

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

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

आयकरअपील सं./ITA No.370/JP/2023  
निर्धारणवर्ष/AssessmentYear : 2018-19

The JCIT C.R. Building, Opp.Session Court, Jaipur Road, Ajmer – 305 001	बनाम Vs.	M/s. R.P. Wood Products Pvt. Ltd. Naya Bazar, Ajmer
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AABCR 7403 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओरसे / Revenue by: Mrs. Monisha Choudhary, Addl. CIT  
निर्धारिती की ओरसे / Assesseeby : Shri C.M. Agarwal, CA

सुनवाई की तारीख / Date of Hearing : 12/09/2023  
उदघोषणा की तारीख / Date of Pronouncement: 30 /11/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal by the Revenue is directed against the order of the Id.  
CIT(A), Udaipur-2 dated 15-03-2023 for the assessment year 2018-19  
raising therein following grounds of appeal:

"1. The Id. CIT(A) has erred in law and on facts in granting relief to the assessee.

2. Whether on the facts and circumstances of the case for the assessment year under consideration, the Id.CIT(A) is justified in law deleting the penalty<sup>8</sup> to the extent of 30% out of total amounting to Rs.1,24,78,052/- levied us 271AAB(1A) of the Income Tax Act, 1961 by AO without appreciating the fact that the assessee himself failed to salvage itself by not paying taxes after search action and furnishing its return u/s 153A within due time as per the declaration made by in its statement u/s 132(4) of the Act.

2.1 At the outset of the hearing of the appeal, the Id. AR of the assessee submitted that the appeal filed by the assessee against the order of the Id. CIT(A), Udaipur dated 15-03-2023 for the same assessment year i.e.2018-19 on the very same issue of levy of penalty under section 271AAB of the Act has already been disposed off by this Bench of ITAT, Jaipur vide its order dated 11-07-2023 (ITA No. 303/JP/2023 for the assessment year 2018-19). Based on that arguments he relied upon the finding recorded in that order of the bench.

2.2 Now the Bench noted that the revenue has belatedly filed an appeal on 05-06-2023 against the order of the Id. CIT(A) , Udaipur-2 raising the grounds of appeal (supra) challenging the relief granted by the Id.CIT(A). It is also noted from the Registry record that this appeal of the Department was registered on the same date 05-06-2023 and fixed for hearing on different dates i.e. 09-08-2023, 17-08-2023, 06-09-2023 and finally appeal is heard on 12-09-2023.

2.3 The Bench has taken into consideration the submissions of both the parties and noted that the issue taken up by the revenue in the present appeal has already been decided in ITA No. 370/JP/2023 and the order of the said appeal was pronounced on 11-07-2023 by observing as under:-

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

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

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

**Penalty where search has been initiated.**

**271AAB.** (1) The Assessing Officer <sup>40</sup>[or the Commissioner (Appeals)] may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under [section 132](#) on or after the 1st day of July, 2012 but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

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

- (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;
- (ii) substantiates the manner in which the undisclosed income was derived; and
- (iii) on or before the specified date—
- (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
- (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—
- (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and
- (ii) on or before the specified date—
- (A) declares such income in the return of income furnished for the specified previous year; and
- (B) pays the tax, together with interest, if any, in respect of the undisclosed income;
- (c) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).

(1A) The Assessing Officer<sup>41</sup>[or the Commissioner (Appeals)] may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under [section 132](#) on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

- (a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, if the assessee—
- (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;
- (ii) substantiates the manner in which the undisclosed income was derived; and
- (iii) on or before the specified date—
- (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
- (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

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

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

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

***Explanation.—For the purposes of this section,—***

- (a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued <sup>42</sup>[under [section 148](#) or under [section 153A](#), as the case may be,] for furnishing of return of income expires, as the case may be;
- (b) "specified previous year" means the previous year—
- (i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of [section 139](#) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or
  - (ii) in which search was conducted;
- (c) "undisclosed income" means—
- (i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under [section 132](#), which has—
  - (A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or
  - (B) otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or
  - (ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.

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

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

13. As it is clear from the provision of the Act that penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income based on incriminating material. In the instant case information was recorded in the iphone and based on that iphone record the assessee has disclosed gross profit @ 17.48 % of Rs. 2,07,96,754/- on a total sales consideration recorded and found from the said iphone at Rs. 11,89,74,566/-. In the assessment proceeding assessee has given the explanation and has offered the income based on the statement recorded u/s. 132(4) of the Act which has not been disputed and the Id. AO has also not recorded any finding that this income so offered is supported by any assets and the same is in the nature of undisclosed income as defined in the explanation to the provision of section 271AAB of the Act. However, neither the Id. AO nor the Ld. CIT(A) has given finding on the contention of the assessee saying that the income is estimated in this case and the income so offered is not in the nature of undisclosed income of the assessee. The Id. AR of the assessee repeatedly argued that it was mere estimation of profit but not the actual income of the assessee. There is no clear finding of the Id. AO or the Id. CIT(A) that in the search corroborative any asset found to have been in the possession of the assessee. There is no evidence to establish that estimated income reflected in the recording found in the iPhone is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the

search/ assessment proceedings. Though the entries found in the iPhone does not indicate any suppression of income but it is only estimation of profit. We note from the order of the assessment as well as that of the penalty that the AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and estimation of income and bring the evidence to unearthen or quantify the said income as undisclosed income. Neither the A.O. nor the investigation wing linked the sales recorded in the iPhone in the nature of undisclosed income. Therefore, we are unable to accept the contention of the revenue that the entries recorded in the iPhone during the course of search indicates undisclosed income or asset.

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

4. We have considered the rival submissions as well as the relevant material on record. The AO has levied the penalty under section 271AAB of the Act in respect of the income surrendered by the assessee on account of LTCG from purchase and sale of equity shares. The question arises whether the surrender made by the assessee in the statement recorded under section 132(4) will be regarded as undisclosed income without testing the same with the definition as provided under clause (c) of Explanation to section 271AAB of the Act. There is no dispute that in the statement recorded under section 132(4), the assessee has disclosed the income under consideration as undisclosed income on account of LTCG. However, for the purpose of levying the penalty under section 271AAB, the primary condition is that the assessee shall pay the penalty equivalent to 10 percent, 20 percent or 30 percent of undisclosed income of specified previous year depending upon the satisfaction of the condition as provided under section 271AAB. The term "undisclosed income" has been defined in the *Explanation* to section 271AAB and, therefore, the penalty under the said provision has to be levied only when the income surrendered by the assessee falls in the ambit of undisclosed income as defined under this section. The mere disclosure of income in the statement recorded under section 132(4) would not *ipso facto* be regarded as undisclosed income unless and until it is tested as per the definition provided in the *Explanation* to section 271AAB of the Act. In the case in hand, there is no dispute that the assessee has duly recorded the transaction of purchase and sale of equity shares of the listed companies in the books of account which has yielded the capital gain in question of Rs. 3,85,30,241/-. The assessee has also shown these shares in the Balance Sheet as on 31st March, 2015 and the AO has not doubted or disturbed the holding of shares by the assessee on the date of Balance Sheet ended on 31st March, 2015. Once the transactions are duly recorded in the books of account, then the documents in the shape of slips containing the details of

LTCG found during the search would not amount to incriminating material disclosing any undisclosed income. The definition of undisclosed income as per clause (c) of *Explanation* to section 271AAB reads as under :—

“ (c) "undisclosed income" means—

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

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or (B) otherwise not been disclosed to the 54[Principal Chief Commissioner or] Chief Commissioner or 54[Principal Commissioner or] Commissioner before the date of search; or

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

The levy of penalty under section 271AAB does not dependent on the addition made during the assessment proceedings but the conditions provided under section 271AAB are precedent for levy of penalty. The assessment order is relevant only for the purpose of limitation provided under section 275 of the IT Act whereas the penalty under section 271AAB has to be imposed only when the income disclosed by the assessee falls in the ambit of undisclosed income as defined under section 271AAB of the Act. The definition of undisclosed income contemplates various forms and the primary condition is that the income of the specified previous year represented by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found during the course of search which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year. In the case in hand, since the surrender was made in respect of the LTCG recorded in the seized material, therefore, it is based on the entries in the other documents found during the course of search. The income in the shape of entries in other documents found during the course of search would be considered as undisclosed income if the said income has not been recorded in the books of account on or before the date of search. In the case in hand, it is undisputed fact that all the transactions of purchase and sale and LTCG arising from the sale of equity shares of the listed companies are duly recorded in the books of account. Therefore, it is not the case of any income of the specified year

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

(A) IN RELATION TO SHARES PURCHASE :

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

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

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

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

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

Acknowledgement of ITR filed on 02.02.2016 u/s 153A of Income-tax Act, 1961 along with computation sheet of total Income of the A.Y. 2013-14. (page nos. 94-97 of paper book)

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

Copy of Assessment Order dated 22.12.2017 u/s 143(3) r.w.s. 153A

passed by Deputy Commissioner of Income Tax, Central Circle Kota (Raj.) for the Assessment Year 2013-14 (page Nos. 99-105 of paper book)

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

Religare Securities Limited

Hem Securities Limited

Suresh Rathi Securities  
Private Limited.

**(B) IN RELATION TO SHARES SALES:**

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

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

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

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

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

Arihant Capital Markets  
Limited

Suresh Rathi Securities  
Private Limited

Hem Securities Limited

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

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

considered as undisclosed income in terms of section 271AAB of the Act. The Tribunal has taken a consistent view that the penalty under section 271AAB is not automatic but the AO has to take a decision as per the provisions of section 271AAB and particularly in the light of the definition of the undisclosed income as prescribed in the *Explanation* to section 271AAB of the Act. We further note that this Tribunal has considered this issue in case of *Raja Ram Maheshwari v. Dy. CIT* in [IT Appeal No. 992(JP) of 2017, dated 10-1-2019] in paras 12 to 14 as under :—

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

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

"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Id. 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 Id. 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 Id. A.R. has taken us to the section 271AAB of the Act and also

section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:

271AAB [Penalty where search has been initiated]: (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him—

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

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

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

(iii) On or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

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

ITA No. 1379 & 1439/JP/2018 Smt. Aparna Agarwal, Kota vs. DCIT, Kota

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

(ii) on or before the specified date-

(A) declares such income in the return of income furnished for the specified previous year; and (B) pays the tax, together with interest, if any, in respect of the undisclosed income;

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

(2) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1). Section 158BFA(2):

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

Provided that no order imposing penalty shall be made in respect of a person if— (i) such person has furnished a return under clause (a) of section 158BC; (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.

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

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

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

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

Sub section (3) of section 271AAB:

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

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

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

14. Therefore, we agree with the contentions of the Id AR that the levy of penalty under section 271AAB is not mandatory. In the instant case, it therefore needs to be examined whether there is any basis for levy of penalty or non-levy thereof and the same will depend upon the facts and circumstances of the present case which we shall discuss in subsequent paragraphs."

5. Hence in view of the facts and circumstances as discussed in detail in foregoing paras as well as following the earlier decision of this Tribunal, we hold that the income surrendered of Rs. 3,85,30,241/- on account of Long-Term Capital Gain by the assessee in the statement recorded under section 132(4) does not fall in the ambit of definition of undisclosed income as contemplated in *Explanation* to section 271AAB of the Act. Regarding cash of Rs. 82,50,000/- found during the course of search, there cannot be any dispute that the same falls in the definition of undisclosed income and the same is subject to penalty u/s. 271AAB of the Act Accordingly, the penalty levied by the AO and sustained by the Id. CIT (A) on LTCG is deleted and penalty sustained by the Id CIT(A) on cash found during the course of search is upheld.

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

15. In addition to the above decision the co-ordinate bench of this tribunal in the case of Rajendra Kumar Gupta Vs. DCIT (Supra) has considered the issue of levy of penalty and the in that case also the bench observed that once the

income does not fall in the category of undisclosed income as per provision of section 271AAB of the Act the penalty deserve to be deleted. On being consistent to the view already taken by the coordinate bench and the facts of the assessee's case shows that the entries in the IPhone and other seized documents representing the income on account of the sales of goods on commission basis and that too the profit is assessee on estimation. Thus, in the absence there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act.

In the result, appeal of the assessee is allowed.

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

From the entire gamut of the case, the Bench noted that the issue has already been disposed off by the bench in the assessee's appeal on merits where in the revenue has also participated and contended the merits of the case. In the light of that conspectus of the case the decision is given by the bench in the assessee's appeal and there is no scope to redecide the department appeal on the very same issue being it escaped from the attention of Department to file it as cross appeal. In this view of the matter, the appeal of the department is infructuous and the same is treated as dismissed.

3.0. In the result, the appeal of the Department is dismissed.

Order pronounced in the open court on 30 /11/2023.

Sd/-

(संदीप गोसाईं)  
(Sandeep Gosain)  
न्यायिकसदस्य / Judicial Member  
जयपुर / Jaipur

दिनांक / Dated:- 30/11/2023

\*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- The JCIT, Ajmer
2. प्रत्यर्धी / The Respondent- M/s.R.P. Wood Products (P)Ltd. Ajmer
3. आयकरआयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No. 370/JP/2023)

Sd/-

राठोडकमलेशजयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखासदस्य / Accountant Member

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar