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

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

आयकर अपील सं./ITA No. 210/JP/2023
निर्धारण वर्ष/Assessment Years : 2020-21

DCIT, Central Circle, Ajmer	बनाम Vs.	Yashwant Kumar Sharma F-108, Industrial Area, Makhupura Parbatpura, Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ASWPS 3791 E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./C.O. No. 04/JP/2023
(Arising out of ITA Nos. 210/JP/2023)
निर्धारण वर्ष/Assessment Years : 2020-21

Yashwant Kumar Sharma F-108, Industrial Area, Makhupura Parbatpura, Ajmer	बनाम Vs.	DCIT, Central Circle, Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ASWPS 3791 E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. C. M. Agarwal (CA)
राजस्व की ओर से/ Revenue by : Sh. James Kurian (CIT) &
Sh. A. S. Nehara (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 18/05/2023
उदघोषणा की तारीख/Date of Pronouncement: 10/07/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the revenue and the cross objection filed by the assessee arising out of the order of the Commissioner of Income Tax

(Appeals)- Udaipur-2 [hereinafter referred to as ld. CIT(A)'] for the assessment year 2020-21 dated 23.01.2023 which in turn arises from the order passed by the ACIT, Central Circle, Ajmer passed under Section 271AAB of the Income tax Act, 1961 (in short 'the Act') dated 30.03.2022.

2. Since the issues involved in this appeal filed by the revenue and cross objections of the assessee relates the assessee for the same assessment year and the grounds of the appeal and CO are interconnected were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

3. Before moving towards the facts of the case we would like to mention that the revenue has assailed the appeal in ITA No. 210/JP/2023 on the following grounds;

> "1. Ground 1. The learned CIT Appeal has erred in law and on facts in deleting penalty levied u/s 271AAB of I.T. Act, 1961, amounting to Rs. 2,19,00,000/-.
>
> 2. Ground 2. "Whether the decision of the Learned CIT Appeal to delete the penalty imposed under section 271AAB of the Income Tax Act, 1961, in the assessment year in question, is justified in law, whereas he has failed to consider that the undisclosed income was unearthed only as a result of search action, and the declaration of the same in the return of income filed by the assessee cannot be regarded as a voluntary disclosure?"
>
> 3. Ground 3. Whether on the facts and circumstances of the case for the assessment year under consideration, the Learned CIT Appeal is justified in Law

in deleting the penalty imposed amounting to Rs. 2,19,00,000/- vide order u/s 271AAB of the Income Tax Act, 1961 without appreciating the fact that the undisclosed income could only be unearthed because of the search action which resulted in assessee owning up the same in return of income filed u/s 139(1).

4. Ground 4. The Learned CIT Appeal has erred in deleting the penalty levied under section 271AAB of the Income Tax Act 1961, failing to keep in mind the scheme of law wherein penalty under section 271AAB would be attracted automatically once income unearthed as a result of search action is disclosed in the return of income.

5. Ground 5 The appellant craves leave to add, amend or withdraw any of the grounds of appeal during the course of appeal proceedings."

Grounds of Cross Objection in CO No. 04/JP/2023 for A.Y 2020-21

3.1 The assessee has filed the cross objection against the appeal of the revenue and the grounds of the cross objections are reproduced here in below :

"1. 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 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). Ld. CIT(A) is not correct in not accepting our ground.

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.Tax Act without specifying the default of the assessee. Ld. CIT(A) is not correct in not accepting our ground.

3. On the facts and in the circumstances of the case the ld. AO has grossly erred in imposing penalty for Rs. 2,19,00,00/- u/s 271AAB of the I.T. Act, 1961, for the assessment year 2020-21.

The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings. ”

4. The fact as culled out from the records is that a search and seizure action u/s 132(1) of the Income Tax Act, 1961 (“Act” for short) was carried out on 13.02.2020 at the residential and business premises of Bhagwati Group, Ajmer and the assessee is member of the that group for which search was initiated. The assessee earns income under the head Salary, Income from Business of proprietorship and Partnership Firm and Interest income. During search and seizure proceedings the appellant admitted the undisclosed income and offered the same for taxation. The appellant filed his original ITR declaring total income of Rs. 4,77,36,320/- on 30.03.2021 which includes undisclosed income of Rs.3,65,00,000/- admitted during search. It was submitted by the assessee that the additional income was offered just to honor the search statement. The assessment order passed under section 143(3) of the Income Tax Act on 30.09.2021 and taxed/assessed the said income of Rs. 4,77,36,320/- in which no addition was made which was offered by the assessee.

4.1 In the assessment order passed the assessing officer recorded his finding for initiation of the penalty proceeding u/s 271AAB(1A) of the I.T. Act and the same is reiterated here in below:

> "Since, the assessee has not explained satisfactory regarding marriage related expenses of his Son i.e. Omanshu Sharma, therefore, the difference of expenditure incurred out of books is treated as undisclosed income. Hence, penalty proceeding u/s. 271AAB(1A) of the Act is also being separately."

4.2 As per the above satisfaction the penalty proceeding was started and the finally vide order dated 30.03.2022 the assessing officer has levied the penalty of Rs. 2,19,00,000/- being the 60 % of the undisclosed income of Rs. 3,65,00,000/-. The relevant finding of the ld. AO is reproduced here in below for the sake of convenience :

Para 6 of penalty order marked as A

5. Feeling dissatisfied from the order of the assessing officer levying penalty of Rs. 2,19,00,000/- the assessee filed an 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:

> "7.5. I have considered the facts of the case, gone through the relevant assessment orders, penalty orders and submission of the appellant and the various case laws.
>
> 7.6. The Assessing Officer while levying penalty has concluded on following points-

1. The assessee declared undisclosed income of Rs. 3,65,00,000/- in the return of income filed u/s 139(1) on the basis of discrepancies found in the seized material.
2. At the search not been conducted such additional income would not have been detected.
3. The disclosure of additional income is not voluntary.
4. The assessee did not admit undisclosed income during the search in the statement recorded u/s 132(4) of the Act.
5. The assessee could not substantiate the manner in which the said income was derived.

7.7. As against this the appellant submitted that the Assessing officer has not mentioned as to how the disclosure of additional income in the return income filed by the appellant is not voluntarly. The Assessing Officer has not mentioned as to how the additional income was detected during the course of search proceedings. Neither, in the assessment order 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. In the assessment order, the assessing officer has no where mentioned that search and seizure action in the case of the assessee has resulted in to detection of any undisclosed income. The assessing officer has simply mentioned that the difference of out of books expenditure is treated as undisclosed income. However, there is no mention of out of books expenditure and how the same has been arrived at. That apart there is no adverse inference as to the seized books of accounts and documents. The AO has neither specified or pinpointed any discrepancy with reference to the seized material nor even mentioned with certainity that the discrepancies were noticed in the material found during the course of search. The AO ought to have categorically brought on record the material found during the course of search indicating undisclosed income of the assessee. The AO has failed to bring on record any material found during the course of search, indicating undisclosed income of the assessee.

7.8 The above relpy of the appellant is found to be convincing on the facts of the case. The AO is required to take a decision based on the facts and material and then to arrive the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as provided in the explanation to section 21AAB of the Act. However, as discussed while deciding the ground no.2, the AO has failed to specify undisclosed income in assessment order and penalty order in the absence of specific allegation of undisclosed income proved against the appellant Penalty levied u/s 271AAB cannot be sustained. The As accordingly directed to

delete the penalty levied u/s 271AAB on the appellant fence this ground of appeal is allowed.

8. The last Ground of Appeal is that the appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings.

8.1 The appellant has not added or altered, amend or withdraw any of the above mentioned grounds of appeal. Accordingly, such mention by the appellant in its ground is treated as general in nature, no needing any specific adjudication and is accordingly treated as disposed off.

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

6. The ld. DR is heard who has relied on the findings of the lower authorities and vehemently submitted that the assessee has disclosed the income after the search and if the search proceeding were not initiated the income would not be disclosed by the assessee. As the assessee has declared income after the search the levy of penalty u/s. 271AAB is automatic.

7. The ld. AR of the assessee against the appeal filed by the revenue and in response to cross objection filed by the assessee relied upon the submission filed before the ld. CIT(A). Since the said submission is already reproduced in para 5.2 of the order of the ld. CIT(A) the same is not reproduced. But he has supplied emphasized on the decision following case laws:

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

- 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.

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

  "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.

- The Jaipur Bench of the Tribunal in the case of Padam Chand Pungaliya (supra) held as follows:-.....

  10.1 Similar are the decisions in the other case laws relied upon by the assessee.

  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.

  12. Even otherwise, Section 271AAB of the Act, contemplates imposition of a penalty pursuant to the disclosure of income in statement recorded u/s 132(4) of the Act by the assessee. It is an admitted fact that no such statement has been recorded from the assessee. Thus, on this ground also, the levy of penalty fails. Nowhere in the assessment order it is stated that undisclosed income has been assessed. The assessment was made u/s 143(3) of the Act and the returned income was accepted. Thus, for all these reason we quash the penalty levied u/s 271AAB of the Act and allow this appeal of the assessee.

8. In addition to the above the ld. AR of the assessee also submitted that the satisfaction made by the ld. AO while initiating the penalty proceeding relates to the marriage expenses of the son of the assessee but in fact in the assessment order there is no whisper of that unexplained expenditure and there is no addition as such in the order of the assessing officer. Not only that there is no discussion in the order levying the penalty about the undisclosed marriage expenditure and the amount involved in that of the matter in the case of the assessee. The ld. AR of the assessee also submitted that while levying the penalty there is levy of penalty on the different facts with that of the initiation of proceedings and thus, the order of

penalty passed is in violation of the principles of natural justice as the ld. AO has not stated under which limb he wanted to levy the penalty and the satisfaction for levy of penalty is on different footing and the actual levy of penalty on different amount which not relates to the satisfaction. Thus, even on this court also the levy of the penalty is in correct.

9. We have heard the rival contentions and perused the material placed on record. The bench noted that the search proceeding was carried out under section 132 of the Act on 13.02.2020 at the residential and business premises of the assessee group and family members of Bhagwati Group of Ajmer and the assessee is amongst the other one of the member of the group. The assessee has filed the return of income on 30.03.2021 consequent to the search and adhered to the disclosure made and thus there is no further addition to the returned of income filed by the assessee and the assessment was completed at the returned income. The bench also takes note of the fact that there is no addition or whisper in the order of the assessment that the undisclosed income is on account of the alleged marriage expenditure as alleged by the ld. AO while recording the satisfaction for levy of the penalty in the assessment order. The bench also note that in the order of the levy of the penalty there is no discussion so as the satisfaction recorded for levy of penalty which was for alleged

unrecorded expenditure for marriage of son of the assessee Mr. Omanshu Sharma. The bench noted that the disclosure made by the assessee in the statement recorded u/s. 132(4) of the Act will be useful to decide the case on hand the same is reproduced here in below for the sake of convenience:

प्रश्न 6. आप को Annex-A5 exhibit No.2 जो कि आपकी कम्पनी मै. भगवती मै भगवती मशीन प्रा. लि. से संबंधित है को आयकर अधिनियम की धारा 132 के तहत Seized किया गया है। कृपया इन लूज दस्तावेजों को Pagewise में दर्ज विवरण के बारे में बताएं ? इन सभी page wise papers/ documents का आपके कम्पनी के कर्मचारी श्री आत्माराम शर्मा, purchase magnager का बयान हो चुका है। उनका बयान आपको दिखा दिया गया रहा हुं। exhibit no.2 में कुल पेज 66 है। कृपया इसके बारे में अपना पक्ष प्रस्तुत करें ?

उत्तर हां मैने पूरे exhibit no.2 के पेज न. 1 से 66 तक देख लिया है। इसमें मुख्यतः जो cash Advance , मशीनरी बेचने में हमें प्राप्त होते है, उसकी हिसाब लिखा जाता है। इसमें, इसके सामने जो भी Case payment दिया है उसका भी हिसाब लिखा हे इन सभी हिसाबों का समरी पेज न. 45 से 59 तक लिखा गया है। अतः मै पूरे Seized documents जो कि मेरे ऑफिस परिसर में मिले है उसके Basis पर मेरे अनुसार मेरी कम्पनी को Net Undisclased Income लगभग रूप्ये 6.10 करोड़ (रूपये छः करोड़ दस लाख) होती है। मै इस Undisclased Income पर जो भी वर्श वाईज टैक्स बनेगा उसे मै समय पर जमा कर दुंगा। मेरे कर्मचारी श्री आत्माराम शर्मा purchase magnager के बयान पेज न. 1 से 10 तक को (प्रश्न सं. 1 से 13 तक) पढ़ लिया है तथा उनके बयान से मै पूर्णतः सहमत हूं।

9.1 It is evident that the income disclosed by the assessee is voluntary based on the loose paper. It is also not in dispute that against this income the revenue could corroborate any money, bullion, jewellery or other valuable article or thing (referred to as assets) and there is no discussion in the order of the assessment that income declared by the assessee comes within the purview of the undisclosed income as defined under the provision of section 271AAB of the Act. It was explained in the statement u/s. 132(4) that undisclosed income was earned from taxable business and was based

on entries mentioned in the impounded documents, inventorized in the form of 'receivables or advance money received' and due taxes had been paid on said declared income while filing the return of income. Therefore, the pre requisites as mentioned in section 271AAB for considering the said income as undisclosed income is not fulfilled as the assessee has disclosed the unaccounted income and it was not corresponding to any assets. There is no finding in the assessment order so as to consider the income disclosed by the assessee as undisclosed income of the assessee. Thus, in the absence of the clear finding in the order of the assessment the income cannot be considered as undisclosed income of the assessee.

9.2 In the order of levying the penalty the ld. AO stated that had search not been conducted additional income would not have been detected and thus he holds that the declaration of the additional income was not voluntary. The ld. AO relying on the decision in the case of CIT vs. Rakesh Suri 331 ITR 458 hold a view that the surrender is not voluntary. We have seen the facts of the case relied upon by the ld. AO in his order for Mr. Rakesh Suri. In that case return of income for the relevant assessment year, the assessee had disclosed long-term capital gain on sale of shares of company 'N'. During assessment proceedings, the assessee was

required to furnish name of stock exchange through which shares were purchased and sold along with the rate of shares of the stock exchange on date of purchase and sale. The assessee did not furnish the required details and, finally surrendered sale proceed of shares on agreed basis. Thus, there are two facts emerges, one is that the case is not related to the search and the assessee has surrendered the income in the assessment proceeding. Thus, the fact of the case on hand and that relied upon are different.

9.3 As regards the validity of notice under section 274 for want of specifying the ground and default, we find that when the basic condition of the undisclosed income not recorded in the books of accounts does not exists, then also the same has to be specified by the AO in the show cause notice and further the ld. AO is required to give a finding while imposing the penalty under section 271AAB as to the income disclosed that income disclosed represented either wholly or partly, by any money, bullion, Jewellery or other valuable article or thing or any entry in the books of account of other documents or transactions found in the course of search under section 132 of the Act, 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. Considering the statement recorded and the surrendered made by the assessee we are of the view that the disclosure is voluntary and is based on the loose paper. The ld. AO has accepted the correctness of the disclosure of income based on the seized material wherein the transaction of unrecorded sale and purchase of machinery was recorded. For this income there is no corroborated assets or valuable articles not recorded in the books of account. Even if the AO is satisfied and came to the conclusion that the assessee has not recorded the undisclosed income in the books of accounts or in the other documents / record maintained in normal course relating to specified previous year, the show cause notice shall also specify the default committed by the assessee to attract the penalty @ 10% or 20% or 30% of the undisclosed income. There is no dispute that the ld. AO has not specified the default and charge against the assessee which necessitated the levy of penalty under section 271AAB of the Act. Consequently, the assessee was not given an opportunity to explain his case for specific default attracting the levy of penalty in terms of clauses (a) to (c) of section 271AAB(1) of the Act. The ld. AR of the assessee relied upon the following decision of this bench wherein the similar issue has been dealt:

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

- 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.

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

- The Jaipur Bench of the Tribunal in the case of Padam Chand Pungaliya vs. ACIT Central Circle-01, Jaipur in ITA No. 112/JP/2018 dated 05/04/2019 .

9.4 Out of the various judgments so relied upon one of the judgment relied upon by the ld. AR of the assessee is decision of this Jaipur bench in the case of Shri Ravi Mathur in ITA No. 969/JP/2017 wherein the facts of that case and the case on hand being similar the same is reproduced for the sake of deciding the case on hand:

"4. We have considered the rival submissions as well as relevant material on record. A search was conducted under section 132 of the IT Act on 30th October, 2014 at the premises of the assessee. The assessee in his statement recorded under section 132(4) has disclosed an income of Rs. 10,02,00,000/- in pursuant to the entries of advances given for purchase of land recorded in the pocket diary which was found and seized during the course of search and seizure action. This is year of search and the financial year would end on 31st March, 2015. However, the assessee disclosed this amount of Rs. 10,02,00,000/- based on the entries in the diary regarding investment in real estate. The due date of filing of return of income under section 139(1) was 30th September, 2015. It is undisputed fact that the assessee is an Individual and was not maintaining regular books of account. Therefore, the transactions recorded in the pocket diary found during the course of search itself would not lead to the presumption that the assessee would not have offered this income to tax if the search is not conducted on 30th October, 2014. Further, the entries in the diary itself do no not represent the income of the assessee during the year under consideration though the assessee was required to explain the source of investment in question and that source would be the income of the assessee. It is most likely that the investment in question was made from the unaccounted income of preceding years. Hence the investment in

the real estate itself would not reveal the nature of income and the source of income of the year under consideration. It is a pre-condition for invoking the provisions of section 271AAB that the assessee admitted the undisclosed income in the statement under section 132(4). The definition of 'undisclosed income' is provided in section 271AAB itself and, therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to said section. The first question arises is whether the levy of penalty under section 271AAB is mandatory and consequential to the disclosure of income by the assessee under section 132(4) or the AO has to take a decision whether the given case has satisfied the requirements for levy of penalty under section 271AAB of the Act. In order to consider this issue, the provisions of section 271AAB are to be analyzed. For ready reference, we quote section 271AAB as under :-

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

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

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

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

(iii) on or before the specified date—

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

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

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

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

(ii) on or before the specified date—

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

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

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

[52][(1A) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of

the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

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

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

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

(iii) on or before the specified date—

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

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

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

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

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

Explanation.—For the purposes of this section,—

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

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

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

(ii) in which search was conducted;

(c) "undisclosed income" means—

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

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

(B) otherwise not been disclosed to the [54][Principal Chief Commissioner or] Chief Commissioner or [54][Principal Commissioner or] Commissioner before the date of search; or

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

search not been conducted.]"

The section begins with the stipulation that the AO "may" direct the assessee shall pay by way of penalty if the conditions as prescribed under clauses (a) to (c) are satisfied. As per sub-section (3) of section 271AAB the provisions of section 274 and 275 as far as may be applied in relation to the penalty referred in this section which means that before imposing the penalty under sec. 271AAB, the AO has to issue a show cause notice and give a proper opportunity of hearing to the assessee. Thus the levy of penalty u/s. 271AAB is not automatic but the A.O. has to take a decision to impose the penalty after giving a proper opportunity of hearing to the assessee. It is statutory requirement that the explanation of the assessee for not fulfilling the conditions as prescribed u/s 271AAB of the Act is required to be considered by the AO and particularly whether the explanation furnished by the assessee is bonafide and non-compliance of the same is due to the reason beyond the control of the assessee. Therefore, the penalty u/s 271AAB is not a consequential act but the AO has to first initiate proceedings by issuing a show cause notice and after considering the explanation and reply of the assessee has to take a decision. This requirement of giving an opportunity of hearing itself makes it clear that the penalty u/s 271AAB is not mandatory but the AO has to take a decision based on the facts and circumstances of the case otherwise there is no requirement of issuing any notice for initiation of proceedings but the levy of penalty would be consequential and only computation of the quantum was to be done by the AO as in the case of levy of interest and fee u/s 234A to E. Even the quantum of penalty leviable u/s 271AAB is also subject to the condition prescribed under clauses (a) to (c) of sub-section (1) and the AO has to again give a finding for levy of penalty @ 10% or 20% or 30% of the undisclosed income. Thus the AO is bound to take a decision as to what default is committed by the assessee and which particular clause of section 271AAB(1) is attracted on such default. Further, mere disclosure of income under section 132(4) would not ipso facto par take the character of undisclosed income but the facts of each case are required to be analyzed in objective manner so as to attract the provisions of section 271AAB of the Act. Since it is not automatic but the AO has to give a finding that the case of the assessee falls in the ambit of undisclosed income as defined in Explanation to the said section. Therefore, the provisions of section 271AAB stipulate that the AO may come to the conclusion that the assessee shall pay the penalty. The only mandatory aspect in the provision is the quantum of penalty as specified under clauses (a) to (c) of Sec. 271AAB(1) of the Act as 10% to 30% or more as against the discretion given to the AO as per the provisions of section 271(1)(c) of the Act where the AO has the discretion to levy the penalty from 100% to 300% of the tax sought to be evaded. Thus the AO is duty bound to come to the conclusion that the case of the assessee is fit for levy of penalty under section 271AAB and then only the quantum of penalty being 10% or 20% or 30% has to be determined subject to the explanation of the assessee for the defaults.

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

> *" The ld. A.Rs have also challenged that the caption of the notice mentioned only Section 271 and not 271AAB. In this respect, the copy of notice has been produced by the ld. A.R. before me. It is seen that the ld. A.R is correct in observing that the section of penalty has not been correctly mentioned by the AO in the caption. However, the AO will get the benefit of section 292BB of the Income Tax Act, 1961 because firstly, the assessee has raised no objection before the AO in this regard. Secondly, last line of the notice clearly mentions section 271AAB. Thirdly, the assessee has given reply to said notice which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB.*
>
> *The assessee has also challenged that the principles of natural justice has not followed by the AO. The detailed submissions of A.R in this regard has already been reproduced above. The A.R did not produce any evidence to show that he was not given proper opportunity of hearing. It is clear from the penalty order that the AO has given penalty notice and which was also replied by the assessee. Therefore, in my opinion, principle of natural justice has not been violated. Thus in view of above discussion penalty imposed by AO u/s 271AAB of the Act is confirmed."*

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

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

5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under;

271AAB [Penalty where search has been initiated]:

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

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

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

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

(iii) On or before the specified date—

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

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

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

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

(ii) on or before the specified date—

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

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

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

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

Section 158BFA(2):

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

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

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

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

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

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

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

6. Careful reading of section 271AAB of the Act, the words used are 'AO may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA(2) of

the Act. The word may direct indicates the discretion to the AO. Further, sub section (3) of section 271AAB of the Act, fortifies this view.

Sub section (3) of section 271AAB:

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

7. The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Hon'ble A.P. High Court in the case of Radhakrishna Vihar in ITTA No.740/2011 while dealing with the penalty u/s 158BFA held that 'we are of the opinion that while the words shall be liable under sub section (1) of section 158BFA of the Act that are entitled to be mandatory, the words may direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."

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

7. As regards the validity of notice under section 274 for want of specifying the ground and default, we find that when the basic condition of the undisclosed income not

recorded in the books of accounts does not exists, then the same has to be specified by the AO in the show cause notice and further the AO is required to give a finding while imposing the penalty under section 271AAB. Even if the AO is satisfied and come to the conclusion that the assessee has not recorded the undisclosed income in the books of accounts or in the other documents / record maintained in normal course relating to specified previous year, the show cause notice shall also specify the default committed by the assessee to attract the penalty @ 10% or 20% or 30% of the undisclosed income. There is no dispute that the AO has not specified the default and charge against the assessee which necessitated the levy of penalty under section 271AAB of the Act. Consequently, the assessee was not given an opportunity to explain his case for specific default attracting the levy of penalty in terms of clauses (a) to (c) of section 271AAB(1) of the Act. The Channai Bench of the Tribunal in the case of DCIT vs. Shri R. Elangovan (supra) at pages 7 to 10 has held as under :-

> " It is clear from the Sub Section (3) of Section 271 AAB that Sections 274 and Section 275 of the Act shall, so far as may be, apply. Sub Section (1) of Section 274 of the Act mandates that order imposing penalty has to be imposed only after hearing the assessee or giving a assessee opportunity of hearing. Opportunity that is to be given to the assessee should be a meaningful one and not a farce. Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of Section 271AAB of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra) relying in its own judgment in the case of Manjunatha Cotton and Ginning Factory (supra) had held as under:-
>
> > ''2. This appeal has been filed raising the following substantial questions of law:
> >
> > (1) Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?
> >
> > (2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of Section 271(1B) with retrospective effect and by virtue of the amendment, the

assessing officer has initiated the penalty by properly recording the satisfaction for the same?

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

3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.

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

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

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

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

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

> View taken by the Hon'ble Karnataka High Court in the above judgment was indirectly affirmed by the Hon'ble Apex Court, when it dismissed an SLP filed by the Revenue against the judgment in the case of SSA's Emerald Meadows (supra), specifically observing that there was no merits in the petition filed by the Revenue. Considering the above cited judgments, we hold that the notice issued u/s.274 r.w.s. 271AAB of the Act, reproduced by us at para 5 above was not valid. Ex-consequenti, the penalty order is set aside.
> 6. Since we have set aside the penalty order for the impugned assessment year, the appeal filed by the Revenue has become infructuous."

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

8. Even otherwise, without restricting ourselves to the validity of show cause notice, we note that section 271AAB of the Act contemplates imposition of penalty pursuant to the disclosure of undisclosed income in the statement recorded under section 132(4) and, therefore, the levy of penalty under this section does not depend on the addition made during the assessment proceedings. Hence the penalty proceedings under section 271AAB are completely independent of the enquiry and finding of the AO in the assessment order except for the limitation provided as per section 275 of the Act. We have already held that the penalty is not automatic but the AO has to take a decision to impose the penalty after giving an opportunity of hearing to the assessee in terms of section 274 of the Act. Thus the AO in the proceedings under section 271AAB of the Act has to first decide that the conditions prescribed under the said section are satisfied for levy of penalty and then to further take a decision after considering the explanation of the assessee for non compliance of any of the conditions under clauses (a) to (c) of sub-section (1) regarding the quantum of penalty. The primary condition for levy of penalty is the existence of undisclosed income as per the disclosure made by the assessee under section 132(4). The term 'undisclosed income' has been defined in Explanations to section 271AAB. Therefore, as per the definition provided in the Explanation, the undisclosed income may have various forms and the same is not recorded in the books of accounts or other documents maintained in normal course relating to the specified previous year. As per **sub-clause (i) of clause (c) of the Explanation**, the undisclosed income means any income of the specified previous year represented by any money, bullion, jewellery or valuable article or things or any entry in books of accounts or other documents or transactions found in the course of search. This definition is further subject to two conditions that the said income has not been recorded on or before the date of search in the books of accounts or other documents maintained in the normal course relating to such previous year or otherwise not being

disclosed to the Principal Chief Commissioner, Principal Commissioner or Commissioner before the date of search. The other forms of undisclosed income as defined in sub clause (ii) is any entry in respect of expenses recorded in the books of accounts or other documents maintained in the normal course. Therefore, the clause (ii) contemplates undisclosed income in the form of false entries of expenses recorded in the books of accounts which is not relevant for the case in hand.

Since in the case of assessee the transactions of investment were found in the diary, therefore, whether these entries in the diary constitute undisclosed income as per clause (c)(i) of Explanation to Section 271AAB of the Act. The assessee is an Individual and for the year under consideration the assessee has not reported any business income nor it was assessed by the AO. Therefore, it is clear that the assessee was not required by any mandate of law to maintain regular books of accounts. In the computation of income, the assessee has shown income from Salary, income from house property and income from other sources. The returned income was accepted by the AO while framing the assessment under section 143(3) and hence assessee's case does not fall in the category where the regular books of accounts are mandatory. The entries of investment in real estate were found recorded in the diary and in the absence of any other document maintained in the normal course relating to the year under consideration, the entries in the diary are to be considered as recorded in the documents maintained in the normal course. It is not the case of the revenue that the assessee has recorded the other transactions in the other documents maintained in the regular course relating to the year under consideration and only these entries are recorded in the diary. Since the levy of penalty under section 271AAB is not based on the addition and enquiry conducted by the AO in the assessment proceedings, therefore, it is incumbent on the AO to conduct a proper examination of facts, circumstances and explanation furnished by the assessee before arriving to the conclusion that penalty under section 271AAB is leviable and further whether it is 10% or 20% or 30% of such undisclosed income. Therefore, the AO is under statutory obligation to examine all the issues during the proceedings under section 271AAB after giving the assessee an opportunity to explain the charges/grounds on which the penalty is proposed to be levied. Hence it is a pre-requisite condition that the AO first specify the charges against the assessee and to make known the assessee of his default so as to afford an opportunity to explain the default/charges so brought against the assessee. Without considering the explanation of the assessee on the specific default, the order passed by the AO under section 271AAB suffers from serious illegality and therefore not sustainable in law. When a stringent action is provided in the Statute against the default committed by the assessee, then it also cast an equally stringent and strict duty on the authority responsible to take such action. Therefore, when the provisions for levy of penalty under section 271AAB is a specific provision to deal with the undisclosed income and it provides a strict penal action then the corresponding duty of the tax authority is also equally stringent. The AO cannot escape from following the strict

mandatory requirement of law and particularly the principle of natural justice. The AO has neither specified the grounds and clause of section 271AAB nor has dealt with the same in the impugned order passed under section 271AAB. The AO has also not given a finding that the case of the assessee falls in the definition of undisclosed income provided under clause (c)(i) of Explanation to section 271AAB. When the transactions of investment in real estate are recorded in the diary being other documents maintained by the assessee for the said purpose, then in the absence of any requirement of maintaining regular books of accounts by the assessee, the case of the assessee would not fall in the definition of undisclosed income as per clause (c) of Explanation to section 271AAB of the Act.

9. The Kolkata Bench of the Tribunal in the case of DCIT vs. Madan Lal Beswal (supra) has considered this issue of the alleged income found recorded in the other documents would fall in the definition of undisclosed income in para 3 and 4 as under :-

> "3. We have heard rival submissions and gone through the facts and circumstances of the case. We find that the issue involved herein is squarely covered in favour of the assessee in the case of DCIT vs Manish Agarwala (another member in the same Nezone Group) in ITA No. 1479/Kol/2015 for AY 2013-14 dated 9.2.2018 by the order of this tribunal , wherein it was held as under:-
>
> > *3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has levied the penalty u/s. 271AAB on the ground that the income from commodity profit has been found during search u/s.132 of the Act which is not reflected in the regular books of account. The AO has accepted that during search the assessee has admitted u/s. 132(4) of the Act the income from speculative trading. The undisputed facts the AO has given finding pertaining to this case is as follows:*
> >
> > *i) The assessee has substantiated the manner in which the income was derived.*
> > *ii) Furnished the return of income therein and*
> >
> > *iii) Paid the tax along with interest.*
> >
> > *Based on the said finding, according to AO, the assessee satisfies the conditions enumerated in sec. 271AAB(i)(a) of the Act and thereafter levied ten percent of Rs.3 cr., which have been deleted by the impugned order of Ld. CIT(A).*
> >
> > *4. The Ld. DR brought to our notice that in the very same group case of Manoj Beswal & Ors. the Tribunal had confirmed the levy of penalty and contended before us that penalty u/s. 271AAB of the Act is mandatory and therefore, according to Ld. DR, the Ld. CIT(A) erred in deleting the penalty by stating that the assessee did not had any 'mens rea' not to disclose the amount in question. According to him, penalty has to be mandatorily levied u/s. 271AAB of the Act on the undisclosed income found during search. On the other hand, Ld. AR Shri Miraz D. Shah, supporting the decision of Ld. CIT(A) made contentions though taken up before the Ld. CIT(A) but has not been adjudicated on those averments, which the Ld. AR urges before us to*

consider while adjudicating the appeal of the Revenue. The Ld. AR also pointed out that the contentions which he is going to raise has been taken up before the AO also, however, according to Ld. Counsel, those legal arguments were not considered by the AO in the right perspective. The first contention of the Ld. AR is that since Sec. 271AAB of the Act is a penalty section it should be construed strictly, which we agree being it is a trite law that penalty provisions have to be strictly interpreted. Next contention of Ld. AR is that sec. 271AAB of the Act is not mandatory because Parliament in its wisdom has used the word 'may' and not 'shall'. So, according to him, it is the discretion bestowed upon the AO whether to initiate and impose penalty u/s. 271AAB of the Act. We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak & Ors. Vs. CIT (2017) 55 ITR (Trib) 209 and 2017 (5) TMI 675- ITAT-Lucknow in ITA No. 416, 417 and 418/LKW/2016 dated 30.01.2017 while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word "may" not "shall". "May" cannot be equated with "shall" especially in penalty proceeding. Using the word "may" in our opinion, gives a discretion to the AO to levy the penalty or not to levy, even if the assessee has made the default under the said provision." Therefore, the 2nd ground of Revenue fails and we hold that penalty u/s. 271AAB of the Act is not mandatory and is discretionary. Before proceeding further, we note that the ex parte order passed by the Coordinate Bench relied upon by Ld. DR, Manoj Beswal, supra, have been recalled in MA Nos. 218 to 220/Kol/2017 dated 12.01.2018 by observing as under:

> *"By virtue of these miscellaneous applications, the assessee seeks to recall the order passed by this Tribunal in I.T.A. Nos. 1471, 1475&1476/Kol/2015 in the hands of Amit Agarwal, Madan Lal Beswal and Manoj Beswal respectively for the assessment year 2013-14 on the ground that notice was not served on the assessee for the hearing and on certain factual error that had crept in the order of the Tribunal. The first preliminary objection raised by the Ld. AR was that the notice of hearing was not served on the assessee for the hearing scheduled on 06.11.2017 and hence, the assessee could not be present on the said date by way of personal appearance. The second objection raised by the Ld. AR was that the Tribunal had stated in para 9 of its order that the assessee himself had accepted that he is engaged in commodities trading business and therefore mandated to maintain books of accounts in terms of section 44AA of the Act and thereby inferring that the assessee had reported the profit from commodities trading business under the head "income from business or profession". Based on this crucial finding, the Tribunal had concluded that since the transaction of commodities trading had not been entered by the assessee in his books of accounts as on the date of search on 01.08.2012 and thereby it takes the character of undisclosed income*

for which penalty u/s 271AAB of the Act is exigible. In this regard, we find that the Ld. AR drew our attention to the computation of the total income wherein the assessee had offered income from commodity trading only under the head income from other sources. We also find that the Ld. AO had also specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income from other sources. We find that due to the absence of the assessee at the time of hearing this particular fact had escaped the attention of the Tribunal. On perusal of the fact available on record, we find that the finding recorded by this Tribunal in para 9 of its order dated 10.11.2017 that the assessee is mandated to maintain books of accounts u/s 44AA of the Act is factually incorrect and deserves to be rectified. This mistake of primary fact had lead to a conclusion of upholding the levy of penalty u/s 271AAB of the Act. Hence, in these facts and circumstances and in view of the aforesaid mistake of primary fact rightly pointed out by the ld. AR , we deem it fit to recall the orders of this Tribunal dated 10.11.2017 in the case of aforesaid assessees."

In the aforesaid scenario, the legal position is that an order which has been recalled for de novo adjudication, is no order in the eyes of law and so it cannot be treated as a precedent. Hence, the reliance placed by the Ld. DR in respect of assessee's in the same group concern cases as decided by the Tribunal no longer survives and cannot be treated as covered against the assessee.

5. The third contention of the Ld. AR is that the assessee is an individual, who was drawing salary income. So, according to him, he need not maintain any books of account as per the Act. According to Ld. AR, undisputedly the assessee was engaged for the first time this AY only in trading of commodities, that too which was conducted in a non-systematic manner and the income from it was duly offered to tax by the assessee in his return of income under the head "Income from Other Sources", which, according to Ld. AR was accepted as such by the AO and drew our attention to page one of assessment order, (not the penalty order) wherein we note that the AO has acknowledged that the assessee owned up Rs. 3 cr. as his income from commodity profit and it has been disclosed in his income and expenditure for AY 2013-14 under the head "income out of speculative business from sale of commodities", and thereafter the AO confirmed the assessee's claim and thereafter total income was assessed by the AO as per the return submitted by the assessee. In the light of the aforesaid facts discerned from assessment order, the assessee's case is that for the first time in this AY he was doing unsystematic speculative activity which earned income and, it was brought under the head "Income from Other Sources", and so, accordingly, he is not required to maintain books of account as stipulated in Sec. 44AA or Sec. 44AA(2)(ii) of the Act because, these provisions are only for assesses who are earning income under the head "Business or profession". We note that Sec. 44AA or Sec. 44AA(2)(ii) of the Act casts a duty upon the assessee who are into "Business or Profession" and such assessee's are bound to

maintain books of account as stipulated therein. For appreciating this submission let us go through the provisions of law.

> *"44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act. (2) Every person carrying on business or profession [not being a profession referred to in subsection (1)] shall,—*
>
> *(i) if his income from business or profession exceeds [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds [ten lakh] rupees in any one of the three years immediately preceding the previous year; or*
>
> *(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed [ten lakh] rupees, [during such previous year; or*
>
> *(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under [section 44AE] [or section 44BB or section 44BBB], as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such [previous year; or]]*
>
> *(iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax during such previous year,]*
>
> *keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act.*
>
> *(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.*

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.]"

So from a reading of the above provisions which clearly stipulates that assessee who are carrying on business or profession shall keep and maintain such books of account and other documents which may enable the AO to compute the total income. We note that assessee in the statement of total income filed before the AO has shown income only under two heads (i) salary income (ii) income from other sources. We would like to reproduce the summary of total income of the assessee filed along with the return:

Income from Salary	*Rs. 45,57,600*
Income from Other sources	*Rs.3,00,24,047*
	Rs.3,45,81,647

6. We note that the AO has accepted the aforesaid statement of total income filed before him without contesting the claim of the assessee as to whether the assessee's claim of income other than from salary should be from "Income from Business". The confusion that has arisen in this case, we note is on the misdirection of AO in the assessment proceedings wherein the assessment order of the assessee, the AO has observed "during search and seizure operation, Shri Manoj Beswal had made a consolidated disclosure of Rs.32 crore vide his disclosure petition. Out of this consolidated disclosure, the assessee owned up Rs. 3 cr. In the disclosure petition Shri Manoj Beswal it was stated that the source of such undisclosed income was out of commodity profit. It has been submitted that the amount has already been disclosed in his Income & Expenditure account for the AY 2013-14 under the head 'Income out of Speculative Business from sale of commodities'. Verification of accounts confirms his claim." This observation is flawed because, we note that AO got carried away by perusal of the "Income & Expenditure Account for AY 2013-14" submitted by the assessee before him, wherein it was shown in the income side that is right hand column as "Income from Speculative Business from sale of commodities" and left hand side column reflects the expenditure; and AO came to the conclusion that assessee has disclosed under the heading income out of Speculative Business from sale of commodities. The character of a receipt and the head under which it has to be taxed is not based on the nomenclature of receipt of income shown in Income & Expenditure Account. All the incomes of revenue nature will be posted in the right hand side column of 'income' in the Income & Expenditure Account and the description given therein cannot determine the head of income prescribed under chapter IV of the Act. Therefore, the observation of the AO in assessment order in the light of his action of accepting the statement of total income filed by the assessee along with return which without being contested, is erroneous, unless the AO was able to negate the claim of the assessee by bringing the income from commodity transactions as part of business income. It should be remembered that under the Income Tax Act 1961, the total income of an assessee individual

/company is chargeable to tax u/s. 4 of the Act. The total income has to be computed in accordance with the provisions of the Act. Section 14 of the Act lays down that for the purpose of computation, income of an assessee has to be classified under five heads. It is possible for an assessee/individual/company to have five different sources of income, each one of it will be chargeable to Income Tax Act. Profits and gains of business or profession is only one of the heads under which an assessee's income is liable to be assessed to tax. If an assessee has not commenced business there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the assessee commences its business, its income from any other source will not be taxed as held by the Hon'ble Supreme Court in the case of Tuticorin Alkali & Chemicals Ltd. Vs. CIT (1997) 227 ITR 172 (SC). It has been further held that when the question is whether a receipt of money is taxable or not or whether certain deduction from that receipt is principles of law and not in accordance with accountancy practice. Further, the Hon'ble Apex Court held that the question as to whether a principal receipt is of the nature of income and falls within the charge of sec. 4 of the Act is a question of law which has to be decided by the Court on the basis of the provisions of the Act and interpretation of the term 'income' given in a large number of decisions of the Hon'ble Supreme Court, High Court and Privy Council. After taking note of the Apex Court order as above, we note that the AO in the assessment order after having accepted the statement of total income (supra) and the return wherein the assessee has shown the income from commodities under the head "Income from Other Sources" cannot now after perusal of "Income & Expenditure Account" determine the character of transaction in the penalty proceedings as "Income from Business or Profession" which approach/action is erroneous. We note that the assessee in his statement of total income along with return has classified his income under two heads (i) Salary and (ii) from other sources and the income of Rs. 3 cr. as income from other sources, which we find the AO has not contested in the assessment order, has thus crystallized and the necessary inference drawn is that assessee an individual who was admittedly a salaried person engaged in the previous year relevant to the assessment year under consideration (that too for the first time) in an activity from which he derived "Income from Other Sources" are not required to maintain books of account which are applicable only if the assessee was engaged in Business or Profession. However, we further note that the transactions which yielded income, the assessee had in fact maintained records from which the AO was able to deduce the true income and expenditure of the assessee. We note the AO in the assessment order has accepted the returned income comprising of income from salary and income from other sources by observing as under :

> *"Total income assessed as per return Rs.3,44,65,120/-".*

And further we note that the AO had specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income from other sources. Thus from a perusal of the assessment order, it is not in dispute that assessee is not engaged in any business. And the AO cannot change the character of income in a derivative proceeding which is an off-shoot of assessment proceedings i.e. the penalty proceedings without contesting and making a finding against the claim of the assessee in the assessment order as discussed above.

7. Finally, the Ld. AR submitted that during the search, the search party found the records of the assessee's transactions in speculative commodity from the drawer of assessee's accountant from which the AO could compute the income of the assessee from the said transaction which amount assessee declared during search and which was duly returned and which figure was accepted by the AO. According to Ld. AR, the fact that search happened on 01.08.2012 need to be taken note of since undisputedly there was enough and more time for the assessee to submit the accounts during assessment proceedings which fact has been taken note of and concurred by the Ld. CIT(A). Thereafter, the Ld. AR drew our attention to the definition of undisclosed income given under section 271AAB which reads as under:

*"**Penalty where search has been initiated.***

'271AAB. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, 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—*

****

Explanation – For the purposes of this section, -

(a) …….

(b) …….

*(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."

According to the Ld. AR, from the facts and circumstances described above, since the assessee is not engaged in business or profession, he does not require to maintain the books of account as per sec. 44AA or sec. 44AA(2) of the Act, therefore, the assessee's case falls in the second limb i.e. "or other documents" as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section which is very important to adjudicate this issue. Therefore, the question is when the search took place, the assessee's transactions (in this case, the speculative transaction) has been found to be recorded in the "other documents" which is (retrieved from the assessee's accountant's drawer) and based on that the assessee declared Rs. 3 cr. during search and later returned income of Rs. 3 cr. as income under the head "Income from Other Sources" which was accepted by the AO in toto. We note that since the income under question (Rs. 3 cr.) was in fact entered in the "other documents" maintained in the normal course relating to the AY 2013-14, which document was retrieved during search, hence, the amount of Rs. 3 cr. offered by
the assessee does not fall in the ken of "undisclosed income" defined in Sec. 271AAB of the Act. So, Rs. 3 cr. which was commodity profit recorded in the other document maintained by the assessee which was retrieved during search cannot be termed as "undisclosed Income" in the definition given u/s. 271AAB of the Act. Since Rs. 3 cr. cannot be termed as "Undisclosed Income" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. Therefore, we uphold the order of the Ld. CIT(A) on the aforesaid reasoning rendered by us.

8. In the result, the appeal of the revenue is dismissed.

4. We find that the facts in the aforesaid case and the decision rendered thereon are squarely applicable to the facts of the instant cases before us and respectfully following the same, we dismiss the appeals of the revenue."

Therefore, when the assessee is not required to maintain the books of account as per section 44AA, then the matter is required to be examined whether the alleged undisclosed income is recorded in the other documents maintained in the normal course as per clause (c) to Explanation to section 271AAB. Undisputedly the alleged income was found recorded in the diary which is nothing but the other record maintained in the normal course, thus the same would not fall in the definition of undisclosed income. Once the said income is found as recorded in the other documents maintained in the normal course, then it cannot be presumed that the assessee would not have disclosed the same in the return of income to be filed after about one year from the date of search. Hence, in view of the above facts and circumstances of the case as well as the various decisions on this point, we hold that the penalty levied under section 271AAB is not sustainable and the same is deleted.

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

9.5 On being consistent to the view already taken by this bench and after careful perusal of the facts of the case and the decision of the ld. CIT(A) at length wherein he has considered all the aspect of the case and has also considered the above cited decision. The ld. CIT(A) also noted that there is clear absence of the satisfaction as to which limb of the penalty exist in this case by the ld. AO in the assessment order and in issuance of notice u/s. 271AAB of the Act to levy the penalty. We have also noted that in the assessment order penalty was initiated for the marriage expenses of the son for which no addition is made and the ld. AO failed to record the satisfaction so as to whether the income disclosed were undisclosed income of the assessee or not the levy of the penalty is unsustainable in law. Considering the facts and judicial decision relied upon as cited her ein above and considering the facts on finding recorded in the order of the ld. CIT(A) we see no infirmity in the order of the ld. CIT(A). Based on these observations the appeal filed by the revenue stands dismissed.

10. So far as the cross objection filed by the assessee taking ground that the ld. CIT(A) has not decided his ground for specifying the default in the order for which the penalty was proposed and taken other general ground that the calculation of penalty is wrong or incorrect. Since, we have

concurred the finding of the ld. CIT(A) and we see no protest of the assessee once the issue is resolved in favour of the assessee. In terms of these observation the cross objection filed by the assessee becomes infructuous.

In the result, the appeal of the revenue is dismissed and the cross objection of the assessee is also dismissed.

Order pronounced in the open court on 10/07/2023.

Sd/-	Sd/-
(संदीप गोसाई)	(राठौड कमलेश जयंतभाई)
(Sandeep Gosain)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 10/07/2023
*Ganesh Kumar, PS
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. The Appellant- DCIT, Central Circle, Ajmer
2. प्रत्यर्थी/ The Respondent- Yashwant Kumar Sharma, Ajmer
3. आयकर आयुक्त/ The ld CIT
4. आयकर आयुक्त(अपील)/The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA Nos. 210/JP/2023 & CO No. 04/JP/2023)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar