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

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

आयकर अपील सं./ITA Nos. 758 & 759/JPR/2023
निर्धारण वर्ष/Assessment Years : 2018-19 & 2019-20

Prem Prakash Agarwal 429/7, Naya Bazar, Ajmer	बनाम Vs.	DCIT, Central Circle, Ajmer, Jaipur Road, Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACGPA 2972 H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 760/JPR/2023
निर्धारण वर्ष/Assessment Years : 2018-19

Ajmer Industries LLP, Naya Bazar Ajmer	बनाम Vs.	DCIT, Central Circle, Ajmer, Jaipur Road, Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABBFA 8448 A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. C. M. Agarwal (CA)
राजस्व की ओर से/ Revenue by : Sh. Ajay Malik (CIT)

सुनवाई की तारीख/ Date of Hearing : 10/01/2024
उदघोषणा की तारीख/Date of Pronouncement: 09/02/2024

आदेश/ ORDER

PER BENCH:

These three appeals are filed by the two different assessee aggrieved from the order of the Commissioner of Income Tax

(Appeals), Jaipur-5 [Here in after referred as (CIT(A))] for the assessment years 2018-19 & 2019-20 dated 08.12.2023, which in turn arises from the order passed by the DCIT, Central Circle, Ajmer passed under Section 271AAB of the Income tax Act, 1961 (in short 'the Act') dated 25.03.2022 & 26.03.2022.

2. Since the issues involved in these appeals are almost identical on facts and are almost common, except the difference in figure of levy of penalty disputed, therefore, these appeals were heard together with the agreement of both the parties and are being disposed off by this consolidated order.

3. At the outset, the ld. AR has submitted that the matter in ITA No. 758/JP/2023 may be taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwoven and the facts and circumstances of other cases are identical except the difference in the amount of levy of penalty in other cases. The ld. DR did not raise any specific objection against taking that case as a lead case. Therefore, for the purpose of the present discussions, the case of ITA No.

758/JP/2023 is taken as a lead case. Based on the above arguments we have also seen that for these appeals grounds are similar, facts are similar, and arguments were similar and therefore, were heard together and are disposed by taking lead case facts, grounds, and arguments from the folder in ITA No. 758/JP/2023.

4. Before moving towards the facts of the case we would like to mention that the assessee has assailed the appeal in ITA No. 758/JP/2023 on the following grounds;

> *"1. On the facts and in the circumstances of the case and in law the order passed by Ld. CIT (A) for confirming penalty u/s 271AAB of the Income Tax, 1961 is wrong, bad in law, invalid and void-ab-initio as the ld. AO initiated the penalty u/s 271AAB of 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).*
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> *2. On the facts and in the circumstances of the case and in law the order passed by Ld. CIT (A) for confirming penalty 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 IT. Tax Act without specifying the default of the assessee.*
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> *3. On the facts and in the circumstances of the case the ld. CIT(A) has grossly erred in confirming penalty for Rs. 2,38,320/- u/s 271AAB of the IT. Act, 1961, for the assessment year 2018-19.*
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> *The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings."*

5. The fact as culled out from the records is that a search and seizure action 132 of IT. Act, 1961, was carried out on 12.09.2018 at the residential and business premises of R. P. Group of Ajmer. Various assets along with certain incriminating document/Loose papers/Books of accounts etc. were also found, inventorized and some of them were also seized or impounded at time of search/survey u/s 132/133A of the I.T. Act.

5.1 In the year under consideration the assessee filed original return of income on 27.10.2018 declaring total income of Rs. 12,02,050/-. Total income of Rs. 12,02,290/- was offered in the return of income filed on 12.06.2019 in compliance to notice u/s 153A of the IT. Act. However, the assessee had submitted a revised computation of income u/s 153A in which total income was shown at Rs. 15,99,490/- but the same was not given any cognizance in the assessment proceedings owing to the reason that there is no such provision available in the Act to revise a return filed in response to notice u/s 153A of the IT. Act, 1961.

5.2 During the course of assessment proceedings, the assessee was asked to explain all the exhibits seized at the time of search proceedings. In response the assessee submitted that some of these deals with the details of the property sold and purchased by all Agarwal family. The assessee Shri Prem Prakash Agarwal was indulged in property brokerage business. Accordingly, the assessee offered an amount of Rs. 65,000/- on account of brokerage income and interest income of Rs. 3,32,200/- which was neither disclosed in the original return of income nor in the return of income filed in response to notice issued u/s 153A of the IT. Act, 1961 for the A.Y 2018-19. Therefore, an addition of Rs. 65,000/- plus 3,32,200/- was made on account of undisclosed brokerage income and interest income and added to the total income of the assessee for A.Y 2018-19 without considering the fact that in the assessment proceeding the assessee has offered that income by filling the revised computation of income and has paid the tax with interest. The ld. AO contended that since the assessee has not disclosed the said income in the return of income for income of Rs. 65,000 [brokerage] + 3,32,200/- [interest income] penalty u/s.

271AAB(1A) of the Act was considered to levied and accordingly penalty of Rs. 2,38,320/- was levied against the assessee.

6. Aggrieved from the order of the ld. AO levying the penalty the assessee preferred an appeal before the ld. CIT(A). Apropos to the grounds so raised by the assessee, the relevant finding of the ld. CIT(A) is reiterated here in below:

> "C As per the provision of section 271AAB(1A)(b), penalty of 60% is leviable if the assessee had not furnishes the return of income for the specified previous year declaring such undisclosed income therein and pays the tax, together with interest, if any, in respect of the undisclosed income.
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> In the present case the assessee had neither disclosed such unaccounted income in ROI filed nor paid any taxes before filing ROI. Instead of this, the assessee had filed revised computation just before finalisation of the assessment order. The language of this section is very much clear. The law does not allow any exemption from penalty on filing revised computation during assessment proceedings in this section. The exemption up to 30% penalty has provided only if the assessee had offered such undisclosed income in ROI and paid taxes on it. As the assessee had not complied the above conditions, therefore the penalty at the rate of 60% as mentioned in this section is clearly applicable. It is important to mention here that there are specified conditions in the Act for imposing penalty at the rate 30% or 60%. Thus, any liberal view cannot be taken that the revised computation filed during assessment proceedings to be considered as ROI filed before due date.
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> D. Therefore, I uphold the order of the AO, for imposing the penalty @ 60 percent as per provisions of clause – (b) of sub-section (1A) of section 271AAB of the IT. Act, 1961."

7. Feeling dissatisfied from the above order of the ld. CIT(A), assessee preferred an appeal before this tribunal on the grounds

as taken in appeal memo and reproduced at para 4 above. In support of the grounds so raised by the assessee the ld. AR of the assessee, vehemently submitted that there is no limb upon which the ld. AO intend to levy the penalty has not been specified and in support he draw out attention to the notice issued by the ld. AO at page 1 of his paper book. Since the assessee has already filed the revised computation of income and has paid the tax along with the interest in the assessment proceeding the penalty is not leviable. To support the view so advanced the ld. AR of the assessee relied upon the various judgment and specifically the decision of Jaipur bench in the case of M/s. R. P. Wood Products Private Limited in ITA no. 168/JP/2023 and Shri Ghanshyam Tak in ITA no. 167/JP/2023 wherein on the similar facts the penalty levied was quashed. The ld. AR of the assessee also relied upon the detailed written submission in support of various contentions raised in this appeal and the written submission reads as under:

> "Most respectfully, the humble appellant submits that the present appeal has been filed against the order dated 08/12/2023 passed by the Ld CIT (A) Jaipur -5 whereby the Ld CIT(A) has dismissed the appeal in toto, summarily rejecting all submissions/contentions of the appellant. Ld CIT(A) confirmed the penalty u/s 271AAB of the Income Tax Act levied by the Ld Assessing Officer at Rs 2,38,320/
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> Most humbly it is submitted that order of the Ld Assessing Officer levying penalty u/s 271AAB of the Income Tax Act was challenged

before the Ld CIT (A) -5 Jaipur specifically raising the following grounds of Appeal in addition to the grounds challenging the order on merit:

"That 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 Income Tax Act, 1961 in the assessment order without specifying the limbs of section 271AAB (IA) of the Act whether it is for clause (a) or clause (b) section 271AAB(1A).

2, That 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."

All the grounds of appeal have been summarily rejected by the Ld CIT(A) without considering various judicial precedents on the issue submitted before him. Moreover, absolutely identical issue decided by the Hon'ble Bench in other group case namely M/s R P Wood Products Pvt Ltd specifically dealing with absolutely identical legal issue has been ignored/ erroneously distinguished by the Ld CIT (A).

Facts of the case have been duly noted by the Ld CIT (A) as under;

"Para 3.1 A search and seizure action u/s 132 of the I.T.Act, 1961 was carried out on 12.09.2018 at the residential and business premises of R.P.Group of Ajmer. Various assets along with certain incriminating documents/loose papers/Books of accounts etc. were also found, inventoried and some of them were also seized or impounded at the time of Search/Survey u/s 132/133A of the I.T.Act,1961.

3.2 The assessee was associated with the above Group. In the instant case the assessee had filed its original ROI u/s 139(1) of the I.T.Act,1961 on 27.10.2018 declaring thereon total income of Rs. 12,02,290/-. Total income of Rs. 12, 02,290/-was offered in the return of income filed on 12.06.2019 in compliance to notice u/s 153A of the I.T.Act, 1961. However, the assessee had submitted a revised computation of income u/s 153A in which total income was shown at Rs. 15, 99,490/- but the same was not given any cognizance in the assessment proceedings owing to reason that there is no such provision available in the Act to revise a return filed in response to notice u/s 153A of the I.T.Act, 1961."

Thus from the facts noted by the Ld CIT(A) it is evident that assessee is a part of RP group of Ajmer and was subjected to simultaneous search & seizure action in R.P. Group.

So far as the legal challenge made to the order of the Ld Assessing Officer, the Ld CIT (A) rejected the related grounds as under:

" Para 5 Decision (For grounds 1-3)

I have considered the facts of the case, gone through the relevant assessment orders, penalty orders and the paper-book & submission of the appellant and the various case laws. All grounds are related to only imposing penalty u/s 271AAB of the I.T. Act, 1961, therefore all of them are taken as together. The contentions/submissions of the appellant are being discussed and decided as under:

5.4 Penalty proceedings u/s 271AAB (1A) of the I.T.Act, 1961 were also initiated separately and notice issued on 21.05.2021 which was duly served. Penalty u/s 271AAB (1A) of the I.T.Act, 1961 was imposed @ 60% of undisclosed income of Rs.3, 97,200/- (i.e. 65,000+3, 32,200) of Rs. 2, 38,320/-.

5.5 As per the provisions of section 271AAB (1A) of the I.T. Act, 1961, the assessee was liable to pay a sum computed at the rate of Sixty per cent of the undisclosed income of the specified previous year by way of penalty in addition to tax payable by it as the undisclosed income was neither declared in the ITR filed u/s 139(1) of the Act nor in the return submitted in response to the notice issued u/s 153A of the Act.

5.6 The AO held that the income so surrendered during the course of assessment proceedings was yet to be recorded in the books of account and therefore was in the nature of "undisclosed income" as defined u/s 271AAB of the Act thus qualifying for levy of penalty under the said section. The AO has clearly mentioned in the notice u/s274 r.w.s 271 and 271AAB of the I.T.Act,1961 that undisclosed income detected pertains to specified previous year and in the assessment order, the AO had made addition only on account of undisclosed income found during the course of search/survey proceedings. Moreover, the appellant had not made compliance of the provisions of clause (a) of the section 271AAB (1A) of the I.T.Act,1961, hence the AO had imposed the penalty as per the provisions of clause (b) of section 271AAB (1A) of the I.T.Act,1961. Hence the contention of the appellant is not acceptable that the notices were without specifying the default of the assessee and without specifying the clause (a) or (b) of the section 271AAB (1A) of the I.T.Act,1961. "

Thus from the decision of the Ld CIT(A) it is evident that Ld Assessing Officer has not specified the exact charge against the assessee either in the assessment order or in the show cause notice or in the penalty

notice. Ld CIT (A) merely inferring the charge from the eventual order passed by the Ld Assessing Officer. However, the route taken by the Ld CIT (A) of inferring the cause from the effect is not a legally permissible route. In penalty proceedings, the Assessing Officer is required to show cause the appellant with the specific charge against him. After levy of penalty, deducing the charge from the penalty imposed by the Ld Assessing Officer does not met the requirement of law. Evidently from the penalty levied by the Ld Assessing Officer @60%, Ld CIT(A) is inferring that penalty has been levied under clause (b) of Section 271AAB(1A) of the Income Tax Act. From the order of the Ld CIT (A) it is undisputed fact that before passing the final order, the assessee was never show caused with the specific charge against him.

The law in this regard is fully settled by numerous decisions of the Hon'ble Bench, decisions of coordinate Benches, various High Courts and Hon'ble Supreme Court. The issue is squarely covered by the decision of the Hon'ble Bench in the case of other group concern namely M/s R. P. Wood Products Private Limited, Naya Bazar, Ajmer Vs.DCIT, Central Circle, Ajmer ITA. No. 168/JP/2023 dated 5.7.2023 wherein the Hon'ble Bench held as under:

"*We further note that in the case in hand, the AO in the show cause notices has neither specified the grounds and default on the part of the assessee nor even specified the undisclosed income on which the penalty was proposed to be levied. Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB(1A) are very vague and silent about the default of the assessee and further the amount of undisclosed income on which the penalty was proposed to be levied. Even the Hon'ble Jurisdictional High Court in case of Shevata Construction Co. Pvt. Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016 has concurred with the view taken by Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Karnataka) which was subsequently upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242 taxman 180 (SC). Accordingly, following the decision of the Coordinate Bench as well as Hon'ble Jurisdictional High Court, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and consequently the order passed under section 271AAB is not sustainable and liable to be quashed.*"

Ld CIT (A) instead referring to the decision of the Hon'ble Bench in ITA No 302/JP/2023 tried to distinguish the factual matrix of the present case from the case decided by the Hon'ble Bench. However, it is submitted that the penalty in ITA No 302/JP/2023 was cancelled by the Hon'ble Bench on merit itself and therefore, did not consider the specific challenge to the jurisdiction of the Assessing Officer in

imposing penalty without show causing the assessee with specific charge of Section 271AAB(1A) of the Income Tax Act. However, in ITA No 168/JP/2023, the Hon'ble Bench had an occasion to consider the specific legal challenge to the jurisdiction of the Assessing Officer for levying penalty which has been decided by the Hon'ble Bench in favour of the appellant.

The present issue being squarely covered by the decision dated 5.7.2023 of the Hon'ble Bench in ITA No 168/JP/2023; the penalty order may please be cancelled. It is prayed accordingly.

Identical issue has also been decided by the Hon'ble Bench in the decision dated 05/07/2023 in ITA No 167/JP/2023 in the case of Sh Ghanshyam Tak Vs DCIT Central Circle, Ajmer.

Reliance is also placed on the decision of the Hon'ble Bench dated 08/11/2023 in the case of JCIT Ajmer Vs Vijay Kumar Saini ITA No 371/JP/2023.

Submissions of merit –

While upholding the levy of penalty on the appellant, the Ld CIT (A) held as under:

"Para 5.12; In the instant case, *it is evident that during the course of assessment proceedings, the assessee had offered the undisclosed brokerage income of Rs.65,000/- and interest income of Rs. 3,32,200/- for taxation but the assessee had not disclosed this income in the return of income filed in response to notice issued u/s153A of the I.T.Act, 1961. Meanwhile during the course of assessment proceedings, the assessee had submitted a revised computation of income declaring therein undisclosed brokerage income of brokerage income of Rs. 65,000/- and interest income of Rs. 3,32,200/-.* It shows that the assessee was aware with the facts of the case and entries found in the seized material and consequences of hiding the true facts of the case. The assessee has not voluntarily offered the undisclosed brokerage income of brokerage income of Rs. 65,000/- and interest income of Rs. 3, 32,200/- but it was based on the facts and the entries found in the seized material.

5.13 The AO had accepted the income so offered by the assessee during the course of assessment proceeding by considering that the income disclosed by the assessee falls under the definition of the undisclosed income of the assessee and the assessee has not disclosed this income earlier before the search proceedings."

Thus, it is evident that the penalty has been imposed on the income disclosed by the Appellant though through filing revised computation of income. However, it is submitted that there is no difference in

disclosure of income in the return or disclosure through filing revised computation before the completion of assessment proceedings. Therefore, the penalty which has been levied only on the returned income as substituted by the revised computation is not leviable even on merits. Reliance in this regard is placed on the following decisions:

Hon'ble High Court of Madya Pradesh in the case of CIT Vs Suresh Chand Mittal 241ITR124 (2000)MP

Supreme Court Judgement in Sir Shadilal Sugar and General Mills Ltd. Vs. CIT, [1987]168 ITR 705

Hon'ble ITAT Delhi Bench in the case of M.G.Contractors Pvt.Ltd. Vs DCIT, Central Circle-1, Faridabad in ITA Nos 7034 to 7038/Del/2014

Hon'ble High Court of Gujarat in the case of Cheldas Khushaldas Patel And Ors. vs Commissioner Of Income-Tax 1992, 196 ITR 200 Guj held as under:

" *7. The Commissioner, in the case of the firm, refused to waive penalty and interest for the assessment years 1976-77 and 1977-78 only on the ground that the returns filed beyond the prescribed period could not be considered to be returns in the eye of law. As pointed out above, since the returns for the said two assessment years were filed beyond the period prescribed for making assessment, the Income-tax Officer issued notice under section 148 of the Act and at the request of the petitioners treated the returns which were earlier filed as returns filed in response to the notice under section 148. It is urged on behalf of the Revenue that disclosure of income voluntarily and in good faith, as envisaged under sub-clauses (a) and (c) of sub-section (1), could be made only by filing a valid return and, if disclosure was not made by a valid return, such disclosure could not be considered, even if it was made voluntarily and in good faith*

8. We are not inclined to accept the submission made on behalf of the Revenue. There is nothing in the above provision to support the Revenue's argument that disclosure could be made only by a valid return. What the provision envisages is a disclosure and not a disclosure by a valid return. It is significant that the provision does not require the filing of a return of income for disclosure of income. Disclosure need not necessarily be made by filing returns of income. It could be made either by an application or a letter or a return which might be beyond the period prescribed for making assessments. A return filed after the expiry of the period of limitation for making assessment would, in our opinion, amount to disclosure of income within the meaning of sub-clauses (a) and (c) of sub-section (1) of section 273A. It cannot be gainsaid that the return of income discloses

the total income of the assessee filing the return. Therefore, merely because the return of income is filed beyond the period prescribed for making assessment, it would not mean that it does not disclose income. As pointed out above, a return of income does disclose the total income of the assessee and such return would not cease to be disclosure of his total income, merely because it is filed beyond the period prescribed for making assessment. In other words, it is not necessary that there should be a valid return filed before the expiry of the period prescribed for making assessment for making disclosure as envisaged under sub-clauses (a) and (c) of sub-section (1) of section 273A. Sub-clause (b) of sub-section (1) also speaks about full and true disclosure of particulars of income. So far as a case covered by clause (ii) of sub-section (1) is concerned, such full and true disclosure has to be made prior to the detection by the Income-tax Officer of concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income. Such disclosure could also be by a revised return or an application or a letter addressed to the taxing authority. Disclosure contemplated by sub-clauses (a), (b) and (c) cannot have different meanings. In other words, it has the same meaning and such disclosure could be made by a return within or beyond the prescribed time for making assessment or by a letter or an application to the taxing authority."

Thus, in view of the legal position as to the true import of filing revised computation of income, explained by the Hon'ble High Court of Gujarat, the appellant cannot be held guilty of not furnishing correct particulars of its income. Merely because there is no express provision u/s 153A of the Act for revising the return of income, the revised computation which has the effect of substituting the original computation and particularly in the circumstances when the revised computation has not been tinkered with by the Ld AO in any manner and has been accepted as it is, the assessee should not be visited with a penalty for citing technicalities alone. Evidently, the revised computation of income is in substitution of original computation of income and has to be treated as such. In the circumstances, the appellant cannot be visited with a penalty.

Hon'ble Ahmedabad Bench of the Tribunal in decision dated 17th May 2023 in the case of *DCIT, Central Circle-1(1), Ahmedabad v. NBM Iron & Steel Trading Pvt. Ltd. [ITA No. 205/Ahd/2022, dated May 17, 2023]* held that if an assessee during a survey surrendered his income and later showed that income in his regular income tax return, no penalty can be imposed on the assessee.

Delhi Bench of the Hon'ble ITAT in the case of ACIT vs. Ashok Raj Nath [2015-ITR V-ITAT-MUM-129] has held that when the assessee voluntary disclosed additional income in the course of assessment proceedings and paid tax thereon and revenue has not placed any

material that assessee want to conceal his income there is no basis arises for imposition of penalty.

Hon'ble ITAT Mumbai Bench in the case of ITO vs. Gope M. Rochlani [2013-ITRV-ITAT-MUM-119] has held that undisclosed income offered in belated return filed u/s 139(4) is eligible for immunity from penalty under Explanation 5 to s. 271(1)(c).

In the circumstances, it is prayed that the penalty levied by the Ld Assessing Officer and upheld by Ld CIT (A) be cancelled. It is prayed accordingly."

8. The ld DR is heard who relied on the findings of the lower authorities and more particularly advanced the similar contentions as stated in the order of the ld. CIT(A). The ld. DR further submitted that the assessment is pursuant to the search, merely filling the revised computation does not escape the penal provision of the Act.

9. We have heard the rival contentions and perused the material placed on record. The brief facts of the case are that a search and seizure action 132 of IT. Act, 1961, was carried out on 12.09.2018 at the residential and business premises of R. P. Group of Ajmer. Various assets along with certain incriminating document/Loose papers/Books of accounts etc. were also found, inventorized and some of them were also seized or impounded at time of search/survey u/s 132/133A of the I.T. Act. In the year under

consideration the assessee filed original return of income on 27.10.2018 declaring total income of Rs. 12,02,050/-. In response to notice u/s 153A of the IT. Act the assessee declared the same income. During the pendency of assessment proceeding pursuant to the search the assessee submitted a revised computation of income u/s 153A in which total income was shown at Rs. 15,99,490/- but the same was not given any cognizance in the assessment proceedings owing to the reason that there is no such provision available in the Act to revise a return filed in response to notice u/s 153A of the IT. Act, 1961. As the assessee Shri Prem Prakash Agarwal was indulged in property brokerage business. Accordingly, the assessee offered an amount of Rs. 65,000/- on account of brokerage income and interest income of Rs. 3,32,200/- advances which was neither disclosed in the original return of income nor in the return of income filed in response to notice issued u/s 153A of the IT. Act, 1961 for the A.Y 2018-19. Therefore, an addition of Rs. 65,000/- plus 3,32,200/- was made on account of undisclosed brokerage income and interest income and added to the total income of the assessee for A.Y 2018-19 without considering the fact that in the assessment proceeding the

assessee has offered that income by filling the revised computation of income and has paid the tax with interest. The ld. AO contended that since the assessee has not disclosed the said income in the return of income of brokerage for Rs. 65,000 and Interest income on the advances which was offered as income for an amount of Rs. 3,32,200/- was added as additional income to the income returned by the assessee. The ld. AO also initiated penalty u/s. 271AAB(1A) of the Act and consequently levied penalty of Rs. 2,38,320/- against the assessee. Based on these set of facts the bench noted that the ld. AO accepted the additional income offered by the assessee based on the seized documents by filling in a revised computation of income which has not been disputed by the ld. AO. The bench noted that the provision of section 271AAB of the Act empower the ld. AO to levy the penalty when the income is undisclosed income. The term "undisclosed income" has been defined in clause (c) of 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. Therefore, it is imperative to peruse the said definition, and it 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 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.

10. As it is evidence that 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. The penalty under section 271AAB cannot be treated as automatic but the ld. 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 on the similar set of facts in the case of M/s. R. P. Wood Products Private Limited in ITA no. 168/JP/2023, Shri Ghanshyam Tak in ITA no. 167/JP/2023 & Shri Vijay Kumar Saini in ITA no. 371/JP/2023 has quashed the penalty considering the

decision of this bench in the case of Ravi Mathur in ITA no. 969/JP/2017 and Rejendra Kumar Gupta in ITA no. 359/JP/2017, based on findings so recorded in those orders and considering the above discussion we are of the considered view that the provisions of Section 271AAB, it can be seen that, it 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. Thus, considering that aspect of the matter and considering the discussion so recorded we agree with the contentions of the ld Counsel for the assessee that the levy of penalty under section 271AAB is not mandatory or automatic, same 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 case. Hence in view of the facts and circumstances as discussed in detail in foregoing paras as well as following the decision of this Tribunal cited supra of which issue in present case is squarely covered with the decision of the coordinate bench in the case of R. P. Wood Products Pvt. Ltd., vs. DCIT in ITA No. 302/JP/2023 dated 11/07/2023 wherein the tribunal decision held 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 ld. AO accepted the additional income offered by the assessee based on the seized documents on profit estimate basis which has not been disputed by the ld. AO. We also take note of the fact there is no whisper in the order of the assessment that the income so offered is of the nature of undisclosed income. The bench noted that the provision of section 271AAB of the Act empower the ld. AO to levy the penalty when the income is undisclosed income. To understand the charge of the penalty on the assessee within the provision of section 271AAB of the Act we first deal with the legal provision of the Act.

> Penalty where search has been initiated.
>
> 271AAB. (1) The Assessing Officer [40][or the Commissioner (Appeals)] may, not- withstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section

132 on or after the 1st day of July, 2012 but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

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

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

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

(*iii*) on or before the specified date—

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

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

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

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

(*ii*) on or before the specified date—

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

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

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

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

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

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

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

(*iii*) on or before the specified date—

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

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

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

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

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

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

(*a*) "specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued [42][under section 148 or under section 153A, as the case may be,] for furnishing of return of income expires, as the case may be;

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

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

(*ii*) in which search was conducted;

(*c*) "undisclosed income" means—

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

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

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

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

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

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

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

finding on the contention of the assessee saying that the income is estimated in this case and the income so offered is not in the nature of undisclosed income of the assessee. The ld. AR of the assessee repeatedly argued that it was mere estimation of profit but not the actual income of the assessee. There is no clear finding of the ld. AO or the ld. CIT(A) that in the search corroborative any asset found to have been in the possession of the assessee. There is no evidence to establish that estimated income reflected in the recording found in the iPhone is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though the entries found in the iPhone does not indicate any suppression of income but it is only estimation of profit. We note from the order of the assessment as well as that of the penalty that the AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and estimation of income and bring the evidence to unearth or quantify the said income as undisclosed income. Neither the A.O. nor the investigation wing linked the sales recorded in the iPhone in the nature of undisclosed income. Therefore, we are unable to accept the contention of the revenue that the entries recorded in the iPhone during the course of search indicates undisclosed income or asset.

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

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

undisclosed income of specified previous year depending upon the satisfaction of the condition as provided under section 271AAB. The term "undisclosed income" has been defined in the *Explanation* to section 271AAB and, therefore, the penalty under the said provision has to be levied only when the income surrendered by the assessee falls in the ambit of undisclosed income as defined under this section. The mere disclosure of income in the statement recorded under section 132(4) would not *ipso facto* be regarded as undisclosed income unless and until it is tested as per the definition provided in the *Explanation* to section 271AAB of the Act. In the case in hand, there is no dispute that the assessee has duly recorded the transaction of purchase and sale of equity shares of the listed companies in the books of account which has yielded the capital gain in question of Rs. 3,85,30,241/-. The assessee has also shown these shares in the Balance Sheet as on 31st March, 2015 and the AO has not doubted or disturbed the holding of shares by the assessee on the date of Balance Sheet ended on 31st March, 2015. Once the transactions are duly recorded in the books of account, then the documents in the shape of slips containing the details of LTCG found during the search would not amount to incriminating material disclosing any undisclosed income. The definition of undisclosed income as per clause (c) of *Explanation* to section 271AAB reads as under :—

" (c) "undisclosed income" means—

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

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

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

The levy of penalty under section 271AAB does not dependent on the addition made during the assessment proceedings but the conditions provided under section 271AAB are precedent for levy of penalty. The assessment order is relevant only for the purpose of limitation provided under section 275 of the IT Act whereas the penalty under section 271AAB has to be imposed only when the income disclosed by the assessee falls in the ambit of undisclosed income as defined under section 271AAB of the Act. The definition of undisclosed income contemplates various forms and the primary condition is that the income of the specified previous year represented by any money, bullion,

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

(A) IN RELATION TO SHARES PURCHASE :

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

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

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

Copy of Corporate Action of the Company informed to Bombay Stock Exchange

(Effect of Stock Split)(page No. 90 of paper book)

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

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

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

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

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

Religare Securities Limited

Hem Securities Limited

Suresh Rathi Securities Private Limited.

(B) IN RELATION TO SHARES SALES:

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

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

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

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

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

Arihant Capital Markets Limited

Suresh Rathi Securities Private Limited

Hem Securities Limited

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

that it should represent *inter alia* any entry in the books of account or other documents found during the search but the said income is not recorded in the books of account. In the case in hand, the document found during the search is not an incriminating material when the entry and the income were duly recorded in the books of account. Therefore, the statement of the assessee recorded under section 132(4) would not constitute incriminating material. Therefore, the said income disclosed by the assessee cannot be considered as undisclosed income in terms of section 271AAB of the Act. The Tribunal has taken a consistent view that the penalty under section 271AAB is not automatic but the AO has to take a decision as per the provisions of section 271AAB and particularly in the light of the definition of the undisclosed income as prescribed in the *Explanation* to section 271AAB of the Act. We further note that this Tribunal has considered this issue in case of *Raja Ram Maheshwari* v. *Dy. CIT* in [IT Appeal No. 992(JP) of 2017,dated 10-1-2019] in paras 12 to 14 as under :—

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

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

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

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

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

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

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

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

(iii) On or before the specified date—

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

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

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

(ii) on or before the specified date-

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

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

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

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

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

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

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

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

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

Sub section (3) of section 271AAB:

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

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

direct in sub section 2 there of intended to directory'. In other words, while payment of interest is mandatory levy of penalty is discretionary. It is trite position of law that discretion is vested and authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of the each case. Plain reading of section 271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."

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

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

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

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

On being consistent we hold that income offered in the assessment proceeding by filling the revised computation and the veracity of the same is not doubted the income so disclosed shall not partakes the character of undisclosed income as contemplated in Explanation to section 271AAB of the Act. Accordingly, the penalty of Rs. 2,38,320/- levied by the ld. AO and sustained by the ld. CIT (A) is deleted.

In terms of these observations, the appeal of the assessee in ITA no. 758/JP/2023 is allowed.

11. The fact of the case in ITA No. 759 & 760-JP-2023 is similar to the case in ITA No. 758-JP-2023 and we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the assessee in this appeal No. 759 & 760/JP/2023 is equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 758/JPR/2023 for the Assessment Year 2018-19 shall apply mutatis mutandis in the

case of Prem Prakash Agarwal & Ajmer Industries LLP in ITA No. 759 & 760-JP-2023 for the Assessment Year 2018-19 & 2019-20.

In the result, three appeals of the assessee are allowed.

Order pronounced in the open court on 09/02/2024.

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

जयपुर / Jaipur
दिनांक / Dated:- 09/02/2024
*Ganesh Kumar, PS
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Prem Prakash Agarwal, Ajmer
   Ajmer Industries LLP, Ajmer
2. प्रत्यर्थी / The Respondent- DCIT, Central Circle, Ajmer, Jaipur Road, Ajmer
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA Nos. 758, 759 & 760/JPR/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar