

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" 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. 272/JPR/2023
निर्धारण वर्ष / Assessment Years : 2016-17

Shri Bitthal Das Parwal Partanion Ka Mandir, Partanion Ka Rasta, Johari Bazar, Jaipur.	बनाम Vs.	Assistant Commissioner of Income Tax, Central Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADYPP 7911 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 273/JPR/2023
निर्धारण वर्ष / Assessment Years : 2016-17

Shri Hari Narain Parwal 376, Nahar Garh Road, Chandpole Bazar, Jaipur.	बनाम Vs.	Assistant Commissioner of Income Tax, Central Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADYPP 8358 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assessee by : Shri S.R. Sharma (C.A.) &
Shri R.K. Bhatra (C.A.)

राजस्व की ओरसे / Revenue by: Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 10/08/2023

उदघोषणा की तारीख / Date of Pronouncement: 06/11/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

These are two appeals filed by the assessee against two different orders of Id. Commissioner of Income Tax (Appeals)-4, Jaipur [herein after referred to as “Id.CIT(A)”] both dated 14.03.2023 for the assessment years 2016-17 respectively.

2. Since, the facts of both the cases are identical, we have heard these cases together and passing the order together. The facts and grounds are taken from the folder of Shri Bitthal Das Parwal in ITA No. 272/JPR/203 and this case is taken as lead case.

3. The assessee in ITA No. 272/JP/2023 has raised the following grounds of appeal:-

“1. That on the facts and in the circumstances of the case the Ld. CIT(A) is wrong, unjust and has erred in law in confirming penalty of Rs. 120000 imposed by the Ld. AO u/s 271AAB(1) of the IT Act, 1961.

2. That the appellant craves permission to add to or amend to any of the above grounds of appeal or two withdraw any of them.”

4. Brief facts of the case are that the assessee is in individual and derives his income from house property, business, capital gain and other sources. A search u/s 132 of the Act was carried out on 07.01.2016 in the

case of Dilip Maihar Group in which assessee was also covered. The assessment u/s 143(3) r.w.s. 153B(1)(b) of the IT Act was completed on 29.12.2017. The Ld. AO in the assessment order initiated penalty proceedings u/s 271AAB(1) of the act and issued show cause notice of which assessee filed explanation. The penalty proceeding has been initiated on the ground that the assessee during the course of search in the statement recorded u/s 132(4) offered a sum of Rs. 12,00,000/- on account of alleged unaccounted cash found as his additional income surrendered as income and the same was disclosed in the return of income filed in pursuant to the search. The ld. AO further noted that the assessee filed his regular return of income u/s. 139 of the Act on 15.10.2016 within due date as specified in section 139 of the Act. The assessee has furnished the return of income for the specified previous year declaring undisclosed income after the search action. The assessee already admitted the undisclosed income after search action. The assessee has already admitted the undisclosed income detected during the search and post search proceedings. Since, the assessee has admitted the undisclosed income and paid the taxes thereon in pursuant to the search the case is covered by the provision of section 271AAB(1)(a) of the Act, 1961 wherein the tax has to be paid on the undisclosed income in the return filed. Thus, as the conditions pursuant to section 271AAB(1)(a)

fulfilled the assessee was charged to the penalty for an amount of 10 % of the amount disclosed at Rs. 1,20,000/- [10 % on 12,00,000/- being the amount disclosed in search and accepted in the return filed pursuant to the search].

5 Aggrieved by the order of levying penalty the assessee has preferred an appeal before the Id. CIT(A). A propos to the grounds so raised by the assessee, the relevant findings of the Id. CIT(A) is reproduced here in below:-

“(x) It is observed that during the course of search proceedings, based on the evidences collected and incriminating documents found the assessee had declared undisclosed income of Rs. 12,00,000/- on account of unaccounted cash. The assessee has himself offered the above income as his additional income for AY 2016-17 in the statement of the assessee recorded u/s 132(4) of the Act. The assessee declared the same income in the return of income for AY 2016-17.

In view of the above facts, the contention of the Id. AR of the appellant that the cash found at the time of search is not his undisclosed income is not found correct. In fact, the case of the appellant clearly falls within the purview of undisclosed income as per the provisions of section 271AAB which is mentioned in the assessment order while recording satisfaction as well as in the penalty order as the appellant disclosed the said amount after the search proceedings. These entries/transactions have 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 and therefore these would attract penalty as per the provisions of section 271AAB of the Act. It is also observed that the AO had issued show cause notice before levy of penalty and therefore it cannot be considered that no opportunity was provided by the AO. Further, the Hon'ble Supreme Court in the case of Sandeep Chandak (Bupra) has held that the provisions of section 271AAB are fully applicable as of the conditions so stipulated or attracts as a search has been initiated under 132 and during the course of search the statement of the assessee has been recorded under section 132(4), in

which the assesses admit undisclosed income and specifies the manner in which such income has been derived"

(xi) Further as regards the levy of penalty u/s 271AAB, it is observed that recently Hone Kolkata Tribunal has held that Penalty u/s 271AAB on undisclosed income is automatic in nature 88 taxmann.com 288 (Kolkata Trib (2017) The Hon'ble Kolkata Tribunal held in favour of revenue as under:

"1) It was not in dispute that the assessee's case would fall within the ambit of section 271AAB(1)(a) as admittedly, the assessee had satisfied the cumulative conditions prescribed therein.

2) The levy of penalty under section 271AAB is automatic in nature as per the plain reading of the provisions. There was no requirement to look into any reasonable cause adduced by the assessee warranting grant of any immunity from levying of penalty under section 271AAB

3 Therefore, even assuming that the mistake was on the part of the accountant of not entering the entries in the books of account regarding the commodities transaction, which might tantamount to reasonable cause, assessee was still eligible to levy of penalty.

(xii) In view of the above discussion and the decision of Hon'ble Supreme Court in the case of Sandeep Chandak (supra), it is clear from the provisions of the section 271AAB, that action of imposition of penalty u/s 271AAB(a) is independent of the enquiries made and subsequent additions made during course of assessment proceedings. In other words, this penalty is not based upon the facts gathered during course of assessment proceeding. It is due to this reason, satisfaction of the AO is not required to be recorded by AO during assessment proceedings or at the time of completion of the proceedings. Further, the provisions of section 271AAB are fully applicable on the conditions so stipulated as a search has been initiated under section 132 and during the course of search the statement of the appellant has been recorded under section 132(4), in which the appellant has admitted the undisclosed income. Accordingly, the contentions raised by the appellant are not found acceptable and are thereby rejected. In view of the above, penalty imposed by the AO u/s 271AAB(1) is upheld.

5. The AR of the appellant did not press for Ground of Appeal No. 2, therefore the same is dismissed.

6. The AR of the appellant has submitted same Ground of Appeal No. 5 and 6 in Form 35 and relates to addition/alteration in the grounds of appeal and is general in nature, therefore no adjudication is required.

6.1 The appellant has not added and altered any of the above ground of appeal. Accordingly, such mention by the appellant in its ground is treated as general in nature, not needing any specific adjudication and is accordingly treated as disposed off.

7. In the result, the appeal of the appellant is dismissed.”

6. Feeling dissatisfied from the order of the Id. CIT(A), the assessee preferred the present appeal challenging the levy of the penalty. The Id. AR of the assessee has filed a detailed submissions in support of the grounds so taken and the same is reproduced hereinbelow:-

“Hon’ble Sir(s),

In the matter of above appeal we are to submit as under: -

The assessee is an individual deriving income from house property, business, capital gain and other sources. A search u/s 132 took place on 07-01-2016 in the case of Dilip Maihar Group in which assessee was also covered. The assessment u/s 143 (3) r.w.s. 153B (1) (b) of I. T. Act, 1961 was completed on 29-12-2017.

Action of Ld. A.O.

The Ld. A.O. in the assessment order initiated penalty proceedings u/s 271AAB(1) of I. T. Act, 1961 and issued show cause notice of which assessee filed explanation. The penalty proceeding has been initiated on the ground that assessee during the course of search in the statement recorded u/s 132(4) offered a sum of Rs.12,00,000/- on account of alleged unaccounted cash found as his additional business income. The Ld. A.O. after rejecting the explanation of assessee levied penalty of Rs.1,20,000/- u/s 271AAB(1)(a) of the Act,1961.

Order of CIT (A)

The assessee filed appeal before CIT (A) against said penalty order and in course of hearing filed written submissions which reproduced in appeal order of CIT (A). The Ld. CIT(A)-IV in his order dated 14-03-23 after giving the findings in Para X to XII upheld the penalty. The Ld. CIT (A) held as under:-

“It is observed that during the course of search proceedings, based on the evidences collected and incriminating documents found the assessee had declared undisclosed income of Rs. 12,00,000/- on account of unaccounted cash. The assessee has himself offered the above

income as his additional income for AY 2016-17 in the statement of the assessee recorded u/s 132 (4) of the Act. The assessee declared the same income in the return of income for AY 2016-17.

In view of the above facts, the contention of the ld. AR of the appellant that the cash found at the time of search is not his undisclosed income is not found correct. In fact, the case of the appellant clearly falls within the purview of undisclosed income as per the provisions of section 271AAB which is mentioned in the assessment order while recording satisfaction as well as in the penalty order as the appellant disclosed the said amount after the search proceedings. These entries/transactions have 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 and therefore these would attract penalty as per the provisions of section 271AAB of the Act. It is also observed that the AO had issued show cause notice before levy of penalty and therefore it cannot be considered that no opportunity was provided by the AO. Further, the Hon'ble Supreme Court in the case of Sandeep Chandak (Supra) has held that "the provisions of section 271AAB are fully applicable as of the conditions so stipulated or attracts as a search has been initiated under section 132 and during the course of search the statement of the assessee has been recorded under section 132(4), in which the assessee admits undisclosed income and specifies the manner in which such income has been derived".

(xi) Further as regards the levy of penalty u/s 271AAB, it is observed that recently Hon'ble Kolkata Tribunal has held that Penalty u/s 271AAB on undisclosed income is automatic in nature 88 taxmann.com 288 (Kolkata - Trib.)(2017). The Hon'ble Kolkata Tribunal held in favour of revenue as under:

1) It was not in dispute that the assessee's case would fall within the ambit of section 271AAB[1](a) as, admittedly, the assessee had satisfied the cumulative conditions prescribed therein.

2) The levy of penalty under section 271AAB is automatic in nature as per the plain reading of the provisions. There was no requirement to look into any reasonable cause adduced by the assessee warranting grant of any immunity from levying of penalty under section 271AAB.

3) *Therefore, even assuming that the mistake was on the part of the accountant of not entering the entries in the books of account regarding the commodities transaction, which might tantamount to reasonable cause, assessee was still exigible to levy of penalty.*

(xii) In view of the above discussion and the decision of Hon'ble Supreme Court in the case of Sandeep Chandak (supra), it is clear From the provisions of the section 271AAB, that action of imposition of penalty u/s 271AAB(a) is independent of the enquiries made and subsequent additions mad during course of assessment proceedings. In other words, this penalty is not based upon the facts gathered during course of assessment proceeding. It is due to this reason; satisfaction of the AO is not required to be recorded by AO during assessment proceedings or at the time of completion of the proceedings. Further, the provisions of section 271AAB are fully applicable on the conditions so stipulated as a search has been initiated under section 132 and during the course of search the statement of the appellant has been recorded under section 132 (4), in which the appellant has admitted the undisclosed income. Accordingly, the contentions raised by the appellant are not found acceptable and are thereby rejected. In view of the above, penalty imposed by the AO u/s 271AAB(1) is upheld.”

The present appeal is against said penalty imposed by Ld. A.O. vide impugned penalty order dated 14-03-2023.

The appellant taken the following grounds in the appeal filed:-

1. *That on the facts and in the circumstances in the case the Ld. CIT(A) is wrong, unjust and has erred in law in levying the penalty of Rs.120000imposed by the Ld AO u/s 271AAB of the I.T. Act 1961.*
2. *That the appellant craves the permission to add to or amend to any of the above grounds of appeal or withdraw any of them.*

The groundwise submission of assessee are as under:-

- (1) The Ground No. 1

It is submitted that the assessee during the course of search declared additional business income of Rs.12,00,00/- for the year under consideration and shown as “Current year business income offered to tax during the course of search” in the computation of total income/return of income which represents cash. The Ld. AO has not determined it as income from other sources u/s 68/69A of Income Tax Act in the assessment but accepted as business income of current year. Therefore, merely on the basis of surrender made in the search statement, this cannot be held as “Undisclosed Income” for the purpose of levy of penalty u/s 271AAB.

Thus, it is only by admission of assessee on which the assessee included the said amount in return filed as his income of current year and paid tax thereon. There is no *iota* of evidence that surrendered income was undisclosed income. The reliance is placed on the judgement in case of *ACIT Vs. Marval Associates*. In the said judgement it was held that Section 271AAB sub-clause (c) of the Act defines undisclosed income as under:-

- (c) “undisclosed income” means-
 - (i) Any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of accounts or other documents or transactions found in the course of a search under section 132, which has –
 - (A) Not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or
 - (B) Otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or
 - (ii) Any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.
- (b) Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132 (4). The A.O. must establish that there is undisclosed income on the basis of incriminating material. It is so specifically held by ITAT, Visakhapatnam Bench in *ACIT Vs. Marval Associates supra*.
- (c) The Ld. A.O. taking the admission of income by assessee as undisclosed income of assessee. “There was no money, bullion, jewellery or valuable article or thing or entry in the books of account or documents transactions were found during the course of search indicating the assets not recorded in the books of account or other documents maintained in the normal course, wholly or partly. In search authorities did not find any undisclosed

asset, any other undisclosed income. The Hon'ble ITAT Delhi Bench in the case of *Ajay Sharma v. Dy. CIT [2013] 30 taxmann.com 109* held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee which has not been declared by the assessee. The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act. In the case of assessee also Ld. A.O. has not established that the income disclosed by assessee in return filed is undisclosed income of assessee within the meaning of Section 271AAB and unless that is established by Ld. A.O. no penalty u/s 271AAB can be imposed on assessee.

Accordingly, it is submitted that it is not the case where Department either found any income or any assets or any expenses not recorded in the regular books of accounts or documents, hence, does not meet the definition of undisclosed income given in Section 271AAB, as the due date of filing of return of income for the assessment year under appeal was 30th Sep. 2016 and accordingly at the time of search in the month of Jan. 2016 it cannot be concluded/drawn an inference that assessee will not declare the said business income in his return of income.

- (2) It is further submitted that in section 271AAB the word 'may' is used instead of 'shall' so it is not mandatory but it is discretionary. Secondly, the intention of the legislature is clear by making the order passed u/s 271AAB as appealable order by amending sub clause (B) of clause (hb) of section 246A w.e.f. 01.07.2012 that it is discretionary and not mandatory to give relief to the assessee where the authorities have not used their discretion to provide relief to the assessee. It is settled position of law that penalties are not compulsory, not mandatory but are always discretionary considering the overall facts and circumstances of the case. In imposition of penalty mens-rea also plays a vital role before imposing the penalty, it is always compulsory to prove the mens-rea of the assessee as malafide for concealment of income or for avoidance of any provision of law in force intentionally. In the case of the assessee, the AO has not mentioned anything in the assessment order passed by him u/s 143(3)/153B(1)(b) of the Act. All the transactions are recorded. Nothing adverse was found which suggest that the assessee's intention was not to disclose the income recorded in the seized documents. The settled position of law is that the power to levy penalty inherently has power not to levy penalty. Thus, the ld. CIT (A) confirmed the penalty under a wrong notion. The provisions of section 271AAB itself speak that these are not mandatory. The reference is made to section 271AAB and submitted that the term "The AO may" used in the section does not make the levy of penalty as mandatory. The section starts that the Assessing Officer "MAY" direct. Thus, it is not 'SHALL' which would have made the levy of penalty mandatory. Thus the ld. CIT (A) was wrong in observing that levy of penalty u/s 271AAB was mandatory. Secondly the provisions of section 271AAB(3) lay down that penalty shall be levied under the section with reference to section 274. In other words the provisions of section shall apply in levying penalty under this section. Section 274 speaks that "No order imposing penalty under this chapter shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard." Thus hearing has to be given to the assessee before levy of penalty. This itself shows that penalty is leviable only after hearing the assessee and in case assessee is able to

make out a case by showing some reasonable cause or otherwise then penalty shall not be leviable. Penalty is not leviable automatic.

In this respect reliance is also placed on the judgement of Hon'ble Supreme Court in case of *CIT Vs Smt. P.K. Noorjahan (1999) 237 ITR 0570* wherein Supreme Court held that word 'may' give discretion to A.O. in the matter and said discretion has to be exercised keeping in view the facts and circumstances of the particular case judicially. The fact that the minimum is prescribed does not mean that penalty must necessarily be imposed in every case falling within sub-s (1). Shah, acting CJ said in *Hindustan Steel Ltd. v State of Orissa 83 ITR 26*. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty. The discretion of the A.O. to levy or not to levy a penalty is still preserved by this section, it must be exercised judicially and on a consideration of all the relevant circumstances. Recently the ITAT Kolkata Bench in case of *DCIT Vs. Manish Agarwal (2018) 92 taxmann.com 81* held "*We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak v. CIT [2017] 55 ITR (Trib.) 209 (Luck.) while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word "may" not "shall". "May" cannot be equated with "shall" especially in penalty proceeding. Using the word "may" in our opinion, gives a discretion to the A.O. to levy the penalty or not to levy, even if the assessee has made the default under the said provision.*" In case of *ACIT Vs. Marval Associates the Visakhapatnam Tribunal (2018) 92 taxman.com 109/ (2018) 170 ITD 353* it was held "*Careful reading of section 271AAB of the Act, the words used are 'A.O. may direct' and 'the assessee shall pay by way of penalty'. Similar words are used section 158BFA (2) of the Act. The word may direct indicates the discretion to the A.O. Further, sub section (3) of section 271AAB of the Act, fortifies this view.*

Sub section (3) of section 271AAB:

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

The legislature has included the provisions of section 274 and section 275 of the Act in 271AAB of the Act with clear intention to consider the imposition of penalty judicially. Section 274 deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Therefore, from plain reading of section 271AAB of the Act, it is evident that the penalty cannot be imposed unless the assessee is given a reasonable opportunity and assessee is being heard. Once the opportunity is given to the assessee, the penalty cannot be mandatory and it is on the basis of the facts and merits placed before the A.O. Once the A.O. is bound by the Act to hear the assessee and to give

reasonable opportunity to explain his case, there is no mandatory requirement of imposing penalty, because the opportunity of being heard and reasonable opportunity is not a mere formality but it is to adhere to the principles of natural justice. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly, we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."The penalty order u/s 271AAB is an appealable order u/s 246A before CIT (A). If the penalty u/s 271AAB had been mandatory there would have not been provision of appeal u/s 246A.

Further the Ld. CIT(A) relied upon the decision of PCIT Vs Sandeep Chandak & others (Supra). In this connection it is submitted that the Hon'ble coordinate of Bench of Jaipur ITAT, Jaipur Bench, Jaipur in the case of Shri Sanjay Goyal V/s DCIT, CC-2, Jaipur (ITA No. 114 JP 2018) Dated 23-09-2019 after considering the said judgement of Sandeep Chandak deleted the penalty levied u/s 271 AAB of the I T Act, 1961. The Hon'ble court in the said judgement held that "*from the question and reply of the assessee has explained the source of Rs.4,00,000/- given to his son as his personal savings. Therefore, even if the assessee has offered the said amount to tax, the same does not fall in the definition of undisclosed income when this amount was paid by the assessee to his son from his personal savings. Further, having regard to the income declared by the assessee in the preceding years as well as for the year under consideration, the savings of Rs.4,00,000/- cannot be ruled out. Accordingly, in the facts and circumstances of the case, the penalty levied u/s 271AAB of the Act in respect of the said amount of Rs.4,00,000/- is deleted.*

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

- (3) It is submitted that the Hon'ble ITAT, Jaipur Bench Jaipur in a recent case of *Shri Raja Ram Maheshwari Vs DCIT (ITA No.992/JP/17) dated 11-01-2019 held that " Para no.22 Regarding undisclosed investment in the construction of house, we find that such undisclosed investment has been worked out based on assessee's statement of approximate investment in the construction of house and after determining the amount which has been reflected in the books of accounts, and the difference has been estimated at Rs 31,77,000. There has been nothing tangible in terms of any entries or documents relating to actual expenditure on construction of house which has been incurred which is found to be false during the course of search and therefore, penalty levied thereon deserve to be set-aside.*

It is also submitted that the Ld AO has not determined it as income from other sources u/s 69A of Income Tax Act in the assessment but accepted as business income of current year. Therefore merely on the basis of surrender made in the survey statement, this cannot be held as "Undisclosed Income" for the purpose of levy of penalty u/s 271AAB. Thus, it is only by admission of assessee on which the assessee included the said amount in return filed as his income of current year and paid tax thereon. There is no *iota* of evidence that surrendered income was undisclosed income. Further the department has carried out search

and seizure operations on the assessee group and during the course of survey, the department has not found any evidence, which shows that the assessee was having any undisclosed income. The revenue authorities have exerted undue pressure and obtained the surrender of income from the assessee.

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

For ready reference the said circular is reproduced herein below:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE & COMPANY AFFAIRS
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES
Room No. 254/North Block, New Delhi, the 10th March, 2003

To
All Chief Commissioners of Income Tax, (Cadre Contra)
&
All Directors General of Income Tax Inv.

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

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

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

3(b) That Hon'able Patna Bench, SMC at Kolkata in the case of Shiv Bhagwan Gupta Vs ACIT, Circle-1, Patna held that:-

9. On a perusal of the provisions of section 271AAB, it is evident that the Section 271AAB is self-contained. There can be no doubt that there is no discretion with the AO as the parameters by which the AO or the tax authorities are bound in regard to the rate of penalty and the circumstances on the basis of which the penal provision can be attracted are self-explanatory. It can be noticed that the Co-ordinate Benches of the Tribunal have categorically held that the expression 'undisclosed income' is given a definite and specific meaning and the word has not been described in an inclusive manner so as to enable the tax authorities to give wider or elastic meaning which enables them to bring within its ambit the species of income not specifically covered by the definition. Moreover, such penal provisions are required to be interpreted in a strict, specific and restricted manner and not in an inclusive manner. If the surrendered income does not fall in the definition of "undisclosed income" as defined u/s 271AAB of the Act, the penalty is not warranted.

It can be further noted that the penalty under section 271AAB can be initiated in respect of undisclosed income as defined in the section 271AAB itself found during the search action, independent of the assessment proceedings. Though, the fact in a case that the assessee has been able to explain the source of the alleged 'undisclosed income' may be relevant for final imposition of the penalty, however, for initiation of the penalty proceedings, the provisions of section 271AAB are self contained and are not dependent upon commencement or finalization of the assessment proceedings. It is further pertinent to note here it is not mandatory for the AO to invoke provisions of section 271AAB of the Act in each every case of levy of penalty pursuant to search action.

There is no bar to the assessing Officer to initiate penalty proceedings u/s 271(1)(c) of the Act even in cases involving search actions if in the facts and circumstances of the case, it is so warranted. The only bar is that no penalty under the provisions of section 270A or section 271(1)(c) of the Act shall be imposed in respect of the undisclosed income, as defined u/s 271AAB of the Act, unearthed during the search action carried out u/s 132 of the Act. It is to be noted that the provisions of section 271AAB and section 271(1)(c) of the Act simultaneously existed and were operational till the provisions of section 271AAC become effective from 01.04.2017.

The Assessing Officer has levied penalty @ 10% of the alleged undisclosed income, however, it is a matter of record in this case that the assessee has not made any surrender of any undisclosed income during the search action. The

assessing officer has not initiated the penalty proceedings u/s 271AAB of the Act on the basis of or in consequence of the said search action, rather the assessing officer, has initiated the penalty proceedings during the assessment proceedings solely on the ground that the assessee has disclosed certain income from undisclosed sources in the return of income and paid due taxes thereupon. The relevant part of the assessment order in this respect is reproduced as under:

“The assessee has filed return u/s 139 showing income of Rs. 2808270/- The assessee has disclosed income of Rs.2179221/- during the year on account of undisclosed jewellery. Penalty u/s 271AAB is initiated.”

A perusal of the above reproduced relevant part of the assessment order reveals that the assessing officer has not mentioned about unearthing of any undisclosed income as defined u/s 271AAB of the Act during search action carried out at the premises of the assessee. In my view, the income declared by the assessee in the return of income or found or assessed by the Assessing officer in the assessment proceedings may be relevant for assessment of the income under section 68 /69 and other related provisions of the Act and also for the levy of penalty under section 271(1)(c) of the Act in view of the relevant provisions of section 68/69 and 271(1)(c) of the Act. However, for the levy of penalty u/s.271AAB, the case must fall within the four corners of the definition of expression “undisclosed income” as defined u/s 271AAB itself. The assessee in this case is an individual and has earned income from partnership firm and interest income. The assessee has neither earned any business income nor earned any income exceeding Rs.50 lakhs so as to require mandatory filing of personal assets and liabilities or to maintain books of accounts; even the assessee is not required to otherwise disclose any such income to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; the alleged income is not any income 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. Assessee has neither made any surrender of any undisclosed income during the search action nor the penalty has been initiated on the basis of undisclosed income found during such search action. In view of the above factual position, the impugned order of the AO imposing the penalty on the assessee under section 271AAB of the Act does not pass the mandate of the provisions of section 271AAB of the Act, therefore, the same being bad in law is hereby quashed.

3(c) Recently the Hon'ble Coordinate Bench in the case of Vimal Chand Surana Vs DCIT, CC-2, Jaipur (ITA No. 304/JP/2018) dated 30-05-2019 held that “10. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee is an Individual and has never reported any income from business except for the year under consideration where the assessee has surrendered the income in the statement recorded under section 132(4) of the IT Act. Even for the year under consideration except the surrendered amount, there is no other business income reported in the return of income which was accepted by the AO. The AO also accepted this fact in

para 6 of assessment order that the assessee primarily derives income from salary and other sources. In the caption of the assessment order, the AO has also reported the nature of source of income as salary and other sources and, therefore, the AO has not disputed the fact that the assessee has never reported any income from business. During the course of statement recorded under section 132(4), the assessee in reply to question no. 4 has submitted that the business is run by his son Shri Pushpendra Kumar and grandson Shri Punit through companies, firms and HUF. Further, in reply to question no. 18, the assessee has explained that the said stock was also kept at the premises of M/s. Bhuramal Rajmal Surana HUF. However, he has surrendered this income in his own Individual hand and stated that only in this year he has started the business. The statement of the assessee was again recorded under section 132(4) on 16.10.2014 and in reply to question no. 4, the assessee again reiterated that in the premises the stock of M/s. Bhuramal Rajmal Surana a proprietorship concern of assessee's HUF and other documents of the said firm are kept. Therefore, the stock which was treated as unaccounted excess stock of the assessee was found at the business premises of M/s. Bhuramal Rajmal Surana and the assessee has surrendered the said amount in his individual capacity instead of in the hands of this proprietorship concern of his HUF. From the facts it is clear that the alleged excess stock/unaccounted stock was nothing but the stock of M/s. Bhuramal Rajmal Surana but when the assessee offered the same in his individual hands, the department did not try to get the disclosure and surrender in the hands of the right person. It appears that the department is more concerned about the surrender whether it is in the hands of the Individual assessee or in the hands of the business concern of the HUF. Once the department has accepted the surrender in the hands of the assessee though the stock was not of the assessee but of the HUF business concern, then after receiving the tax for levy of penalty under section 271AAB of the Act, the AO was under the statutory obligation to establish that the said stock found at the time of search and disclosure made by the assessee falls in the definition of undisclosed income of the assessee as per explanation to section 271AAB of the Act. Once the stock was found at the premises of the business concern of HUF and the surrender was taken from the assessee in his individual capacity, then the penalty cannot be levied by ignoring or over-looking the fact that when assessee has not carried out any business either in the past or in future or even during the year under consideration. The AO has accepted that the assessee's main source of income is only salary and other sources, thus the mere surrender under section 132(4) would not ipso facto bring the same in the ambit of undisclosed income as defined in explanation to section 271AAB of the Act. Even otherwise, neither the AO nor the ld. CIT (A) has made any effort to made out a case that the income surrendered by the assessee falls in the definition of Undisclosed Income as per explanation to section 271AAB of the Act. Accordingly, in view of the facts and circumstances of the case when assessee was not found to be doing any business in his individual capacity and all business of Gem & Jewellery are run through the proprietorship concern of the assessee's HUF as well as the other firms and companies in which the assessee and his family members are partners and directors, the said income on account of excess stock disclosed by the assessee cannot be regarded as undisclosed income for the purpose of levy of penalty under section 271AAB of the Act. The definition of Undisclosed Income as provided in explanation to section 271AAB has to be considered for the purpose of levy of penalty and not the mere

disclosure of undisclosed income under section 132(4) of the IT Act. Accordingly, we delete the penalty levied under section 271AAB of the Act in respect of the Income surrendered on account of excess stock. Since we have considered that this is not undisclosed income of the assessee, therefore, we do not propose to go into the issue of valuation of closing stock.

The above findings of law in the said judgement squarely applies in case of assessee on the facts of the case. In view of the above it is submitted that surrender of Rs.1200000/- made on account of excess cash is not come within the ambit of term undisclosed income and accordingly no penalty is imposable u/s 271AAB of the IT Act, 1961.”

7. Per contra, the ld. DR relied upon the orders of the lower authorities and submitted on the decision of Kolkata Tribunal in the case of ACIT vs. Vishal Agarwal (2018) 100 taxmann.com 283. The ld. DR also submitted that as per provision of section 271AAB the levy of penalty is automatic. Based on this argument the ld. DR argued the contentions already recorded in the orders of the lower authority.

8. We have heard the rival contentions, perused the material placed on record and gone through the judicial decision cited by both the parties to drive home their respective contentions. The Bench noted that in this case the assessee filed the return of income on 15.10.2016 declaring total income of Rs. 97,17,940/- for the year under consideration where in the assessee offered undisclosed income of Rs. 12,00,000/-, being the amount of undisclosed cash found during the search. The ld. AO considering that set off of fact that the assessee admitted plea of disclosing the cash found as unaccounted income for the year under consideration, he initiated the

penalty proceedings u/s 271AAB of the Act. After hearing the contention of the assessee the Assessing Officer held that the assessee has furnished the return of income for the specified previous year declaring undisclosed income. After search action the assessee already admitted the cash found as undisclosed income in the search proceedings as well as in the post search proceedings this fact is not disputed and thereby offered the same in the return of income as undisclosed income. The ld. AO thus noted that the assessee has admittedly declared cash found as undisclosed income and paid tax due thereon. Therefore, the case is squarely covered by the provisions of Section 271AAB of the Act and therefore, considering the fact that the assessee has already paid tax the penalty levy of penalty @ 10% of the amount of cash found and treated as undisclosed income in the return of income for an amount of Rs. 12,00,000/- ld. AO confirmed the penalty @ 10 % of the said cash found as undisclosed income. The matter was carried to the ld. CIT(A) who held that after the amendment made in 2012 for levy of penalty in respect of search cases, wherein the explanatory notes clarifying for penalty proceedings u/s 271AAB of the Act is mandatory in nature. The ld. CIT(A) in the order made a detailed discussion on the memorandum explaining budgetary provisions of section 271AAB and held that the levy of penalty where the undisclosed income disclosed coupled with the assets not recorded the levy of penalty is automatic. As the assessee has already accepted the cash found to the

extent of Rs. 12,00,000/- as undisclosed income. Thus, the ld. CIT(A) after detailed deliberation and after examining the provisions of section 271AAB read with the memorandum of explaining budgetary provisions and considering the various cases laws cited in the order he held the assessee is liable to pay the penalty. The ld. CIT(A) has also relied upon the decision of Rajasthan High Court in the case of CIT vs. Dr. R.C. Gupta and Co. (1980) 122 ITR 567 (Raj.) wherein the jurisdictional High Court held that certain amount which is admitted as income in the return of income so filed, no further evidence would be necessary to show that it was an amount which represented his income or that it represented his undisclosed income. Here in this case the fact of the case is squarely covered that the assessee found in position cash of Rs. 12,00,000/- and the said cash was considered as undisclosed income while filing the return of income. Therefore, considering the detailed discussion and provisions of law cogently ready with the purpose of introducing the provisions in the section 271AAB we do not find any infirmity in the detailed order of the ld. CIT(A) who has held that the levy of penalty is automatic and therefore, we confirmed the action of the ld. CIT(A). In the light of this facts and circumstances of the case as discussed hereinabove, the appeal of the assessee is dismissed.

9. Since the appeal of the assessee in ITA No.272/JPR/2023 for the assessment year 2016-17 has been decided against the assessee, therefore, the decision taken therein shall also apply mutatis mutandis in the appeal of the assessee bearing ITA No. 273/JPR/2023 for the assessment year 2016-17 on similar facts and circumstances of the case (supra). Hence, this appeal of the assessee is dismissed.

In the result, the appeals of the assessee are dismissed.

Order pronounced in the open court on 06/11/2023.

Sd/-
(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-
(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 06/11/2023

*Santosh

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

1. The Appellant- Shri Bitthal Das Parwal, Jaipur,
Shri Hari Narain Parwal, Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle-3, Jaipur.
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File ITA No. 272 & 273/JPR/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar