

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH: CHENNAI		
श्री मंजूनाथा. जी, लेखा सदस्य एवं श्री मनोमोहनदास, न्यायिक सदस्य के समक्ष BEFORE SHRI MANJUNATHA. G, ACCOUNTANT MEMBER AND SHRI MANOMOHAN DAS, JUDICIAL MEMBER		
आयकर अपील सं./ITA No.1168/Chny/2023 निर्धारण वर्ष/Assessment Year: 2019-20		
M/s.Enrica Enterprises Pvt. Ltd., No.85, Matruvazhi Salai, (Bypass Road), Poonamallee, Chennai-600 056. [PAN: AAACE 9199 F] (अपीलार्थी/Appellant)	V.	The Dy. Commissioner of – Income Tax, Central Circle-3(4), Chennai. (प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Shri D. Anand, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Shri R. Clement Ramesh – Kumar, CIT
सुनवाई की तारीख/Date of Hearing	:	14.02.2024
घोषणा की तारीख /Date of Pronouncement	:	06.03.2024

आदेश / ORDER

PER MANJUNATHA. G, AM:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-20, Chennai, dated 17.08.2023 and pertains to assessment year 2019-20.

2. The assessee has raised the following grounds of appeal:

1. The order of the learned Commissioner Of Income (Appeals)-20, is wrong, illegal and is opposed to law. The learned Commissioner (Appeals) erred in law and on facts in confirming the action of learned assessing officer in levying penalty under section 271AAB of the Act.

:: 2 ::

2. *The learned Commissioner Of Income (Appeals)-20 ought to have seen that penalty proceedings is independent of assessment proceedings and therefore penalty is not leviable merely on the ground that certain additions have been made in the assessment proceedings.*

3. *The learned CIT(A) ought to have seen that section 271AAB of Act has three limbs as specified in Section i.e. 271AAB (1) (a), (b) & (c) and the notice issued to the does not specify in which limb the penalty sought to be levied and merely mentioning Section 271AAB in notice do not satisfy the requirement of law.*

4. *The learned CIT(A) ought to have seen the assessing officer while issuing notice for levy of penalty, the notice issued u/s 274 r.w.s 271AAB of the Act should specifically mention that penalty u/s 271AAB of the Act is being levied @10/20/ 30% since the appellants case falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. The AO in the impugned notice ought to have specifically mentioned as to why the appellant should not be visited by penalty @30% of the undisclosed income since the appellants case falls under clause-c of section 271AAB of the Act. In te absence of the same the said notice is vitiated and penalty is unsustainable in law.*

5. *The learned CIT(A) ought to have seen that in absence of the requisite contents of specific charge in notice under section 271 r.w.s. 271AAB the initiation of proceedings cannot be sustained and is bad in law.*

The learned CIT(A) ought to have seen that a bare reading of the notice under section 271 rws 271AAB suggests that the notice has been issued in a casual fashion. The officer has not applied his mind and no specific charge is mentioned for which the appellant is required to be show caused.

6. *The learned CIT(A)-20 ought to have seen that the penalty proceedings is deemed to have been initiated only with the issue of notice under section 271AAB and that the said notice should specifically state the reasons for levy of penalty. Failure on the part of the AO to specifically state the reasons under which limb the penalty is levied would tantamount to failure to record satisfaction as well as non-application of mind thereby making the said levy illegal and opposed to law. In the instant case the penalty notice suffers from aforesaid infirmity.*

7. *The learned CIT(A) ought to have seen that the AO in the assessment proceedings has unequivocally and unambiguously expressed his satisfaction on the explanation offered by the appellant and the materials submitted to substantiate the same. The AO has no where justified how the appellants case would not fall under section 271AAB.*

8. *The learned CIT(A) ought to have seen that for levy of penalty under section 271AAB the A.O. must establish that there is undisclosed income on the basis of incriminating material and that that Penalty u/s 271AAB is leviable only on undisclosed income and not merely on an admission made by the assessee u/s.132 (4). The assessing officer has miserably failed to quantify the undisclosed income.*

:: 3 ::

9. *The learned CIT(A) ought to have seen that the AO while levying penalty under section 271 AAB failed to follow the specific definition of undisclosed income provided in Section 271AAB, being penal provision and that the same is required to be strictly construed in light of satisfaction of conditions specified therein.*

10. *The learned CIT(A) ought to have seen that appellant has admitted a consolidated sum of Rs. 113.99 Crores over the Financial Years and accordingly allocated the admitted sum over a period of 5 years on adhoc basis and the same has been assessing officer has accepted and found to be in order the income offered by the appellant by estimating disallowance of portion of marketing expense over a period.*

11. *The learned CIT(A) ought to have seen that the sum of Rs.32.46 Crores does not qualify as "income of specified previous year not recorded in the books of account before the date of search" so as to attract clause (i) of Explanation (c) to section 271AAB.*

12. *The learned CIT(A) ought to have seen that the discretion to impose penalty must be exercised judicially. The learned CIT(A) failed to see that addition made in the assessment order is on ad hoc basis, based on estimated disallowances of portion of marketing expense and based on surrender of income not backed by any incriminating material and would therefore not attract penalty under section 271AAB.*

13. *The learned CIT(A) failed to see that in the instant case addition is made by the assessing officer merely based on income surrendered by the appellant and not based on any incriminating material warranting levy of penalty. Neither the appellant nor the investigation team had any evidence as to the quantum of inflated expenditure year wise.*

14. *The learned CIT(A) ought to have seen that the sum of Rs.32.46 Crores does not represent " any entry in respect of 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" so as to attract clause (ii) of Explanation (c) to section 271AAB.*

15. *The learned Commissioner ought to have seen that penalty cannot be levied merely because an amount taxed as income as held by Hon'ble Supreme Court in the case of M/s.Hindustan Steel Ltd. vs State of Orissa (1972) 83 ITR 26(SC) and decision of Hon'ble High Court of Delhi in Escorts Finance Ltd. (2009) 226 CTR (Del) 105.*

For these and other grounds that may be rendered at the time of hearing it is most humbly prayed that the Hon'ble Tribunal may be pleased to allow the appellants appeal and thus render justice.

3. The brief facts of the case are that the assessee, M/s.Enrica Enterprises Pvt. Ltd., is engaged in the business of manufacture and sale of Indian Made Foreign Liquor (IMFL) and it is one of the prime suppliers to M/s.Tamilnadu State Marketing Corporation Ltd (TASMAC). A search

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and seizure operations u/s.132 of the Income Tax Act, 1961 (in short "the Act"), was conducted at the premise of the assessee on 06.12.2018. During the course of search, a sum of Rs.55,27,70,000/- of unaccounted cash was found and seized from the residential premise of Shri. M.Kothandarami Reddy and six individuals, who had identified themselves as associates of the assessee and claimed that they have held the cash for and on behalf of the assessee. The amount of cash seized during the course of search and seizure on 06.12.20128 in the residential premise of Shri M.Kothandarami Reddy, Director of the assessee and others was tabulated in Page No.2 of the assessment order. In the course of search, a sworn statement u/s.132(4) of the Act, was recorded from Shri S.D.Rami Reddy, one of the Director of the assessee company and in response to Q.Nos.17 & 18, he has explained the ***modus operandi*** of generation of cash seized during the course of search and also admitted a sum of Rs.113.99 Crs. as additional income for the period from 01.04.2014 to 06.12.2018 which includes cash seizure of Rs.55.27 Crs. The Director of the assessee company has also explained the ***modus operandi*** of generation of unaccounted cash by way of inflated expenditure booked under the head marketing expenditure being 'gift articles' purchased and admitted that on an average 1/3rd of actual expenditure accounted in the books of accounts, has been received back in cash from the suppliers. The relevant question and answer in the

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statement recorded u/s.132(4) of the Act, from Shri S.D.Rami Reddy, was reproduced as under:

Q.17. While answering to Q.6, in your sworn statement recorded under section 132(4) dated 9.12.2018, while asking the modus operandi of generating unaccounted cash, you have stated that you will raise bogus bills for which you pay them through banking channels and receive cash from them. Please go through your statement and clarify about generation of unaccounted cash.

Ans. Sir, we have not raised any bogus bills from our suppliers of gift articles to generate unaccounted cash. However, we received back one third of the invoice value on an average in the form of cash from our gift article suppliers. Since this amounts to inflation of the expenditure in our books of account, we undertake to withdraw of claim towards expenditure in the respective years.

Q:18. Please furnish the quantity of cash generated invoice-wise and party -wise with details of suppliers?

Ans. Sir I don't have the invoice-wise and party -wise details of cash generated. However, I am here by submitting year-wise details of cash generated on this account as under –

S.No.	Financial Year	Amount in Crores
1	2014-15	16.39
2	2015-16	23.62
3	2016-17	15.79
4	2017-18	25.73
5	2013-19	32.46
		113.99

However, no corroborative evidence to the sworn statement was unearthed during search.

4. Consequent to search proceedings, the case was taken up for scrutiny. In response to notice under section 153A of the Act, issued by the AO, the assessee has filed its return of income on 25-11-2020 admitting a total income of Rs.125,92,51,312/-, which includes additional income offered during the course of search towards inflated expenditure amounting to Rs. 32.46 crores. During the course of assessment proceedings, on enquiry with the suppliers of gift articles, replies were received from the suppliers of gift articles along with account copy as

:: 6 ::

reflected in the books of the assessee, where, all of them stated to have supplied gift articles to the assessee, but some of them also stated that the assessee took back some cash at times. The AO completed the assessment u/s.143(3) r.w.s.153A of the Act on 26.07.2021, accepting the additional income voluntarily offered by the assessee towards inflated expenditure under the head 'gift articles'. While completing the assessment, the AO observed that after considering relevant submissions of the assessee, the income offered by the assessee, including estimated disallowance of portion of marketing expenses, is found to be in order and accepted. The relevant submissions of the assessee and findings of the AO are reproduced as under:

In continuation to the above, during assessment proceedings, assessee claimed that no corroborative evidence to the sworn statement w.r.t. found/seized materials was unearthed so as to suggest the culpability of tax evasion.

After going through the circumstances in entirety. The income offered by the assessee, including the estimated disallowance of portion of marketing expenses, is found to be in order and accepted.

5. The AO, along with the assessment order dated 26.07.2021 initiated penalty proceedings u/s.274 r.w.s.271AAB of the Act, dated 26.07.2021 and called upon the assessee to show cause 'as to why' an order imposing penalty should not be made. In response, the assessee vide letter dated 07.08.2021 submitted that there is no undisclosed income as defined in Explanation-C to Sec.271AAB (1)(a) of the Act, and thus, question of levying penalty u/s.271AAB of the Act, does not arise. The AO after considering relevant submissions of the assessee and also taken note of relevant provisions of Sec.271AAB of the Act, observed that it is evident

:: 7 ::

from the search proceedings and sworn statement recorded from the assessee, there is undisclosed income of the specified previous year in the form of additional income offered towards estimated disallowance of marketing expenses and said additional income was gone unnoticed had search been not conducted in the case of the assessee. The arguments of the assessee that it has voluntarily surrendered additional income to buy peace and avoid litigation are devoid of merits. Therefore, opined that the additional income offered by the assessee represents any income of the specified previous year by any entry in respect of expenses recorded in the books of accounts of the assessee 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 has not been conducted. Therefore, rejected arguments of the assessee and levied penalty of 30% of total undisclosed income offered by the assessee. The relevant findings of the AO are as under:

V. The submission of assessee and the material available on record is perused carefully and the following observations are made.

a) Assessee company is engaged in business of manufacture and sale of IMFL products and is one of the prime suppliers to M/s. TASMAC.

b) The modus operandi of the business is, assessee indulged in suppression of real income by means of inflation of expenses, particularly under the head purchase of gift articles and other business promotion expenses. Further, the payments were made to suppliers by transferring by way of cheques/RTGS. Later, the vendor/suppliers withdrew cash and handed over to the assessee – M/s. Enrica Enterprises Pvt Ltd. By this way, assessee has generated unaccounted cash over a period of years.

Further, Mr.Rami Reddy, director of M/s. EEPL decides the quantum of amount to be generated in cash from various suppliers. The close aide of the group were actively involved in assisting for safe keeping the cash. The huge sum of cash seized during the search action were such safely kept cash meant for meeting out certain expenditures. In his self-incriminating statement u/s 132(4) of the IT Act 1961, Mr.Rami Reddy, has claimed to have resorted into the activity of withdrawing, by way of cash, a portion of his RTGS payments towards supply of gift articles booked under the head selling expenses as "marketing expenses".

c) During the search proceedings an amount of Rs.54,59,20,000/- was seized in the residence and office of different parties including the employees of M/s.EEPL and relatives of Mr.Rami Reddy, who aided him in safe keeping of such huge cash money. The assessee has consciously stashed the cash in different places in order to utilize them whenever required. This would have never reached the light of law unless, a search action was conducted u/s 132 of the IT Act 1961. As all the evidences gathered were against the assessee, the same has been admitted and offered in the return filed u/s 153A by the assessee in the respective assessment years as tabulated below.

AY	U/s 139(1)	Additional Income as compared to original return	U/s 153A	Sum Offered during Search (in
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				crores)
2015-16	7,92,44,724	16,39,00,000	24,31,44,724	16.39
2016-17	14,52,34,049	23,62,00,000	38,14,34,049	23.62
2017-18	(-)13,23,64,515	15,79,00,000	2,55,35,485	15.79
2018-19	8,82,46,473	25,73,00,000	34,55,46,473	25.73
2019-20	(Original)103,10,81,312	32,46,00,000	103,10,81,312	32.46
	(Revised)125,92,51,312			

It is evident from the above discussion that, the huge amount appropriated for making certain expenditures were unearthed only because of the Search Action conducted on 06.12.2018. Hence, there is no merit in the claim of assessee that it has disclosed the expenses voluntarily. Unless, the evasion had been detected, assessee would have continued practicing this evasive methodology forever and caused huge loss to revenue.

d) Assessee has stated in its reply that, "there is no undisclosed income as defined in the Explanation c) to section 271AAC(1A) of the Act." Assessee merely tries to complicate a simple and apparent issue with sophisticated phrases. It has been very clearly discussed in the assessment order that, assessee disclosed Rs. 32,46,00,000/- for the relevant AY after the seizure of huge cash amount during the search proceedings. This is plain and visible from any legal perspective that, a huge sum remained undisclosed till the date of search, not just for the relevant AY, but for several assessment years prior to the relevant assessment year.

e) Further, assessee has stated in its reply dated 29.07.2021 that, "Judicial opinion is also to the effect that initiation and dropping of penalties are the prerogative of the Assessing Officer. In other words, these sections are not mandatory but are subject to the discretion of the Assessing Officer to be decided on the merits of each case...."

Assessee itself has clearly stated that, it is the prerogative of the Assessing officer based on Judicial Opinion. It is pertinent to mention here that, it is a clear case of undisclosed income which was admitted by the assessee only during the search proceedings and hence a fit case to be penalized. The relevant section which



:: 10 ::

reiterates the same is reproduced below.

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 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;

f) Further, assessee's claim that it has extended complete cooperation during the assessment proceedings, has no virtue as the concealment cannot be nullified by mere cooperation post search action. Further, the fact that assessee has not preferred appeal also loses merit in this aspect. Because, it is only confirming the truth that, assessee has indulged in tax evasion and hence finds no merit its own case. Further, the statute does not recognize such defenses under section 271AAB, which has been reiterated in the order of **Hon'ble Supreme Court in the case of Mak Data Pvt Ltd Vs. Commissioner of Income Tax – II**. The relevant part is reproduced below.

"...The assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to amicable settlement with the Income Tax Department. The statute does not recognize those types of defences under Explanation 1 to section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the appellant assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty..."

The AO has to satisfy itself whether the penalty proceedings be initiated or not during the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing...

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The principle laid down by this court has correctly been followed by the Revenue and we find no illegality in the Department initiating penalty proceedings in the instant case..."

g) It is also evident from the search proceedings and the sworn statements that, assessee, has deliberately and knowingly appropriated huge amount of cash from the business and stored in the residential premises of the employees and relatives. Therefore, concealment in this case has been clearly established.

VI. Accordingly, penalty is levied u/s 271AAB of the Income Tax Act, 1961, in respect of undisclosed income. The penalty amount is worked out as under: 7,

6. Being aggrieved by the penalty order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged show cause notice issued u/s.274 r.w.s.271AAB of the Act, dated 26-07-2021 in light of certain judicial precedents and argued that the AO has not specified the clauses under which penalty u/s.271AAB of the Act, has been initiated. The assessee had also challenged penalty levied on additional income offered in the return of income filed u/s.153A of the Act, and accepted by the AO on the ground that said additional income does not come under the definition of undisclosed income, as per Explanation-C to Sec.271AAB of the Act.

7. The Ld.CIT(A) after considering relevant submissions of the assessee and also taken note of relevant facts opined that the additional income declared by the assessee towards estimated disallowance of marketing expenses comes under definition of undisclosed income as per Explanation-C to Sec.271AAB of the Act, because, the assessee has quantified the undisclosed income for each year including for the impugned assessment year based on actual inflation of expenditure in its

:: 12 ::

books of accounts and said estimate is based on admission of suppliers of 'gift articles' during the course of assessment proceedings, where the suppliers have categorically stated that at times cash has been refunded to the assessee. This is further fortified by the statement of working Director of the assessee company, where, he has explained **modus operandi** generation of unaccounted cash and also admitted that cash found during the course of search, is on account of inflated expenditure under the head 'marketing expenses'. Therefore, the Ld.CIT(A) opined that it is a clear case of undisclosed income of specified previous year and accordingly, there is no error in the reasons given by the AO to levy penalty u/s.271AAB of the Act. The Ld.CIT(A) had also rejected arguments of the assessee on show cause notice issued u/s.274 r.w.s.271AAB of the Act, and held that non-specification of sub-section in the penalty notice issued u/s.274 r.w.s.271AAB of the Act, issued by the AO do not vitiates the penalty proceedings. The relevant findings of the Ld.CIT(A) are as under:

:: 13 ::

7. Decision:

7.1 I have gone through the assessment order u/s 153A r.w.s. 143(3), order u/s 271AAB, Grounds of appeal and written submissions of the appellant, judicial precedents relied on by it.

7.2 Ground of appeal No 1,2 & 8

These are general Grounds which do not require separate Adjudication.:

7.3 Ground of appeal No 3, 6 & 7:

7.3.1 Vide Ground appellant challenged quantification of Undisclosed income at Rs.32,46,00,000/- holding that the amount merely represents estimated income which is allocated by appellant company for the year. It is also contended that the AO failed to mention undisclosed income in the assessment order.

7.3.2 Arguments of appellant can be summarized as follows:

1. Undisclosed Income as per section 270AAB is "Income of the specified year" which has not been recorded in books.
2. Neither Appellant nor investigating Authority had evidences regarding quantum of inflated expenditure of the company year wise.
3. Income disclosed by the assessee for various years is based on 'Estimate'.
4. Income disclosed for the year represents 'income apportioned for the year' by the assessee but not 'undisclosed income' of the year. The appellant has relied on various judicial precedents.

:: 14 ::

7.3.3 Explanation (c) of section 271AAB defines "undisclosed income" for the purpose of section which is reproduced as under:

"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 Chief 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.'*

7.3.4 'Undisclosed income' as per section 271AAB is income which may be in the nature of money either fully or partly found during the course of search which has not been recorded in the books of accounts maintained for the year before the date of search. It also includes income represented by any entry in respect of an expense recorded in the books maintained for the year is found to be false and would not have been found but for search.

7.3.5 In the present case, during course of search cash to the tune of Rs.55,28,65,700/- was found which was not recorded in regular books of accounts maintained for the year. Managing Director of the company owned up cash found. The fact that cash was not recorded in books is accepted. He explained that 'unaccounted cash' found during search was generated by the company by making wrong entries in the form of inflation of expenditure over the years. Thus, cash found during search and modus operandi adopted by company to generate that cash both attract definition 'undisclosed income' as per Explanation(c) of section 271AAB. It is the contention of the appellant that 'undisclosed income of the specified year' alone is to be considered for levy of penalty under the section. Since the appellant company has disclosed 'undisclosed income' for the year on 'estimate basis', it can't be said that it pertains to the year under consideration.

7.3.6 So the question that needs examination is whether income disclosed by the appellant is on estimate basis or not. I have carefully examined the claim of appellant that the amount disclosed was estimated income in the light of sworn statement of Managing Director of company Sri D. Rami Reddy recorded on 04-02-2019.

Q.No.17 While answering to Q.No.6, in your sworn statement recorded u/s 132(4) of the Income Tax Act, 1961 dated 09.12.2018, while asking the modus operandi of generating unaccounted cash, you have stated that will raise bogus bills for which you pay them through banking channels and receive cash from them. Please go through your statement and clarify about your generation of unaccounted cash.

Ans.: Sir, we have not raised any bogus bills from our suppliers of gift articles to generate unaccounted cash. However, we received back one third of the invoice value on an average in the form of cash from our gift articles suppliers. Since this amounts to inflation of the expenditure in our books of accounts, we undertake to withdraw our claim towards expenditure in the respective years.

Q.No.18 Please furnish the quantity of cash generated invoice-wise and party-wise with the details of suppliers?

Ans.: Sir, I don't have the invoice-wise and party-wise details of cash generated. However, I am hereby submitting the year-wise details of cash generated on this account as under:

S.No.	Financial Year	Amount (in crores)
1	2014-15	16.39
2	2015-16	23.62
3	2016-17	15.79
4	2017-18	25.73
5	2018-19	32.46
	Total	113.99

I hereby offer this amount of Rs.113.99 crores as the additional income in the hands of M/s Enrica Enterprises Private Ltd. For the respective financial years as mentioned above."

From above replies, it is noticed that MD of the company accepted to withdraw excess claim of expenditure made for different years by the company. He has given details of unaccounted cash generated for different years on account of withdrawal of excess expenditure claimed.

:: 16 ::

It is observed that noticed from above statement that nowhere Managing Director stated that he is providing details of unaccounted cash on 'Estimated basis' as contended by the appellant now. It is clear that he has clarity with regard to unaccounted cash generated by inflation of expenditure each year. Though he said he can't produce invoice-wise/ party-wise unaccounted cash generated for each year, he is clear about total quantum of unaccounted cash generated each year. It is observed that amount admitted for each year is not some random round figure. That itself shows that disclosure made by the appellant is not on estimate basis but basing on actual unaccounted cash generated each year.

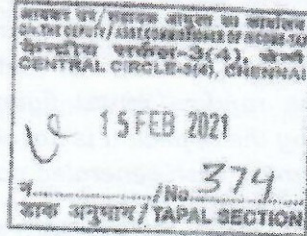
Further Shri D.Rami Reddy in his sworn statement cited above while replying to question No:17 stated that the appellant receives 1/3rd of invoice value as cash back from suppliers. Therefore 1/3rd of invoice value of gift articles recorded as marketing expenses for the year would give unaccounted cash generated by the appellant. It appears that the Managing Director having personal knowledge of affairs of company has identified quantum of inflated expenditure each year and admittedly consequent generation of unaccounted cash, admitted accordingly.

It is noticed that the appellant nowhere disputed modus operandi unearthed during search nor it disputed generation of unaccounted cash by inflation of expenditure. Huge unaccounted cash was found during search to the tune of Rs.55.28 Crores from various persons. All those persons stated that it was received from Managing Director of appellant company for safe keeping. Unaccounted cash Rs.55.28 Crores found during search is admittedly not recorded in books. The appellant explained source of unaccounted cash as inflation of marketing expenditure in books and cash received back from suppliers which is not again recorded in books. When there is primary evidence in the form of unaccounted cash found not recorded in books and sworn statement of Managing Director of appellant company giving details of unaccounted cash generated for each year after acknowledging primary evidence found during search, it is incorrect to say except statement of appellant there is no other evidence available with the department.

It is noticed from assessment order that the AO made enquiries during assessment proceedings with suppliers of gift articles to appellant company and some of the suppliers have agreed that the appellant company took back some cash from them. (para 2, page 8 of Assessment order). Copy of letter of one of suppliers of appellant company wherein supplier has agreed that he has withdrawn cash as required by appellant company.

:: 17 ::

Thirumalai Enterprises

15th February, 2021

TO,

Deputy Commissioner of Income Tax
Central Circle - 3(4)
Chennai

Respected Sir,

SUB Letter dated 09/02/2021 issued by your goodself

This is in response to your summons under Section 131 of the Income Tax Act

I am the proprietor of M/s Thirumalai Enterprises having my office at No.12, Veerappan Street, Sowcarpet. We have been dealing with various kinds of corporate gift articles like pens, key chains, umbrellas and textile products for the past 7 to 8 years. We have supplied many of these items to M/s Enrica Enterprises Private Limited during the past 5 years. On receipt of order over the phone, we used to source the required items and inform them. They would then send their transporter to pick up the items.

The ledger copy of M/s Enrica in our books is enclosed. All payments were made by M/s Enrica by way of bank transfers. As we had stated, most of our purchases are through banking channels. In certain cases where purchases had to be made in cash, cash was withdrawn from the bank. Cash withdrawn was also used to meet any incidental expenditure. In rare cases when there was a request from M/s Enrica for some cash, we obliged them by withdrawing some cash.

Thanking You

Thirumalai N
Proprietor

:: 18 ::

Hence it is incorrect to say no evidence is available with AO with regard to inflation of expenditure by the appellant company. Since the appellant company has admitted undisclosed income in the return of Income filed, the AO has not expanded scope of enquiries once sufficient evidence regarding modus operandi was found.

Further the AO has mentioned in penalty order that appellant company explained that unaccounted cash generated is being used by the appellant company to meet some inadmissible expenditure outside books. It explains why entire unaccounted cash generated over the years could not be found during search."

7.3.7 In view of the above contention of appellant that income disclosed is on Estimate Basis is not acceptable. I am of the considered view that the appellant company has worked out unaccounted cash generated i.e 'undisclosed income' for each year including current year basing on actual inflation of expenditure in its books but not on estimate basis.

7.3.8 The Appellant has relied on Rulings of various Hon'ble Courts in support of its contentions which are clearly distinguishable on facts and law. Details are discussed as under:

Smt Aparna Agarwal Vs DCIT, Central Circle, Kota, [2019] 105 taxmann.com 233 (Jaipur Trib): In this case, assessee disclosed Long term capital gains on sale of shares in the return of Income filed u/s 153A for the specified year as 'Undisclosed Income' on which penalty u/s 271AAB was levied. In this case, Hon'ble court observed that entries regarding purchase and sale shares were already correctly recorded in books of accounts by the date of search. Hence court held that LTCG not disclosed may amount to undisclosed income but it will not fall u/s 271AAB since such income is not generated because of either non recording of entry in books or because of wrong entries made in books. Not applicable to facts of the case at hand. Since in the present case, the appellant admittedly inflated expenditure for the year, made wrong entries in books of account which clearly attracts section 271AAB.

Shiv Bhagwan Gupta vs. ACIT, Central Circle-1, Patna, [2021] 125 taxmann.com 306 (Patna Trib.): In this case assessee has not made disclosure of certain income u/s 132(4) but disclosed it in the return of

:: 19 ::

Income filed for the year for which penalty u/s 271AAB is levied. Hon'ble court held that income disclosed in return of income is not unearthed during search, hence penalty u/s 271AAB is not attracted. This decision is not applicable. In the present case, the appellant has admitted u/s 132(4) 'Undisclosed income' for the current year basing on modus operandi unearthed consequent to seizure of cash.

Padam Chand Pungliya vs. ACIT, Central Circle-1, Jaipur (2020) 113 taxmann.com 446 (Jaipur Trib.): In this case additions were made based on seized pocket diary of assessee in which some notings were made with regard to house construction. Addition was made on account of House construction on which penalty u/s 271AAB was levied. Hon'ble tribunal deleted penalty holding that pocket diary is not books of accounts, can't be considered as wrong entry made in books and house construction can't be completed in 2 months and AO has not even enquired actual period of construction of House. This decision is not applicable to facts of present case. In the present case unaccounted cash was found which admittedly generated basing on wrong entries in books.

DCIT, Central Circle-1, Jaipur vs. Nirmla Kumar Agarwal [2016] 75 taxmann.com 266 (Jaipur Trib.): It relates penalty levied u/s 271AAA but not 271AAB. As per section 271AAA penalty on undisclosed income for the specified year was 10%. But penalty would not be leviable if certain conditions are satisfied. One of them is assessee has to substantiate the manner in which such 'un disclosed income' is earned. In this case, AO levied penalty for not substantiating manner in which undisclosed income is earned. Hon'ble court after observing that AO has never asked assessee to substantiate 'undisclosed income, deleted penalty u/s 271AAA holding that the assessee had no occasion to explain when AO has not asked for it. No where related to facts of case.

DCIT, 22(3), Mumbai vs. Vijay Rauff Gajra [2016] 75 taxmann.com 225 (Mumbai Trib.): Again relates to 271AAA penalty. Penalty levied was deleted since the AO has not clarified which of the conditions of section 270AAA for non levy of penalty are not met by assessee. Not applicable to facts of case.

ACIT v. Emirates Technologies (P) Ltd [2017] 88 taxmann.com 637 (Delhi-Trib.): The case relates to penalty u/s 271AAA. As per section 271AAA penalty on undisclosed income for the specified year was 10%. But penalty would not be leviable if certain conditions are satisfied. One of them is assessee has to substantiate the manner in which such 'undisclosed income' is earned. In this case, AO levied penalty for not substantiating the manner in which undisclosed income is earned. Hon'ble court after observing that AO has never asked assessee to substantiate 'undisclosed income, deleted penalty u/s 271AAA holding that the assessee had no occasion to explain when AO has not asked for it. No where related to facts of case.

7.3.16 It can be summarized that in this case during search 'unaccounted cash' was found which was not recorded in books. The appellant admitted that cash was generated by making false entries in books i.e. by inflating expenditure. Sworn statement u/s.132(4) of Managing Director of company shows that undisclosed income admitted for the year is not on estimated basis but clearly linked to evidence found during search in the form of cash. The appellant company disclosed 'undisclosed income' in the return of income filed for the year and paid tax. Therefore, all the conditions u/s.271AAB(a) are satisfied. The AO has rightly levied penalty u/s 271AAB (a). Consequently, Grounds of Appeal Nos 3, 6 & 7 are **dismissed**.

7.4 Ground of appeal No 4:

It is the contention of appellant that the AO failed in rebutting all objections raised by appellant vide letter dated 29-07-2021. I have gone through penalty order. The AO has answered main contention of appellant vide para c & d of penalty order. Hence Ground of appeal 4 is **Dismissed**.

7.5 Ground of appeal No 5:

7.5.1 The appellant has contested this appeal on technical ground that in the penalty notice sent, the AO has not specified which of sub clauses of section 271 AAB are applicable. Written submissions filed by the appellant raise technical ground of defective penalty notice.

:: 21 ::

7.5.2 As per provisions of section 271AAB, penalty is levied on 'undisclosed income of the specified year' unlike u/s. 271(1)(c) where penalty can be levied for two different charges. Though penalty u/s.271AAB is levied for singular charge, it proposes levy of penalty at different slabs subjected to conditions prescribed therein.

Penalty u/s.271AAB

S.No.	Conditions for levy of penalty @ 30% u/s 271AAB(1A)(a)	Conditions for levy of penalty @ 60% u/s 271AAB(1)(b)
1.	Income disclosed u/s.132(4) basing on cash found or basing on no entries/false entries in books of accounts	Cases that do not fall under 271AAB(1A)(a)
2.	Assessee substantiates the manner in which undisclosed income is earned	
3.	Files the return of income before the specified date disclosing the undisclosed income admitted u/s.132(4) and pays tax on undisclosed income.	

7.5.3 The fact that whether 'Undisclosed income of specified year has been admitted u/s 132(4) and whether 'admitted income' was disclosed in the return and tax paid or not are all in the knowledge of assessee unlike in case of section 271 (1) (c) where there can be confusion to assessee with regard to the charge that is attracted as per facts of the case. Charge u/s 271AAB is singular. Only rates of penalty vary depending upon either fulfillment/non fulfillment of conditions laid down in the section by assessee. Therefore Non specification of subsection in the penalty notice u/s 271AAB issued by AO in the present case do not vitiate penalty proceedings. Further it noticed from

reply filed by appellant during appellate proceedings on 07.08.2021 (reproduced in penalty order) that the appellant has never sought clarity from AO with regard to applicability of specific sub-clause to section 271AAB in its case. Therefore, it can be presumed that there was no ambiguity on that count to appellant while making its submissions.

7.5.4 Hon'ble Jaipur bench in *Rambhajo's Vs ACIT, ITA 991/JP/2017* has adjudicated same issue and held as under:

"On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Merely because the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file his explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", there is a singular charge under section 271AAB i.e, of the existence of undisclosed income for the specified previous year found during the course of search. Therefore, in the instant case, where the notice dated 16.3.2016 is issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act, the assessee is made aware of the specific charge against him and an opportunity has thus been given to him to rebut such charge and therefore, we do not see any infirmity in

the initiation of the penalty proceedings and consequent penalty order so passed by the AO. A similar view has been taken by the Co-ordinate Bench in case of Mahesh Kumar Jain & others (ITA No. 630/JP/17 & others dated 27.11.2017).*

7.5.5 Therefore, I am not inclined to allow ground of appeal raised by appellant on this issue. Ground of appeal no 5 is **dismissed**. Accordingly, all grounds of appeal of appellant are **dismissed**.

8. The Ld.Counsel for the assessee, Shri D. Anand, Advocate, submitted that the Ld.CIT(A) erred in conforming the penalty levied by the AO u/s.271AAB of the Act, without appreciating the fact that the penalty u/s.271AAB of the Act, is not mandatory and further, such penalty cannot be imposed without providing reasonable opportunity of hearing to the assessee. The Ld.Counsel for the assessee referring to provisions of Sec.274 & 275 of the Act, submitted that the provisions of Sec.271AAB(3) of the Act, specifically says sec.274 & 275 of the Act, shall as far as may be applied in relation to the penalty referred to in this section, which means before initiating penalty proceedings, the AO should show cause to the assessee and also called for explanation and such show cause notice should be specific to the sub-clauses, under which, the AO proposed to initiate penalty proceedings. Since, the AO has issued a notice in a routine manner without specifying sub-clause under which penalty is initiated, the entire proceedings becomes vitiates and invalid.

9. The Ld.Counsel for the assessee further submitted that the additions made by the AO towards income voluntarily surrender by the

:: 24 ::

assessee in the return of income filed u/s.153A of the Act, does not come under the definition of undisclosed income as defined in Explanation-C to Sec.271AAB of the Act. Further, there is no reference in the assessment order with regard to undisclosed income, which is evident from the assessment order passed by the AO, where the AO clearly observed that after considering relevant circumstances in its entirety, income offered by the assessee, including the estimated disallowance of marketing expenses is found to be in order and accepted. From the findings of the AO, it is very clear that the AO has not made out a case of undisclosed income of specified previous year, which warrants levy of penalty u/s.271AAB of the Act, and thus, the order passed by the CIT(A) confirming penalty levied by the AO, should be quashed.

10. The Ld.DR, Shri R. Clement Ramesh Kumar, CIT, submitted that the arguments of the assessee on the issue of show cause notice has been negated by the Ld.CIT(A) with a specific finding in light of provisions of Sec.271AAB of the Act. Further, non-specification of sub-clause in the notice does not vitiate entire penalty proceedings as contended by the Ld.Counsel for the assessee. Further, the AO has made out a case of undisclosed income of a specified previous year in respect of undisclosed income offered by the assessee towards estimated disallowance of marketing expenses and such addition is purely based on material found during the course of search. During the course of search, the Department has gathered incriminating materials, including unaccounted cash which is

:: 25 ::

generated out of inflated expenditure under the head 'marketing expenses'. The Director of the assessee company admitted to have generated cash by inflating expenditure, which is further strengthened by the confirmation submitted by suppliers of gift articles. Therefore, the arguments of the assessee that estimated disallowance of marketing expenses, does not come under undisclosed income of specified years is incorrect, and thus, the AO and the Ld.CIT(A) has rightly levied penalty and their orders should be upheld.

11. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. Levy of penalty u/s.271AAB of the Act, is not mandatory, which is evident from the fact that order passed by the AO imposing penalty u/s 271AAB is appealable order u/s.246A of the Act, before the First Appellate Authority. If penalty u/s.271AAB of the Act, mandatory in nature, then, there would not have been any appeal jurisdiction against penalty order before the First Appellate Authority. Therefore, in our considered view, there is a merit in the arguments of the Counsel that levy of penalty u/s.271AAB of the Act, is not mandatory and which depends upon facts of each case is acceptable and in accordance with law. Further, once penalty u/s.271AAB of the Act, is not mandatory in nature, then, the next question that arises for our consideration is whether the assessee should get opportunity of hearing or not. Sub-section (3) of sec.271AAB of the Act, stated that provisions of Sec.274 & 275 of the Act, shall as far as may be applied in

:: 26 ::

relation to the penalty referred in this section. This means, before levy of penalty u/s.271AAB of the Act, the AO must issue show cause notice as required u/s.274 of the Act, and called explanation from the assessee. Thus, it is evident that penalty u/s.271AAB of the Act, cannot be imposed, unless the assessee has been given a reasonable opportunity and assessee is being heard. Once, the AO is bound by the Act to hear the assessee and give reasonable opportunity to explain his case, in our considered view, show cause notice issued by the AO u/s.274 r.w.s.271AAB of the Act, should specify the exact charge on which the assessee is directed to pay penalty u/s.271AAB of the Act. Sec.271AAB of the Act, has two clauses. Sub-section (a) to Sec.271AAB(1) of the Act, specifies 30% penalty of the undisclosed income of the specified previous year, if assessee in the course of search in statement u/s.132(4) of the Act, admits undisclosed income and specify the manner in which such income has been derived and also substantiated the manner in which undisclosed income was derived and pays tax on or before due date of furnishing return of income. Sub-clause (b) specifies penalty at 60% of the undisclosed income of the specified previous year, if it is not covered under the provisions of Clause-(a). From the above, it is manifestly clear that there are two scenarios for levy of penalty depend upon facts of each case and accordingly, in the show cause notice, the AO should specify under which clause, the assessee is directed to pay penalty u/s.271AAB of the Act. In the present case, on perusal of notice issued u/s.274

:: 27 ::

r.w.s.271AAB of the Act, it is undisputedly clear that the AO has issued notice in a routine manner without mentioning under which clause of section 271AAB of the Act, the assessee is liable for penalty. Though, the AO while passing the impugned order, has imposed the penalty as per clause-(a) of sec.271AAB(1) of the Act, but, no such ground was specified in the show cause notice issued on 26.07.2021. Therefore, we are of the considered view that there is no application of mind at the time of issuing show cause notice and also no satisfaction from the AO regarding undisclosed income of specified previous year and further, under which clause such undisclosed income falls. Further, issuing a notice without specifying clause under which, the assessee is directed to pay penalty is definitely vague, incorrect in nature, and consequent order passed by the AO imposing penalty u/s.271AAB of the Act, becomes illegal, void **ab initio**. This legal position is fortified by the decision the Hon'ble Madras High Court in the case of PCIT v. R. Elangovan in TCA Nos.770 & 771 of 2018, wherein, the Hon'ble Madras High Court held that sec.271AAB of the Act, which deals with penalty consist of three contingencies. Therefore, the AO who pointed out the assessee as to under which of the three clauses, he chooses to proceed against the assessee so as to enable the assessee to give an effective reply. Since, the same has not been mentioned the assessee has been denied reasonable opportunity to put forth their submissions. Hence, the Tribunal is right in observing penalty could not have been levied based on such defective notice and, more

:: 28 ::

particularly, when the assessee has been strenuously canvassing jurisdictional issue from the beginning. The relevant findings of the Hon'ble Madras High Court are as under:

14. In our considered view, the Tribunal is fully right in vacating the penalty on the ground that the notice was defective. The provisions of the Act have clearly laid down the procedure to be followed and adhered to while imposing the penalty. The proposal for such penalty proceedings was separately initiated upon completion of assessment and there may be cases where the assessee would not even contest the order of assessment. But, that would not preclude the assessee from challenging the penalty proceedings, as penalty proceedings are independent and the procedure required to be followed cannot be dispensed with.

15. As rightly pointed out by the learned counsel appearing for the assessee, Section 271AAB of the Act, which deals with penalty consists of three contingencies. Therefore, the Assessing Officer should point out to the assessee as to under which of the three clauses, he chooses to proceed against the assessee so as to enable the assessee to give an effective reply. Since the same has not been mentioned, the assessee has been denied reasonable opportunity to put forth their submissions. The Tribunal, in paragraph 5 of the impugned order, has verbatim reproduced the penalty notice and we find that the notice is absolutely vague and none of the irrelevant portions had been struck off nor the relevant portions had been marked or indicated. Hence, the Tribunal is right in observing that the penalty could not have been levied based on such defective notice and more particularly, when the assessee has been strenuously canvassing the jurisdictional issue from the inception.

16. In so far as the decision of the Allahabad High Court in the case of Sandeep Chandak is concerned, the factual position is slightly different. This decision is for the principle that where the assessee, in the course of search, makes a statement, in which, he admits the undisclosed income and specifies the manner, in which, such income has been derived, then the provisions of Section 271AAB of the Act would automatically get attracted. There can be no quarrel over this proposition. But, once the provisions get attracted, it is incumbent on the part of the Assessing Officer to specify as to under which clause in Section 271AAB(1) of the Act, he intends to proceed against the assessee. In the instant case, in the absence of such material in the penalty notice, it has to be held that the notice is defective.

17. The decisions of the Karnataka High Court in the cases of Manjunatha Cotton and Ginning Factory and SSA's Emerald Meadows and the decision of this Court in the case of Babuji Jacob clearly support our above conclusion. For all the above reasons, we find no grounds to interfere with the common order passed by the Tribunal.

18. Accordingly, the above tax case appeals are dismissed confirming the common impugned order passed by the Tribunal. No costs. Consequently, the connected CMP is also dismissed.

:: 29 ::

12. In this view of the matter and by respectfully following the decision of Hon'ble jurisdictional high court in the case of PCIT v. R. Elangovan (supra), we are of the considered view that order passed by the AO imposing penalty u/s.271AAB of the Act, in consequent to vague notice issued u/s 274 r.w.s. 271AAB dated 26-07-2021 cannot be sustained.

13. Having said so, let us come back to issue on merits. As per provisions of Sec. 271AAB(1)(a) of the Act, the AO may direct that in case, search has been initiated u/s.132 of the Act, the assessee shall pay by way of penalty in addition to taxes, if any, payable by him on sum computed @30%/60% of the undisclosed income of the specified previous year depend upon facts of each case. The term 'undisclosed income' has been defined in Explanation-c to Section 271AAB of the Act, which reads as under:

(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 5a[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.

:: 30 ::

14. In the present case, Clause (i) of Explanation-c of Section u/s.271AAB of the Act, is not applicable. In fact, the AO and the Ld.CIT(A) invoked Clause-(ii) of Explanation-C to Section u/s.271AAB of the Act. As per Clause-(ii), undisclosed income of a specified previous year means any income of the specified previous year represented either wholly or partly by any entry in respect of expenses recorded in the books of accounts 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 has not been included. From the reading of Explanation-(c) and definition of undisclosed income, it is very clear that it should represent wholly or partly any entry in respect of expenses recorded in the books in the normal course relating to the specified previous year, which is found to be false and also has not been found to be so had the search has not been concluded. First of all, there should be falsification of entry in the books of accounts in respect of any expenditure. Secondly, such falsification should come to know as a consequence of search conducted. In the present case, the AO has arrived at a satisfaction to the effect that there is undisclosed income of previous year, which warrants penalty u/s.271AAB of the Act, on additional income offered by the assessee in the return of income filed u/s.153A of the Act, towards estimated disallowance of 1/3rd of marketing expenses. No doubt, the assessee has admitted additional income of Rs.113.99 Crs. towards estimated disallowance of 1/3rd of marketing

:: 31 ::

expenses when the Department has found and seized unaccounted cash Rs.55.27 Crs. in the residential premise of the assessee Company Director and their associates. But, fact remains that said unaccounted cash was not identified to any particular assessment year or person. Although, the AO has telescoped unaccounted cash to additional income offered by the assessee towards estimated disallowance of marketing expenses, but, in our considered view, said cash was not identified for the impugned assessment year either by the assessee or by the AO. Further, additional income offered by the assessee and accepted by the AO towards estimated disallowance of marketing expenses is also an **ad hoc** disallowance without there being any observation/adverse comments with regard to expenses accounted by the assessee in the books of accounts of the specified previous year and also explanation offered by the assessee. The sole basis for the AO to levy penalty u/s.271AAB of the Act, is voluntary surrender of income by the assessee in the return of income filed u/s.153A of the Act, and such income has been quantified in the statement recorded u/s.133(4) of the Act. Although, the AO took support from confirmation from one of the suppliers, where he has stated that at times cash has been returned to the assessee, but there is no specific admission in the confirmation letter of suppliers regarding supplies made to the assessee and refund of 1/3rd of cash for the impugned assessment year. We have gone through the reply received from supplier which has been extracted in the penalty order and we find that said reply is general

:: 32 ::

in nature without any specific reference for the impugned assessment year and also amount of cash returned to the assessee. Therefore, in our considered view, on the basis of admission of the assessee without there being any reference to incriminating material surrender of additional income in the return of income filed u/s.153A of the Act, cannot be considered as undisclosed income as defined in Explanation-(c) to Sec. 271AAB(1)(a) of the Act and such undisclosed income is for specified previous year. Thus, we are of the considered view that Clause-(ii) of Explanation-(c) to Sec. 271AAB(1)(a) of the Act, is not attracted in the given facts and circumstances of the case in respect of additional income offered by the assessee amounting to Rs.32.46 Crs. and thus, in our considered view, said additional income surrendered by the assessee does not come under the definition of undisclosed income and consequently, the AO cannot levy penalty u/s.271AAB of the Act.

15. The assessee has relied upon certain judicial precedents in support of its arguments. The assessee has relied upon the decision of ITAT Mumbai Benches, in the case of Shri. Prafulla Shashikant Vaidya v. DCIT in ITA No.469/Mum/2023 order dated 30.08.2023. The Tribunal under identical set of facts has considered the issue of penalty levied u/s.271AAB of the Act, in respect of income surrendered by the assessee and held that surrender of income would not if so facto lead to the conclusion that the amount surrendered by the assessee is undisclosed

:: 33 ::

income in terms of Sec.271AAB of the Act. The relevant findings of the Tribunal are as under:

7. We have considered the rival submissions as well as the relevant material placed on record. The AO has levied the penalty under section 271AAB of the Act in respect of the income surrendered by the assessee. 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 by confirming statement of the director of valuable group. 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 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. Section 271AAB defines the undisclosed income as under:

"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 Chief 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.'.

8. As far as the issue involved in this case is concerned, it falls under clause (i) above which envisages that the income in the form of jewellery or cash which has not been recorded in the books of accounts or other documents maintained in the normal course relating to such previous year. Now in the case of assessee entire jewellery and cash was duly recorded in the documents maintained in the normal course and was also explained to the lower authorities. But the same has only been accepted partially. In the penalty order none of the authorities have given any finding that, how the income confirmed in the quantum proceedings falls in the category of 'undisclosed income'. The documents submitted in the form of sales tax return etc. are independently verifiable evidence without

:: 34 ::

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, albeit 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. Once the assessee has explained the fact that all the assets found during the course of search have been duly recorded in the documents in the normal course relating to such previous year, 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.

9. In this case one more anomaly is noted, as during the search jewellery of Rs. 1.55 crore and cash of Rs. 27 lakhs were seized but disclosure was taken only for Rs. 66.48 lakhs, which also indicates that the said disclosure don't have any live connection with each other. Therefore, the statement of the assessee recorded under section 132(4) de hors any corroborative material or document found would not constitute incriminating material, when assessee later explained the source from the books. Therefore, the said income disclosed by the assessee cannot be considered as undisclosed income in terms of section 271AAB of the Act. The penalty under section 271AAB cannot be treated as 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.

10. 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 phraseology has been used by the legislature and decision of Hon'ble A.P High Court in case of *Radha Krishna Vihar* (ITA No. 740/2011)."

11. From a plain reading 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. 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:

:: 35 ::

"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 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 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 subsection (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 subsection (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;

:: 36 ::

(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).

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):

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

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

- (i) such person has furnished a return under clause (a) of section 158BC;*
- (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.*
- (iii) Evidence of tax paid is furnished along with the return; and*
- (iv) An appeal is not filed against the assessment of that part of income which is shown in the return:*

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

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 under 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 sections 274 and 275 shall, as far as maybe, apply in relation to the penalty referred to in this section.

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

:: 37 ::

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 Radha krishna Vihar in ITA 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 subsection 2 thereof 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 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 each case."

12. Thus, we agree with the contentions of the Id 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.

13. 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, we hold that the addition confirmed does not fall in the ambit of definition of undisclosed income as contemplated in Explanation to section 271AAB of the Act. Accordingly, the penalty of Rs. 6,09,244/-levied by the AO and sustained by the Id. CIT (A) is deleted.

16. In this view of the matter and by following the decision of coordinate Benches of ITAT Mumbai in the case of Prafulla Shashikant Vaidya v. DCIT in ITA No.469/Mum/2023 order dated 30.08.2023, we are of the considered view that additional income offered by the assessee in the return of income filed in response to notice issued u/s 153A of the Act, towards surrender of estimated disallowance of i/3rd marketing expenses does not come under the definition of undisclosed income as defined in Explanation-c to Sec.271AAB of the Act. The sum of Rs.32.46 Crs. does not qualify as undisclosed income of the specified previous year not recorded in the books of accounts before the date of search as

:: 38 ::

required by Clause-(ii) of Explanation-(C) to Sec.271AAB of the Act. The same does not represent any entry in respect of expenses recorded in the books of accounts or other documents maintained in the normal course relating to the specified previous year, which is found to be false as required by Clause-(ii) of Explanation-(C) to sec.271AAB of the Act. Therefore, we are of the considered view that the AO is erred in levying penalty u/s.271AAB of the Act, on additional income offered by the assessee in the return filed u/s.153A of the Act. The Ld.CIT(A) without appreciating relevant facts simply sustained penalty levied by the AO and thus, we set aside the order of the Ld.CIT(A) and direct the AO to delete penalty levied u/s.271AAB of the Act.

17. In the result, appeal filed by the assessee is allowed.

Order pronounced on the 06th day of March, 2024, in Chennai.

Sd/-
(मनोमोहन दास)
(MANOMOHAN DAS)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 06th March, 2024.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant

2. प्रत्यर्थी/Respondent

Sd/-
(मंजूनाथा. जी)
(MANJUNATHA.G)

लेखा सदस्य/**ACCOUNTANT MEMBER**

3. आयकरआयुक्त/CIT

4. विभागीय प्रतिनिधि/DR

5. गार्डफाईल/GF