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

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

आयकर अपील सं. / ITA. No. 302/JP/2023
निर्धारण वर्ष / Assessment Years : 2018-19

R. P. Wood Products Private Limited, Naya Bazar, Ajmer	बनाम Vs.	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 (C.A.)
राजस्व की ओर से / Revenue by : Sh. Shailendra Sharma (CIT)

सुनवाई की तारीख / Date of Hearing : 24/05/2023
उदघोषणा की तारीख / Date of Pronouncement : 11/07/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the Commissioner of Income Tax (Appeals), Udaipur-2 [Here in after referred as Ld. CIT(A)] for the assessment year 2018-19 dated 15.03.2023, which in turn arises from the order passed by the DCIT/ACIT, Central Circle, Ajmer passed under Section 271AAB of the Income tax Act, 1961 (in short 'the Act') dated 16.03.2022.

2. The assessee has marched this appeal on the following grounds:-

> "1. On the facts and in the circumstances of the case and in law the penalty order passed u/s 271AAB of the Income Tax Act, 1961 is wrong, bad in law, invalid and void-ab-initio as the ld. AO initiated the penalty u/s 271AAB of the Income Tax Act, 1961 in the assessment order without specifying the limbs of section 271AAB(1A) of the Act whether it is for clause (a) or clause (b) section 271AAB(1A).
> 2. On the facts and in the circumstances of the case and in law the penalty order passed u/s 271AAB of Income Tax Act, 1961 is wrong, bad in law, invalid and void-ab-initio as the ld. AO issued notice under section 274 r.w.s 271AAB(1A) of I.T. Tax Act without specifying the default of the assessee.
> 3. On the facts and in the circumstances of the case the ld. AO has grossly erred in imposing penalty for Rs. 1,24,78,052/- u/s 271AAB of the I.T. Act, 1961, for the assessment year 2018-19.
> The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings."

3. The fact as culled out from the records is that the assessee company had filed its original return of income on 29.10.2018 declaring total income of Rs.38,16,370/-. The search and seizure action u/s 132 of 1.T. Act, 1961, was carried out on 12.09.2018 at the residential and business premises of R.P. Group of Ajmer. Various assets had been found at the time of search and some of them were also seized at various places of the group at the time of action u/s 132 of I.T. Act. Certain incriminating documents/Loose papers/Books of accounts etc. were also found, inventorized and some of them also seized or impounded at the time of

search/survey u/s 132/133A of the I.T. Act. In response to notice issued u/s. 153A of the Act the assessee filed return on 12.06.2019. The assessee company has submitted a revised computation of income u/s 153A in which total income has been shown at Rs.2,46,01,180/- but the same is not given any cognizance due to the reason that there is no such provision available in the Act to revise a return filed in response to notice u/s 153A of the I.T. Act, 1961.

3.1 During the course of search proceedings, Iphone date of Shri Ashutosh Bansal one of the assessee in the group of R. P. Group was extracted along with other electronics devices and inventoried at Sr no. 13 of Annexure A of accounts / books etc. found at 129/8, Naya Bazar, Ajmer. The assessee was asked to provide his explanation on the transaction appearing on each and every page of the said Annexures. In response to the above Shri Ashutosh Bansal vide his submissions made for the A.Y.2019-20 has submitted that page wise reply of Annexures has been considered in M/s R.P. Wood Products Pvt. Ltd. On examination of the submission of the assessee M/s R.P. Wood Products Pvt. Ltd. for the A.Y.2019-20, it is noticed that it has submitted vide its reply

dated 03.03.2021 that the most of the above I- phone data relates to sales made on commission basis and accordingly the unaccounted sales on commission basis for the A.Y 2018-19 have been worked out to Rs.11,89,74,566/-, on which G.P. of Rs.2,07,96,754/- (@ 17.48% being weighted G.P. rate) has been shown by the assessee.

3.2 The assessee vide his submission dated 03.03.2021 for A.Y.2018-19 has also submitted that "It is also an established position of law that on unaccounted sales/turnover what is to be taxed is the profit embedded in these sales. The Hon'ble Guj. High Court in the case of CIT Vs. President Industries Ltd., 258 ITR 654 (Guj) has held that addition cannot be entire undisclosed sales proceeds. Only the profit embedded in sales proceeds can be taxed." The assessee has also placed his reliance on various other judicial pronouncements in this regard, which have been duly considered. Accordingly, the assessee offered an amount of Rs.2,07,96,754/- on account of commission sales which was neither disclosed in the original return of income nor the return of income filed in response to notice issued u/s 153A of the I.T. Act, 1961 for the A.Y.2018-19. Therefore, an addition of

Rs.2,07,96,754/- is hereby made on account of undisclosed commission sales and added to the total income of the assessee for A.Y.2018-19.

3.3 The ld. AO noted that against the assessment order the assessee has not preferred any appeal and as the penalty proceedings were initiated u/s. 271AAB of the Act the assessee was asked to submit the reply. The assessee mad his submission on 14.02.2022. The ld. AO did not convince from the submission of the assessee and stated that the assessee has accepted in the assessment proceeding about the undisclosed income on account of sales on commission basis which was neither declared in the ITR filed u/s. 139(1) nor in the return submitted u/s. 153A of the Act. He further hold that mere payment of taxes on the said income, during the course of assessment proceeding, does not give immunity to the assessee from the levy of penalty u/s. 271AAB(1A) of the Act. Based on these observations, the ld. AO hold that the assessee is found to be liable for imposition of penalty u/s. 271AAB(1A) of the Act in respect of undisclosed income of Rs. 2,07,96,754/- and therefore, 60 % of the said amount was imposed as penalty for an amount of Rs. 1,24,78,052/-.

4. Aggrieved from the order of the ld. AO, assessee preferred and appeal before the ld. CIT(A). A propose to the grounds so raised by the assessee, the relevant finding of the ld. CIT(A) is reiterated here in below:

> “6. I have considered the facts of the case, gone through the relevant assessment orders, penalty orders and the paper-book & submission of the appellant and the various case laws.
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> 6.1 The assessing officer levied penalty because the undisclosed income on account of sales on commission basis was neither declared in the ITR Filed u/s 139(1) or in the return submitted in response to the notice issued u/s 153A of the Act. The AO held that mere payment of taxes on the said income, during the coruse of assessment proceedings, does not given immunity to the assesse from levy of penalty u/s 271AAB(1A) of the Act. As per AO the detection of undisclosed income was taken place in consequence to the search action and that too was on the basis of incriminating material seized.
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> Per contra the appellant argued that the AO has not mentioned specific default of section 271AAB of the Act, i.e. either default of clause (a) or default of clause (b) of the said subsection. This argument of the appellant is not found to be acceptable as the AO has specified the main section and the appellant is well aware that under which clause his case is covered. No prejudice is caused to the appellant because of not specifying of particular clause. The application of particular clause depends on facts and circumstances of the case. If the appellant fulfills certain conditions then particular clause can change. Therefore, the argument of the appellant is not found to be acceptable. The appellant argued that the offer of additional income during the assessment proceedings was made only to buy peace and avoid further litigations. The additional income offered is not directly relateable to any cogent material found during search but on estimate basis. This argument of the appellant is not found to be acceptable as the appellant offered the additional income to cover the discrepencies in the seized material.
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> The appellant argued that no corroborative evidence was found in addition to seized documents. The arguent of the appellant is not found acceptable because the appellant admitted undisclosed income in the statement recorded during search and the appellant has himself provided corroborative evidence in the form of revised computation of income filed during the assessment proceedings.

The appellant argued without prejudice to the other arguments that the appellant is covered by provision of (a) of Section 271AAB (1A) which is as under

(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;
Appellant argued that appellant admitted undisclosed income during statement recorded u/s 132(4) of the Act on 14.09.2018 vide Q.N. 10 &15 and again on dated 05.11.2018 vide Q.N.1. Vide reply to question No 10 and 15 the appellant substantiated the manner in which the undisclosed income was derived and also paid the tax before completion of assessment. Due to covid period the date for compliance was extended but as the date of return could not be revised and as such the revised computation of income was filed. The appellant argued that penalty should be deleted.

The reply of the appellant is considered. It is seen that the appellant admitted undisclosed income during the search in the statement recorded u/s 132(4). Appellant substantiated the manner in which the undisclosed income was derived and also paid the tax before completion of assessment. The appellant did not incude the undisclosed income admitted during search in the return of incomefiled u/s 153A for the specified previous year. Now question arises whether the revised computation filed during assessment proceedings can be treated as compliance to the requirement of the law as there is no provision to revise the return of income filed in response to return filed u/s 153A. In this regard the appellant has relied upon the judgement in the case of ACIT v/s Ashok Raj Nath ITA No.2970/Del/2012 on dated 31.08.2012 wherein it was held as under-

"9. In the instant case, the assessee voluntary disclosed additional income during the course of assessment proceedings and paid tax thereon. In the light of view taken in the aforesaid decisions, it cannot be

said in the case before us, additional income disclosed during the course of assessment proceedings was not voluntary or that the assessee wanted to conceal the income. Even though the revised retum was found to be invalid, the AO accepted the income as declared in the revised return and computation. The AO did not bring any material on record that the declaration of income made by the assessee in his revised return or his explanation was not bonafide. In these circumstances, there appears to be no basis for imposition of penalty on the ground that the assessee furnished inaccurate particulars of income. Since the Revenue have not placed before us any material nor brought to our notice any contrary decision so as to enable us to take a different view in the matter, we are not inclined to interfere. Therefore, ground no.1 in the appeal is dismissed."

The appellant has also relied upon on the decision by Honourable Delhi High Court in case of CIT v/s Harnarain in ITA NO.2072/2010 darted 31.10.2011. In this case it was held as under :-

"10. It is also observed that the CIT(A) had relied on the decision of the Madhya Pradesh High Court and the Jharkhand High Court in the case of CIT v. S.V. Electricals P. Ltd.(155 Taxman 158) and CIT v. Ashim Kumar Agarwal (153 Taxman 226) respectively where it was held that where the assessee surrenders his full income, though at a later stage, there was no question of any concealment on his part and consequently no penalty under Section 271(1)(c) was leviable, and that a omission from retum of income did not amount to concealment.

11. In view of the discussion above and the cited decisions, surrender of the amount by the Assessee after receipt of the questionnaire could not lead to an inference that it was not voluntary, in the absence of any material on record to suggest that it was bogus or untrue. It is further evident that there was neither any detection nor any information in the possession of the Revenue which might lead to a conclusion that there was a detection by the Revenue of concealment. Accordingly, the question of law framed is answered against the Revenue and in favour of the Assessee. The Appeal is dismissed....."

Though these decisions were rendered with reference to the penalty levied u/s 271(1)(c), the ratio of these judgements is that even though the revised return was found to be invalid, the AO accepted the income as declared in the revised return and computation. The AO did not bring any material on record that the declaration of income made by the assessee in his revised return or his explanation was not bonafide. The facts of present case are similar to the decisions relied upon by the applicant. It is also true that the revised computation is accepted by the AO while making assessment. In the case of Dy. Commissioner of Income Vs Smt Sheena Mathur ITA No. 627/JP/2017, dated 10.11.2017 it was held that "we are of the view that there is no restriction for filing a

revised return pursuant to filing of return in response to notice under section 153A of the Act and the provisions of section 139(5) are equally applicable in case of return filed pursuant to notice under section 153A of the Act. It is well settled that assessment proceedings and penalty proceedings are separate and distinct. The yardsticks of the penalty proceedings are different from the quantum proceedings. Considering the facts that the revised computation of income filed by the appellant is finally accepted by the AO while finalizing the assessment order, a lenient view with regard to levying penalty deserve be taken. However, the penalty cannot be deleted as argued by the appellant because his case is covered by the definition of undisclosed income as defined in the section 271AAB itself. The definition as provided in the section 271AAB is reproduced as under-

(c) "undisclosed income" means-

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

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

year; o r
(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.

It is admitted fact that income of the specified previous year represented entry in the books of account or other documents or transactions found in the course of a search under section 132, which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year. During the search unaccounted sales were found on the basis of documents seized. The appellant admitted that these are unaccounted sales on commission. The appellant not included this income in the Return of Income filed u/s 139 which is admitted during search and the additional income is included in the revised computation of income furnished during assessment proceedings after search. The appellant has not explained that his case is not covered by the definition

of undisclosed income. Therefore, the argument of the appellant that the penalty @ 0 percent should be levied is not found to be acceptable.

Looking to the totality of facts and circumstances of the case the appellant deserves a lenient view and it is held that the appellant fulfilled the requirement of the provision of (a) of Section 271AAB (1A) as revised computation of income filed by the appellant is finally accepted by the AO while finalizing the assessment order. Therefore, the penalty levied by the AO @ 60 percent as per provisions of (b) is reduced to the extent of @ 30 percent as per provisions of section 271AAB (1A)(a).

7. The appellant has raised fourth ground appeal to crave leave to add, alter, amend or withdraw any of the grounds of appeal during the course of or alternative grounds at or before hearing.

7.1 The appellant has not craved leave to add, alter, amend or withdraw any of the grounds of appeal during the course appellate proceedings; therefore this ground of appeal is treated as disposed of.

8. In the result the appeal is treated as partly allowed."

5. As the assessee did not find any favor fully, from the finding of the ld. CIT(A), assessee preferred an appeal before the tribunal on the grounds as taken in appeal memo and reproduced at para 2 above. In support of the grounds so raised by the ld. AR of the assessee, he has relied upon the following written submission.

"Most respectfully, the humble appellant submits that the present appeal has been filed against the order dated 15/03/2023 passed by the Ld CIT(A) Udaipur -2 whereby the Ld CIT(A) has allowed only part relief to the appellant in respect of wholly illegal, void ab initio and arbitrary order of the Assessing Officer Central Circle- Ajmer of imposing penalty u/s 271AAB(1A) of the appellant. The aggrieved appellant is challenging the order of the Ld CIT(A) on 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. "

<u>FACTS IN BRIEF</u>

Brief facts leading to the filing of present appeal by the appellant assessee are as below:

1. Search & seizure proceedings u/s132 of the Income Tax Act were carried out by the Income Tax Department at the premises of appellant assessee company in connection with Search & seizure action in R.P.Group of cases of Ajmer 12.09.2018.

2. Return of income u/s 139(1) of the Income Tax Act was filed on 29.10.2018 at an income of Rs 38,16,370/. In response to the Notice u/s

153A return was filed on 12.06.2019 at an income of Rs 38,16,370/ which was subsequently revised at Rs 2,46,01,180/.

3. During the course of assessment proceedings, for buying peace and avoiding protracted litigations with the department, the appellant offered an additional income of Rs 2,07,96,754/ for taxation and also paid due taxes thereon which was accepted by the department and the Assessing Officer completed the assessment u/s 143(3) of the Income Tax Act at the very same income of Rs 2,46,13,124/ i.e the income offered in the revised return of income/computation of income.

4. Along with the assessment order, the Assessing Officer also initiated penalty u/s 271AAB(1A) making the following note in the assessment order:

"Accordingly, the assessee offered an amount of Rs 2,07,96,754/ on account of commission sales which was neither in the original return of income nor in the return of income field in response to notice issued u/s153A of the I.T.Act 1961 for the A.Y.2018-19. Therefore, an addition of Rs 2,07,96,754/ is hereby made on account of undisclosed commission sales and added to the total income of the assessee for A.Y.2018-19. Penalty proceedings u/s 271AAB(1A) of the Income Tax Act 1961, are being initiated separately.

5. For initiating penalty proceedings u/s 271AAB(1A) of the Income Tax Act, no reasons were given by the assessing officer in the assessment order except mentioning that Penalty proceedings u/s 271AAB(1A) of the Income Tax Act 1961 are being initiated separately. The Assessing Officer has neither referred to any undisclosed income within the meaning of explanation(c) to Section 271AAB(1A) of the I.T.Act nor specified the default prescribed u/s 271AAB(1A) of the Income Tax Act.

6. Thereafter, Ld Assessing Officer issued a stereotyped show cause Notice u/s 271 read with section 274 of the Income Tax Act without specifying the specific default of section 271AAB(1A) of the I.T.Act, i.e either default of clause (a) or default of clause (b) of the said sub section. Prior to the imposition of penalty another stereotyped show cause notice dated 09/02/2022 was issued by the Assessing Officer simply stating that the penalty proceedings u/s 271AAB of the Income Tax Act are pending in assessee's case.

7. On the basis of show cause Notice date dated 09/02/2022, the Ld Assessing Officer Central Circle Ajmer levied the penalty of Rs 1,24,78,052/ u/s 271AAB(1A) of the Income Tax Act without specifying any clause of section 271AAB(1A) of the Income Tax Act invoked by him for levying the penalty.

8 Thus, the Assessing Officer initiated and imposed penalty on the appellant without bringing on record any definite evidence of unaccounted sales having been made by the assessee company and without quantifying the exact amount of unaccounted sales discovered as a result of search or undisclosed income discovered in the search and without specifying the exact limb of Section 271AAB(1A) of the Income Tax, either in the assessment order, or in the penalty order, and on the basis of show cause notice where even the specific sub section of section 271AAB was not mentioned.

9. Aggrieved by the absolutely illegal and arbitrary penalty order, the humble appellant filed appeal before the Ld CIT(A)-2 Udaipur praying for quashing of the same. However, Ld CIT(A) upheld the validity of the order passed by the AO sans any mention of specific limb of section 271AAB(1A), though allowing part relief to the Appellant by holding the appellant guilty of the mischief of clause (a) of Section 271AAB(1A) instead of clause (b) under which penalty was supposedly levied by the Assessing Officer.

Aggrieved by the decision of the Ld CIT(A), the present appeal has been preferred.

It is also the contention of the appellant that apart from non sustainability of the impugned penalty order passed without show causing to the appellant of the exact charge against the appellant, the illegal penalty order could not have been resurrected by the Ld CIT(A) when the penalty order has been held by him to have been passed under patently wrong limb of Section 271AAB(1A) of the I.T.Act.

<u>Submissions in support of the grounds of appeal taken by the appellant</u>
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It is in the background that the humble appellant has approached your Honours by filing the present appeal for providing due relief to the aggrieved appellant by quashing the wholly unsustainable and completely illegal and arbitrary order. The humble appellant submits that the various grounds of appeal raised in the appeal Memo are not exhaustive as the order passed by the Assessing Officer is completely illegal, arbitrary and bad in law and prima facie unsustainable, however, the appellant seeks leave of the Hon'ble Tribunal to raise any other ground of appeal not set out in the appeal Memo, in case during the course of proceedings before your Honours, it is considered expedient to do so in the interest of substantial justice. In addition to the verbal arguments to be made before your Honours, brief factual and legal submissions in support of the specific grounds of appeal are made as under:

Submissions on the specific grounds of appeal:

The appellant herein submits that :

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.

<u>DECISION OF THE LD CIT(A)</u>

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.

<u>Comments on the decision of the Ld CIT(A)</u>

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 <u>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,</u> 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 :-……..

….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.
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."

6. In addition, the above written submission the ld. AR of the assessee submitted that GP estimation does not fall in the definition of the undisclosed income and therefore, one the income is not established as undisclosed income merely the income is estimated the assessee is not liable to penalty u/s. 271AAB of the Act. He also submitted that satisfaction for levy of penalty has to be recorded at the time of initiation of the penalty and not at the time of levying of penalty. The ld. AR of the assessee also submitted that the ld. AO has not specified the limb under which the penalty can be levied and this is more strengthen when the ld. CIT(A) has reduced it from 60 % to 30 %. He submitted 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. Based on the above contention the ld. AR of

the assessee prayed to take a lenient view of the matter and even the penalty sustained at 30 % is also required to be quashed.

7. The ld DR is heard who relied on the findings of the lower authorities and more particularly advanced the similar contentions as stated in the order of the ld. CIT(A). The ld. DR justifying the levy of penalty submitted that the assessee has not preferred any appeal against the order of the assessment where the addition is made to the income of the assessee. The assessee has not offered the income voluntarily. The ld. DR submitted that there is no provision under the law to specify the limb when the working of penalty is specifically given in the provision of the Act.

8. In the rejoinder the ld. AR of the assessee submitted that the assessee was prevented from the sufficient cause and the assessment was going on in the corona period even though the assessee has offered the income to buy the peace and alternatively the ld. AR of the assessee submitted that the income offered is not undisclosed income supported by any asset of the assessee company and thus, even on merits of the case the penalty is not leviable.

9. We have perceived the oral as well as written arguments raised by both the parties to drive home to their contentions. The bench noted that the assessee during the course of the assessment proceeding submitted as under :

> The assessee vide his submission dated 03.03.2021 for A.Y.2018-19 has also submitted that "It is also an established position of law that on unaccounted sales/turnover what is to be taxed is the profit embedded in these sales. The Hon'ble Guj. High Court in the case of CIT Vs. President Industries Ltd., 258 ITR 654 (Guj) has held that addition cannot be entire undisclosed sales proceeds. Only the profit embedded in sales proceeds can be taxed." The assessee has also placed his reliance on various other judicial pronouncements in this regard, which have been duly considered.

10. The bench also noted that the ld. AO accepted the additional income offered by the assessee based on the seized documents on profit estimate basis which has not been disputed by the ld. AO. We also take note of the fact there is no whisper in the order of the assessment that the income so offered is of the nature of undisclosed income. The bench noted that the provision of section 271AAB of the Act empower the ld. AO to levy the penalty when the income is undisclosed income. To understand the charge of the penalty on the assessee within the provision of section 271AAB of the Act we first deal with the legal provision of the Act.

> **Penalty where search has been initiated.**
>
> **271AAB.** (1) The Assessing Officer [40][or the Commissioner (Appeals)] may, not- withstanding 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,—

(*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 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*).

(1A) The Assessing Officer [41][or the Commissioner (Appeals)] 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 [42][under section 148 or under section 153A, as the case may be,] 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.

11. Here in this case the income offered is not as per the definition of the undisclosed income as defined under the Act. The assessee has voluntarily based on the seized document offered the income on estimate basis, based on the explanation of the assessee the ld. AO has accepted the income so offered by the assessee without finding anything in the nature of undisclosed income and there is also no finding in the order of the assessment or in the order of the penalty that the income disclosed by the assessee falls under the definition of the undisclosed income of the assessee. The assessee has offered the profit based on the seized material considering it the sales made on commission basis and the same has not been disputed by the ld. AO.

12. We also note from the order of the ld. CIT(A) that he has hold a view that the assessee admitted undisclosed income in the statement recorded during the search and himself based on the material declared the additional income and therefore, the penalty was reduced from 60 % to 30 % believing that the assessee in

search accepted the income in the statement recorded and the specified the manner of earning the income and paid the taxes together with the interest on the undisclosed income.

13. As it is clear from the provision of the Act that penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income based on incriminating material. In the instant case information was recorded in the iphone and based on that iphone record the assessee has disclosed gross profit @ 17.48 % of Rs. 2,07,96,754/- on a total sales consideration recorded and found from the said iphone at Rs. 11,89,74,566/-. In the assessment proceeding assessee has given the explanation and has offered the income based on the statement recorded u/s. 132(4) of the Act which has not been disputed and the ld. AO has also not recorded any finding that this income so offered is supported by any assets and the same is in the nature of undisclosed income as defined in the explanation to the provision of section 271AAB of the Act. However, neither the ld. AO nor the Ld. CIT(A) has given finding on the contention of the assessee saying that the income is estimated in this case and the income so

offered is not in the nature of undisclosed income of the assessee. The ld. AR of the assessee repeatedly argued that it was mere estimation of profit but not the actual income of the assessee. There is no clear finding of the ld. AO or the ld. CIT(A) that in the search corroborative any asset found to have been in the possession of the assessee. There is no evidence to establish that estimated income reflected in the recording found in the iPhone is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though the entries found in the iPhone does not indicate any suppression of income but it is only estimation of profit. We note from the order of the assessment as well as that of the penalty that the AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and estimation of income and

bring the evidence to unearth or quantify the said income as undisclosed income. Neither the A.O. nor the investigation wing linked the sales recorded in the iPhone in the nature of undisclosed income. Therefore, we are unable to accept the contention of the revenue that the entries recorded in the iPhone during the course of search indicates undisclosed income or asset.

14. The ld. AR of the assessee has relied on the decision of this co-ordinate bench decision wherein on the similar facts the penalty was vacated in the case of Smt. Aparana Agarwal Vs. DCIT, CC, Kota reported at 105 Taxmann.com 233 where in the bench has held that :

> **4.** We have considered the rival submissions as well as the relevant material on record. The AO has levied the penalty under section 271AAB of the Act in respect of the income surrendered by the assessee on account of LTCG from purchase and sale of equity shares. The question arises whether the surrender made by the assessee in the statement recorded under section 132(4) will be regarded as undisclosed income without testing the same with the definition as provided under clause (c) of Explanation to section 271AAB of the Act. There is no dispute that in the statement recorded under section 132(4), the assessee has disclosed the income under consideration as undisclosed income on account of LTCG. However, for the purpose of levying the penalty under section 271AAB, the primary condition is that the assessee shall pay the penalty equivalent to 10 percent, 20 percent or 30 percent of undisclosed income of specified previous year depending upon the satisfaction of the condition as provided under section 271AAB. The term "undisclosed income" has been defined in the *Explanation* to section 271AAB and, therefore, the penalty under the said provision has to be levied only when the income surrendered by the assessee falls in the ambit of undisclosed income as defined under this section. The mere disclosure of income in the statement recorded under section 132(4)

would not *ipso facto* be regarded as undisclosed income unless and until it is tested as per the definition provided in the *Explanation* to section 271AAB of the Act. In the case in hand, there is no dispute that the assessee has duly recorded the transaction of purchase and sale of equity shares of the listed companies in the books of account which has yielded the capital gain in question of Rs. 3,85,30,241/-. The assessee has also shown these shares in the Balance Sheet as on 31st March, 2015 and the AO has not doubted or disturbed the holding of shares by the assessee on the date of Balance Sheet ended on 31st March, 2015. Once the transactions are duly recorded in the books of account, then the documents in the shape of slips containing the details of LTCG found during the search would not amount to incriminating material disclosing any undisclosed income. The definition of undisclosed income as per clause (c) of *Explanation* to section 271AAB reads as under :—

" (c) "undisclosed income" means—

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

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or (B) otherwise not been disclosed to the 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 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. In the case in hand, it is undisputed fact that all the transactions of purchase and sale and LTCG arising from the sale of equity shares of the listed companies are duly recorded in the books of account. Therefore, it is not the case of any income of the specified year representing the entry in the other documents which has not been recorded in the books of account on the date of search. Therefore, the primary condition of undisclosed income that the income represented by the entry in the other record is not recorded in the books of account on the date of search is not satisfied. The definition of "undisclosed income" is subjected to two conditions that the said income 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. The second condition is not relevant for our purpose since these entries are undisputedly duly recorded in the books of account of the assessee. We further note that the seized material does not reveal the nature of transaction being genuine or bogus but the entry in the seized material is only the computation of long-term capital gain on sale of shares. Therefore, the documents which were found and seized during the course of search and seizure action contains the details of LTCG would not be regarded as incriminating material disclosing any income not recorded in the books of account. Hence the primary condition for treating such income as undisclosed income in terms of section 271AAB is not satisfied. Apart from the fact that these transactions were duly recorded in the books of account, the assessee has also produced relevant documents, the details of which are as under :—

(A) IN RELATION TO SHARES PURCHASE :

Summary of shares purchased during the FY 2012-13 (page No. 87 of paper book)

Copy of share allotment Advice in support of share purchased (page No. 88 of paper book.

Copy of relevant page of bank statement showing the payment made against purchases of shares (page No. 89 of paper book)

Copy of Corporate Action of the Company informed to Bombay Stock Exchange (Effect of Stock Split)(page No. 90 of paper book)

Acknowledgement of ITR filed on 07.10.2013 u/s 139(1) of Income-tax Act, 1961 along with computation sheet of total Income of the A.Y. 2013-14 (page Nos. 91-93 of paper book).

Acknowledgement of ITR filed on 02.02.2016 u/s 153A of Income-tax Act, 1961 along with computation sheet of total Income of the A.Y. 2013-14. (page nos. 94-

97 of paper book)

Copy of Balance Sheet and Capital Account of Assessment Year 2013-14 (page No. 98 of paper book)

Copy of Assessment Order dated 22.12.2017 u/s 143(3) r.w.s. 153A passed by Deputy Commissioner of Income Tax, Central Circle Kota (Raj.) for the Assessment Year 2013-14 (page Nos. 99-105 of paper book)

Copy of ledger A/c of following shares brokers from the books of account of assessee depicting the details of equity shares purchased by the assessee are enclosed : (page Nos. 102 -105 of paper book)

Religare Securities Limited

Hem Securities Limited

Suresh Rathi Securities Private Limited.

(B) IN RELATION TO SHARES SALES:

Summary of shares sale during the year under consideration (page No. 110 of paper book)

Copy of sales bills/contract notes of shares (page Nos. 111-158 of paper book)

Copy of ledger Account of assessee in books of accounts of share brokers through whom the shares were sold (page Nos. 159 of paper book)

Copy of relevant page of bank statement showing the entry of payment received against sales of shares (page nos. 160-169 of paper book)

(C) DEMAT ACCOUNT STATEMENT OF FOLLOWING SHARES BROKERS IN RESPECT OF SALES & PURCHASE OF SHARES (Page nos. 170-172A of paper book) :

Arihant Capital Markets Limited

Suresh Rathi Securities Private Limited

Hem Securities Limited

Thus, the purchase bill for the purchase of shares along with ledger account in the books of the share broker clearly reveal the date of purchase and also payment of purchase consideration through banking channel as reflected in the bank account statement of the assessee. All

the above mentioned documents are independently verifiable evidence without having any control or influence of the assessee except the books of account of the assessee which were not disputed by the AO. Further, the revenue has not disputed the correctness of the documentary evidence filed by the assessee but the AO has proceeded on the assumption that the income disclosed by the assessee under section 132(4) is undisclosed income for the purpose of section 271AAB of the Act. The AO while passing the assessment order under section 153A for the assessment year 2015-16 has not disturbed the holding of the shares shown in the Balance Sheet as on 31st March, 2014. These transactions were also carried out from the capital account of the assessee which was also part of the record of the assessment year 2014-15. But the AO has accepted all these details without any adverse finding or comments while passing the assessment order under section 153A of the Act. The assessee has also produced sale bills/contract notes regarding sale of shares, copy of ledger account of the assessee in the books of share broker in respect of sale transactions, bank statement showing receipt of sale consideration and Demat account having the entries of credit of shares at the time of purchase and debit of shares at the time of sale. The equity shares in question are of listed companies in the Stock Exchange and were purchased and sold by the assessee through Stock Exchange. Therefore, the transactions of purchase and sale are verifiable from the independent source including the record of the Stock Exchange without having any influence of the assessee. Hence the document produced by the assessee is the evidence which cannot be manipulated and also can be verified from the independent sources. Once the assessee has established the fact that all these transactions are recorded in the books of account and also produced, the relevant documentary evidence to establish the genuineness of the purchase and sale of shares through Stock Exchange, then the mere disclosure and surrender of income would not *ipso facto* lead to the conclusion that the amount surrendered by the assessee is undisclosed income in terms of section 271AAB of the Act. For bringing the income surrendered by the assessee in the fold of undisclosed income as per the definition of "undisclosed income" in *Explanation* to section 271AAB, the said income must represent either any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents but has not been recorded in the books of account as on the date of search. Therefore, the primary condition for treating an income as undisclosed income is that it should represent *inter alia* any entry in the books of account or other documents found during the search but the said income is not recorded in the books of account. In the case in hand, the document found during the search is not an incriminating material when the entry and the income were duly recorded in the books of account. Therefore, the statement of the assessee recorded under section 132(4) would not constitute incriminating material. Therefore, the said income disclosed by the assessee cannot be considered as undisclosed income in terms of

section 271AAB of the Act. 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 *Raja Ram Maheshwari* v. *Dy. CIT* in [IT Appeal No. 992(JP) of 2017,dated 10-1-2019] in paras 12 to 14 as under :—

'12. Now, coming to another contention of the ld AR where he has challenged the findings of the ld. CIT(A) that penalty u/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the ld AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phraselogy has been used by the legislature and decision of Hon'ble A.P High Court in case of *RadhaKrishna Vihar* (ITA No. 740/2011).

13. In this regard, we refer to the provisions of Section 271AAB which begins with the stipulation that the Assessing officer may direct the assessee and the assessee shall pay the penalty as per clause (a) to (c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as maybe applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show cause granting an opportunity to the assessee. Thus, the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the case. Similar view has been taken by the various Co-ordinate Benches and useful reference can be drawn to the decision of the Co-ordinate Bench in case of *ACIT* v. *Marvel Associates* 92 Taxmann.com 109 wherein it was held 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 *pari materia* 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. has 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 1st 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

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(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 (a) 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."

14. Therefore, we agree with the contentions of the ld AR that the levy of penalty under section 271AAB is not mandatory. In the instant case, it therefore needs to be examined whether there is any basis for levy of penalty or non-levy thereof and the

same will depend upon the facts and circumstances of the present case which we shall discuss in subsequent paragraphs."

5. 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 of Rs. 3,85,30,241/- on account of Long-Term Capital Gain 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. Regarding cash of Rs. 82,50,000/- found during the course of search, there cannot be any dispute that the same falls in the definition of undisclosed income and the same is subject to penalty u/s. 271AAB of the Act Accordingly, the penalty levied by the AO and sustained by the ld. CIT (A) on LTCG is deleted and penalty sustained by the ld CIT(A) on cash found during the course of search is upheld.

ITA No. 1379 & 1439/JP/2018 Smt. Aparna Agarwal, Kota vs. DCIT, Kota, In the result, appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed."

15. In addition to the above decision the co-ordinate bench of this tribunal in the case of Rajendra Kumar Gupta Vs. DCIT (Supra) has considered the issue of levy of penalty and the in that case also the bench observed that once the income does not fall in the category of undisclosed income as per provision of section 271AAB of the Act the penalty deserve to be deleted. On being consistent to the view already taken by the coordinate bench and the facts of the assessee's case shows that the entries in the IPhone and other seized documents representing the income on account of the sales of goods on commission basis and that too the profit is assessee on estimation. Thus, in the absence there was no undisclosed income found during the course of search and

no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 11/07/2023

Sd/-	Sd/-
(डा० एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judcial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 11/07/2023
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- R. P. Wood Products Pvt Ltd., Ajmer
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle, Ajmer
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. 302/JP/2023}

आदेशानुसार / By order
सहायक पंजीकार / Asst. Registrar