on the issue of providing part relief to the appellant instead of quashing the entire order of the Assessing Officer;

It is most humbly submitted that the Ld CIT(A) in the impugned order held that in the facts and circumstances of the case penalty under clause (a) of Section 271AAB(1A) providing levy of penalty @30% is leviable against the penalty levied by the AO under clause (b) of Section 271AAB(1A) where the penalty is leviable @ 60% of undisclosed income. It is the submission of the appellant that when the Ld CIT(A) held that the clause under which penalty has been levied by the Assessing Officer was not applicable, the Ld CIT(A) ought to have cancelled the entire penalty instead of sustaining the penalty under different clause. Satisfaction for levy of penalty has to be recorded at the time of imitation of the penalty and not at the time of levying of penalty. Since the penalty has been initiated and imposed under patently wrong clause as is clearly discernible from the order of the Ld CIT(A), though the contention of the appellant remains that there was no valid initiation of the penalty, however, without prejudice to the stand the appellant submits that the penalty order based on patently wrong initiation cannot be resurrected and must go in its entirety.

This is the settled position of law that the penalty follows the show cause notice which reflects the mind of the initiating authority. As the show cause notice was flawed, the entire penalty order gets invalidated. For imposing/upholding penalty under clause (a) of Section 271AAB(1A) of the Act the penalty proceedings need to be initiated separately, a course not known to the law after the issuance of initial show cause notice. Therefore, even for this very reason alone, the entire penalty order needs to be quashed being clearly untenable in law and facts of the case. It is therefore submitted that the decision of the Ld CIT(A) suffers from contradictions on this issue. Initiation of penalty by issuing proper show cause notice is jurisdictional requirement before levying penalty u/s 271AAB as it can only be initiated during the course of assessment proceedings alone. As the order of the Ld Assessing Officer levying penalty under clause (b) has been held by the Ld CIT(A) as not justified, the entire proceedings get vitiated and the penalty order cannot remain alive in any other form. It is therefore humbly prayed that the order of the Ld Assessing Officer of levying penalty under clause (b) of Section 271AAB(1A) be quashed in full. It is prayed accordingly."

5. On the other hand, the ld. D/R relied on the orders of the revenue authorities. He submitted that the penalty was rightly levied on account of unrecorded additional income on the basis of seized papers.

6. We have heard the rival contentions, perused the material on record and gone through the orders of the revenue authorities. A search and seizure proceedings under section 132 of the I.T. Act, 1961 was carried out at the premises of the assessee company. During the course of search and seizure action under

section 132 conducted on 12.09.2018, some loose papers were found and seized. At the time of assessment proceedings, on the basis of statement recorded under section 132(4) of the IT Act, the assessee offered an amount of Rs. 93,59,859/- being gross profit charged on the unaccounted commission sales of Rs. 5,46,08,276/- for taxation. The said disclosure was made in pursuant to the entries in the seized documents.

6.1 Subsequently, the AO initiated the penalty proceedings and imposed penalty of Rs. 56,15,915/- @ 60% on total undisclosed income of Rs. 93,59,859/- under section 271AAB(1A) of the Act. The assessee raised objection against the levy of penalty by filing the reply and written submissions and mainly contended that the additional income was disclosed and offered to tax to buy peace and avoid litigation and, therefore, the penalty cannot be levied under section 271AAB of the Act.

It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1A) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be considered and decided in the penalty proceedings. Since the assessee has offered the said income to buy peace and avoid litigation with the department, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the

penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to the said section. Therefore, we do not agree with the observation of the ld. CIT (A) that the levy of penalty under section 271AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact that all the conditions provided under section 271AAB are satisfied. At the outset, we note that an identical issue has been considered by the Coordinate Bench of this Tribunal in the case of Ravi Mathur vs. DCIT (supra) in para 4 to 6 as under :-

> " *"4. We have considered the rival submissions as well as relevant material on record. A search was conducted under section 132 of the IT Act on 30th October, 2014 at the premises of the assessee. The assessee in his statement recorded under section 132(4) has disclosed an income of Rs. 10,02,00,000/- in pursuant to the entries of advances given for purchase of land recorded in the pocket diary which was found and seized during the course of search and seizure action. This is year of search and the financial year would end on 31st March, 2015. However, the assessee disclosed this amount of Rs. 10,02,00,000/- based on the entries in the diary regarding investment in real estate. The due date of filing of return of income under section 139(1) was 30th September, 2015. It is undisputed fact that the assessee is an Individual and was not maintaining regular books of account.*

Therefore, the transactions recorded in the pocket diary found during the course of search itself would not lead to the presumption that the assessee would not have offered this income to tax if the search is not conducted on 30th October, 2014. Further, the entries in the diary itself do no not represent the income of the assessee during the year under consideration though the assessee was required to explain the source of investment in question and that source would be the income of the assessee. It is most likely that the investment in question was made from the unaccounted income of preceding years. Hence the investment in the real estate itself would not reveal the nature of income and the source of income of the year under consideration. It is a pre-condition for invoking the provisions of section 271AAB that the assessee admitted the undisclosed income in the statement under section 132(4). The definition of 'undisclosed income' is provided in section 271AAB itself and, therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to said section. The first question arises is whether the levy of penalty under section 271AAB is mandatory and consequential to the disclosure of income by the assessee under section 132(4) or the AO has to take a decision whether the given case has satisfied the requirements for levy of penalty under section 271AAB of the Act. In order to consider this issue, the provisions of section 271AAB are to be analyzed. For ready reference, we quote section 271AAB as under :-

" ***271AAB.*** *(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012 [49][but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President[50]], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—*

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified

previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum [51][computed at the rate of sixty per cent] of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

[52][(1A) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, if the assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).]

(2) No penalty under the provisions of [53][section 270A or] clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) [52][or sub-section (1A)].

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(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 [54][Principal Chief Commissioner or] Chief Commissioner or [54][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.]"

The section begins with the stipulation that the AO "may" direct the assessee shall pay by way of penalty if the conditions as prescribed under clauses (a) to (c) are satisfied. As per sub-section (3) of section 271AAB the provisions of section 274 and 275 as far as may be applied in relation to the penalty referred in this section which means that before imposing the penalty under sec. 271AAB, the AO has to issue a show cause notice and give a proper opportunity of hearing to the

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

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

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

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

which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB.

The assessee has also challenged that the principles of natural justice has not followed by the AO. The detailed submissions of A.R in this regard has already been reproduced above. The A.R did not produce any evidence to show that he was not given proper opportunity of hearing. It is clear from the penalty order that the AO has given penalty notice and which was also replied by the assessee. Therefore, in my opinion, principle of natural justice has not been violated. Thus in view of above discussion penalty imposed by AO u/s 271AAB of the Act is confirmed."

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

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

5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of

section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under;

271AAB [Penalty where search has been initiated]:

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1 st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived.

(ii) Substantiates the manner in which the undisclosed income was derived; and

(iii) On or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4_) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(2) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

Section 158BFA(2):

(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC:

***Provided** that no order imposing penalty shall be made in respect of a person if—*

(i) such person has furnished a return under clause (a) of section 158BC;

(ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.

(iii) Evidence of tax paid is furnished along with the return; and

(iv) An appeal is not filed against the assessment of that part of income which is shown in the return:

***Provided** further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.*

6. Careful reading of section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA(2) of the Act. The word may direct indicates the discretion to the AO. Further, sub section (3) of section 271AAB of the Act, fortifies this view.

Sub section (3) of section 271AAB:

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

7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of

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

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

Thus the Tribunal has analyzed all the relevant provisions of the Act as well as various decisions on this point and then arrived at the conclusion that the penalty under section 271AAB is not mandatory but the AO has the discretion to take a

decision and the same should be based on judicious decision of the AO. Accordingly following the earlier decision of this Tribunal in the case of Ravi Mathur vs. DCIT (supra), we hold that the levy of penalty under section 271AAB is not mandatory but the AO has a discretion after considering all the relevant aspects of the case and then to satisfy himself that the case of the assessee falls in the definition of undisclosed income as provided in the explanation to section 271AAB of the Act.

6.2. The second limb of challenging the validity of initiation of penalty proceedings for not specifying the ground and default in the show cause notice issued under section 274 has been considered by the Coordinate Bench of this Tribunal in the case of Ravi Mathur vs. DCIT (supra) in para in para 7 as under :-

> *"7. 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. The*

Channai Bench of the Tribunal in the case of DCIT vs. Shri R. Elangovan (supra) at pages 7 to 10 has held as under :-

" It is clear from the Sub Section (3) of Section 271 AAB that Sections 274 and Section 275 of the Act shall, so far as may be, apply. Sub Section (1) of Section 274 of the Act mandates that order imposing penalty has to be imposed only after hearing the assessee or giving a assessee opportunity of hearing. Opportunity that is to be given to the assessee should be a meaningful one and not a farce. Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of Section 271AAB of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra) relying in its own judgment in the case of Manjunatha Cotton and Ginning Factory (supra) had held as under:-

''2. This appeal has been filed raising the following substantial questions of law:

(1) Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of Section 271(1B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?

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 CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.

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

In the earlier case of Manjunatha Cotton and Ginning Factory (supra) their lordship had observed as under:-

''Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law ;

The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee ;) taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law ; penalty proceedings are distinct from the assessment proceedings : though proceedings for imposition of penalty emanate from proceedings of assessment, they are independent and a separate aspect of the proceedings ;

The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the proceedings on the merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared invalid in the penalty proceedings''.

View taken by the Hon'ble Karnataka High Court in the above judgment was indirectly affirmed by the Hon'ble Apex Court, when it dismissed an SLP filed by the Revenue against the judgment in the case of SSA's Emerald Meadows (supra), specifically observing that there was no merits in the petition filed by the Revenue. Considering the above cited judgments, we hold that the

notice issued u/s.274 r.w.s. 271AAB of the Act, reproduced by us at para 5 above was not valid. Ex-consequenti, the penalty order is set aside.

6. Since we have set aside the penalty order for the impugned assessment year, the appeal filed by the Revenue has become infructuous."

In view of the decision of the Chennai Bench (supra), the show cause notice issued by the AO in the case of the assessee is not sustainable."

We further note that in the case in hand, the AO in the show cause notices has neither specified the grounds and default on the part of the assessee nor even specified the undisclosed income on which the penalty was proposed to be levied. Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB(1A) 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.

As regards merits of levy of penalty,

7. The ld. A/R of the assessee has submitted that the AO while passing the penalty order under section 271AAB has not given a finding that the income disclosed by the assessee is an undisclosed income as per definition provided in the explanation to section 271AAB(1A) of the Act. He has further submitted that when the levy of penalty is not mandatory but to be imposed on merits of each case, then the AO is duty bound to first hold that the income disclosed by the assessee is undisclosed income as per the provisions of section 271AAB and then take a decision of imposing the penalty. He has referred to the relevant disclosure made by the assessee in the statement recorded under section 132(4) and submitted that it is a clear case of obtaining the disclosure from the assessee without any incriminating material disclosing any undisclosed income. The alleged seized material of Annexure A-2 is nothing but containing some imaginary names and details and some figures which were specifically stated by the assessee in his statement. The ld. A/R has thus contended that the said seized documents are nothing but dumb and deaf papers without indicating any undisclosed income of the assessee. The assessee has surrendered the income just to buy peace and avoid unnecessary protracted litigation, however, there is no iota of evidence that the surrendered income was undisclosed income of the assessee. All the entries in the seized documents are written against some imaginary names and figures and do not represent any actual transaction but only for sake of obtaining the surrender from the assessee, the search party has forced upon these documents on the assessee. The ld. A/R has referred to the CBDT Circular No. 286 of 2003 dated 10th March, 2003 and submitted

that the CBDT expressed its concern about the practice of confession of additional income during the course of search and seizure proceedings which do not serve any useful purpose in the absence of any evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed. Hence the ld. A/R has submitted that the Board has time and again advised the taxing authorities to avoid obtaining an admission/confession of undisclosed income under coercive/undue influence. He has then referred to the Circular dated 18th December, 2018 and submitted that the CBDT has repeated its earlier instructions. Thus the ld. A/R has submitted that in the absence of any undisclosed income indicated or discovered on the basis of seized material, the disclosure made in the statement under section 132(4) is not sufficient to levy the penalty under section 271AAB of the Act. In support of his contention, he has relied upon the following decisions :-

Ravi Mathur vs. DCIT
ITA No. 969/JP/2017 dated 13.06.2018.

Padam Chand Pungliya vs. ACIT
ITA No. 112/JP/2018 dated 05.04.2019.

Shri Mahendra B. Chowhan vs. ACIT
ITA No. 1590 to 1596/Bang/2019 dated 19.10.2020.

Shri Ashok Bhatia vs. DCIT
ITA No. 728 & 729/Ind/2018 dated 05.02.2020.

Shri Vimal Chand Surana vs. DCIT
ITA No. 304/JP/2018 dated 30.05.2019.

Smt. Rashmi Jalan vs. ACIT
ITA No. 326/Kol/2020 dated 30th September, 2020.

Smt. Aparna Agrawal vs. DCIT
ITA No. 1379/JP/2018 dated 25.03.2019.

Shri Kamal Sethia vs. ACIT
ITA No. 190/JP/2018 dated 17.06.2019.

ACIT vs. Harish Bagla
ITA No. 2302/Kol/2016 & ITA No. 2303/Kol/2016 dated 1.10.2019.

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

Thus the ld. A/R has submitted that even if the seized material discloses some out-flow of funds from the assessee's hands, the same cannot necessarily be an income of the assessee. Therefore, in the absence of any other material or evidence to show the undisclosed income of the assessee, only the entries in the seized material which is dumb and deaf document cannot be the basis of levy of penalty under section 271AAB of the IT Act. As regards the penalty proceedings under section 271AAB(1A) of the IT Act, 1961, no reasons were given by the AO in the assessment order except mentioning that penalty proceedings u/s 271AAB(1A) are being initiated separately. The AO has neither referred to any undisclosed income within the meaning of explanation (c) to section 271AAB(1A) of the IT Act nor specified the default prescribed u/s 271AAB(1A) of the IT Act. In respect of undisclosed commission sales, the ld. A/R has submitted that there is no material found or detected during the course of search. Therefore, the ld. A/R has submitted that for buying peace and avoiding litigations with the department the assessee offered an additional income of Rs. 93,59,859/- for taxation would not come in the ambit of undisclosed income as per the definition provided under section 271AAB of the Act.

8. On the other hand, the ld. D/R has submitted that the assessee has disclosed the additional income based on the seized material found during the course of

search. Therefore, the disclosure is in respect of the undisclosed income recorded in the seized material. He has relied upon the orders of the authorities below.

9. We have considered the rival submissions as well as the relevant material on record. The assessee disclosed the additional income during the statement under section 132(4) of the IT Act on the basis of seized material. It is pertinent to note that without ascertaining the full particulars of the persons in whose names the entries are made, it is possible that all these names are only imaginary and not the names of any existing persons. Therefore, these vague entries itself do not represent the real transaction and consequently the undisclosed income of the assessee. The Coordinate Bench of this Tribunal in the case of Rajendra Kumar Gupta vs. DCIT (supra) has considered the issue of out flow of funds from the assessee can be an undisclosed income for the purpose of section 271AAB of the Act in para 21 as under :-

> *"21. 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 article or thing. Whether it can then be said that such undisclosed cash advances represents 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. 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 the 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 statute 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 AO 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 deserved to be set-aside."

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 commission sales in the absence of the real transactions do not constitute the undisclosed income of the assessee as defined in the explanation to section 271AAB(1A) of the Act. Accordingly, the penalty levied under section 271AAB(1A) in respect of the said amount is not sustainable and liable to be set

aside. Accordingly, the penalty levied by the AO under section 271AAB(1A) of the Act is deleted.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 5/07/2023.

Sd/-	Sd/-
(राठौड़ कमलेश जयंतभाई)	(संदीप गोसाई)
(RATHOD KAMLESH JAYANTBHAI)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 5/07/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. R.P. Wood Products Pvt. Ltd., Ajmer.
2. प्रत्यर्थी / The Respondent- The DCIT, Circle-4, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 168/JP/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar