

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos.97 & 98/Ind/2024 (AY:2017-18 & 2018-19)

Mukesh Kumar Ranka, Shop No. 117, 2 nd Floor, Dawa Bazar, Indore. (PAN:ABMPR7841P) (Assessee/Appellant)	<u>बनाम/</u> Vs.	ACIT, Central Circle, Ujjain (Stationed at Indore) (Revenue/Respondent)
---	----------------------------	---

ITA Nos.104 & 103/Ind/2024 (AY:2017-18 & 2018-19)

Anju Jain, L/H of Late Sushil Jain, 102, Varun Tower, 1/2, Meera Path, Indore. (PAN:ABNPJ8067E) (Assessee/Appellant)	<u>बनाम/</u> Vs.	ACIT, Central Circle, Ujjain (Stationed at Indore) (Revenue/Respondent)
--	----------------------------	---

Assessees by	Shri Sumit Nema, Sr. Advocate with Shri Gagan Tiwari and Shri Arun Dwivedi, ARs
Revenue by	Shri Harshit Bari, Sr. DR

Date of Hearing	18.03.2024
Date of Pronouncement	21.03.2024

आदेश / ORDER

Per Bench:

This is a bunch of four appeals by two separate assessees, assailing four separate appeal-orders all dated 29.12.2023 and all passed by learned

Commissioner of Income-tax (Appeals)-3, Bhopal which in turn arise out of respective penalty-orders dated 28.06.2021/18.09.2021 passed by ACIT, Central Circle, Ujjain, stationed at Indore ["AO"] u/s 271AAB of Income-tax Act, 1961 ["the Act"] for Assessment-Years ["AY"] 2017-18 & 2018-19.

2. Since these appeals emanate from a common search on parties, the grounds taken by parties are identical except change of figures and the parties are also represented by same counsels, these were heard together at the request of parties and are being disposed of by this consolidated order for the sake of convenience, brevity and clarity. Since the grounds in all appeals are identical, except change of figures, the first appeal being ***ITA No. 97/Ind/2024 of Mukesh Ranka for AY 2017-18*** is taken as a lead case and the effective grounds taken therein are only re-produced below. However, the decision taken in lead case shall apply equally to all other appeals:

- 1. The Ld. CIT(A)-3, Bhopal erred in fact and in law in confirming the action of Ld. ACIT, Central Circle, Ujjain, [the AO"] in initiating penalty u/s 271AAB of the Income-tax Act, 1961.*
- 2. The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty of Rs. 15,00,000/- u/s 271AAB(1A) of the Act.*
- 3. The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB(1A) of the Act without appreciating the fact that the penalty initiated by the Ld. AO is void-ab-initio.*
- 4. The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB(1A) of the Act without satisfying the conditions prescribed therein.*
- 5. The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB(1A) of the Act despite the fact that*

additional business income offered during the course of search does not tantamount to undisclosed income as defined u/s 271AAB.

6. *The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB of the Act despite the fact that no document relating to additional income offered to tax were found during the course of search.*
7. *The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB(1A) of the Act despite the fact that appellant had suo motu offered additional income to tax.*
8. *The Ld. CIT(A) erred in fact and in law in confirming the action of Ld. AO in levying penalty u/s 271AAB of the Act despite the fact that approval granted by the Jt. Commissioner as per mandate of section 274 was mechanical and without application of mind.*
9. *Without prejudice to the above, the Ld. CIT(A) erred in fact and in law in confirming the action of the Ld. AO in levying penalty u/s 271AAB(1A) of the Act at the rate of 60% despite the fact that the manner and sum of additional income was admitted during the course of search in the statement recorded u/s 132(4) and offered to tax in the return of income."*

3. The background facts leading to these appeals are such that a search u/s 132 of the Act was conducted by revenue authorities upon one "Shriji Polymers (India) Ltd. Group" including assessee on 27.07.2017 pursuant to which assessments were framed u/s 153A/143(3) of the Act. During search, a lump sum surrender of Rs. 3,50,00,000/- was made by/on behalf of assessee. Thereafter, honouring such surrender, each of the both assessee declared additional income of Rs. 25,00,000/- in AY 2017-18 and Rs. 1,50,00,000/- in AY 2018-19 in their respective returns, thus aggregating to Rs. 3,50,00,000/-, and paid applicable taxes. The AO, while passing assessment-orders u/s 153A/143(3) taxed those additional incomes as such without any change. Thus, there was no dispute between assessee and AO for taxation of income. However, the AO initiated

proceeding for imposition of penalties u/s 271AAB qua the additional incomes and issues show-cause notices. In response, the assessee filed replies to AO which the AO did not accept. Ultimately, the AO passed penalty-orders dated 28.06.2021/18.09.2021 imposing penalties of Rs. 15,00,000/- in AY 2017-18 and Rs. 90,00,000/- in AY 2018-19 upon both assessee u/s 271AAB(1A). The penalties were computed as equal to 60% of additional incomes. Aggrieved, the assessee filed first-appeal to CIT(A) and made a detailed submission but did not find any favour from CIT(A) who upheld penalties. Now, the assessee have come in next appeals before us challenging the orders of lower-authorities.

4. Ld. AR for assessee carried us to the assessment-order, penalty-order, order of first-appeal, the documents filed in paper-books and copies of judicial rulings separately filed in a case-law paper-book. Ld. Representatives of both sides also made vehement oral arguments. We have heard them peacefully at length and considered the documents held on record as well as their submissions.

5. Ld. AR for assessee firstly drew our attention to Para 5 & 7 of assessment-order passed by AO. Those paras read as under:

"5..... Further, the return for the A.Y. 2017-18 was filed on 11.01.2019 u/s 153A declaring total income of Rs. 45,27,800/- including undisclosed income of Rs. 25,00,000/-, which was admitted by the assessee during statement on oath u/s 132(4) of the Act. In view of the provisions of section 271AAB of the Act, I am satisfied that penalty proceedings must be initiated for the amount of disclosure made u/s

132(4) of the Act. Hence, penalty proceedings u/s 271AAB are hereby initiated for AY 2017-18.

7. Further, the return for the A.Y. 2018-19 was filed on 26.03.2019 u/s 139(1) declaring total income of Rs. 2,08,09,600/- including undisclosed income of Rs. 1,50,00,000/- which was admitted by the assessee during statement on oath u/s 132(4) of the Act. In view of the provisions of section 271AAB of the Act, I am satisfied that penalty proceedings must be initiated for the amount of disclosure made u/s 132(4) of the Act. Hence, penalty proceedings u/s 271AAB are hereby initiated for AY 2018-19."

6. Then, Ld. AR drew our attention to the following 'Office Note' appended by AO to the assessment-order:

"1. The seized material has also been examined so far as considered relevant but nothing incriminating was found in relation to this case.

2. The Bank account of the assessee was examined and no adverse view is required."

7. Then, the Ld. AR drew us to the penalty-order passed by AO which reads as under:

"4.1 I have carefully considered the reply of the assessee. The claim of the assessee that it had voluntarily disclosed the aforesaid income just to buy peace of mind is not acceptable. Had the survey/search proceedings as narrated hereinabove not been carried out, the assessee would not have offered the aforesaid income for taxation. The disclosure made by the assessee is a direct consequence of the survey/search operation conducted by the department. If the assessee had wanted to buy peace of mind, he would have made disclosure before the survey/search operation. This is merely a tactic of the assessee for escaping the penal proceedings.

4.2 Further, the assessee has claimed that during the survey/search operation, no corroborating document was found, which can prove that there is any undisclosed income. This also is not acceptable. If that was the case, there was no need to the assessee to offer the income for taxation. No prudent person would offer any income to tax, which he has not earned either in disclosed or in undisclosed form. The disclosure made by the assessee is itself an evidence that the assessee had income which was not offered to tax."

8. Analysing above orders, Ld. AR submitted that (i) The Para No. 5 & 7 of assessment-order passed by AO does not refer any incriminating material and the AO has merely assessed the surrendered income already offered by assessee in the return of income, and (ii) In the 'Office Notes' appended to assessment-order the AO has clearly mentioned that he has examined the seized-material and nothing incriminating was found & the bank a/c of assessee was also examined and no adverse view is required. Despite this, the AO has imposed penalty u/s 271AAB(1A), vide Para No. 4.1 & 4.2 of penalty-order re-produced above, merely by observing that (i) Had the search not been carried, the assessee would have not offered income for taxation, and (ii) If there would have not been any corroborative document to prove the undisclosed income, there would have been no need for the assessee to offer income for taxation. Ld. AR contended that while making such observations, the AO has travelled beyond the scope and ambit of section 271AAB(1A). To show this, Ld. AR carried us to the provision of section 271AAB(1A) which reads as under:

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

- (a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, if the assessee-*
 - (i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;*

Mukesh Kumar Ranka & Anju Jain L/H of Late Sushil Jain, Indore
ITA Nos.97 & 98/Ind/2024 and 104 & 103/ Ind/2024 - AYs. 2017-18 & 2018-19

- (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).*

XXX

Explanation.- For the purposes of this section,-

- (a) *"specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;*
- (b) *"Specified previous year" means the previous year-*
 - (i) *which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or*
 - (ii) *in which search was conducted.*
- (c) *"Undisclosed income" means-*
 - (i) *any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has-*
 - (A) *not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or*
 - (B) *otherwise not been disclosed to the 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."*

9. Ld. AR submitted that a simple reading of section 271AAB(1A), without making any effort, clearly shows that the section prescribes penalty @ 30% or 60% of the "undisclosed income" and the term "undisclosed income" has also been defined by Parliament in the Explanation to section 271AAB itself. The said Explanation prescribes *"For the purposes of this section, (c) "undisclosed income" means*". Thereafter, the term "undisclosed income" is defined, in clause (c) of the Explanation to mean (i) any income 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 in the course of a search, or (ii) any income represented by any entry of an expense recorded in the books of account or documents maintained in the normal course which is found to be false. But, in the present case of assessee, nothing is found by AO in terms of either (i) or (ii) of clause (c) of Explanation. He submitted that the AO has simply assessed the surrendered income already included by assessee in the return of income and that too with a clinching noting that there was no 'incriminating material' found during search. Therefore, when there is no "undisclosed income" as falling within (i) or (ii) of clause (c) of the Explanation, the AO has wrongly imposed penalty. Ld. AR submitted that in Para No. 4.1 & 4.2 of penalty-order, the AO has given strange and irrational basis for imposition

of penalty. Therefore, the penalty imposed by AO is illegal and deserves to be quashed.

10. Having submitted thus, Ld. AR carried us to the order passed by CIT(A) which reads as under:

"4.1.2. I have perused the facts of the case and have examined both the order of the Assessing Officer (AO) as well as the detailed submission of the counsel of the appellant. The brief facts of the case are that a search and seizure action u/s 132 of the Act, 1961 was carried out at the business as well as the residential premises of the Shriji Polymers (India) Ltd group on 27.07.2017. During the course of search operation, the appellant made a disclosure of income in the statement recorded u/s 132(4) and offered the same to tax. The Ld AO initiated penalty proceedings u/s 271AAB of the Act against the appellant and levied penalty of Rs. 15,00,000/- for the year under consideration. In the penalty order, the Ld AO stated that the appellant has made voluntary disclosure in his statement u/s 132(4) of the Act and since all the conditions for levying penalty u/s 271AAB were being satisfied, the same had been levied.

4.1.3. In his turn, the counsel of the appellant has taken the following plea:-

- (i) The voluntary surrender was made by the appellant to secure peace of mind. Even though documents were impounded during the course of the search, none of these point to any undisclosed or suppressed income. The appellant stated that the income should be seen in terms of additional income offered for these years and not as undisclosed income.*
- (ii) The explanation to section 271AAB of the Act defines 'undisclosed income' and unless the income surrendered by the appellant falls within the ambit of this definition, section 271AAB cannot be invoked.*

4.1.4. Looking to the intricacies of the case, I feel that it would be pertinent to examine the scheme of penalty provisions as given in the IT Act, 1961 and also to further look at the role of an 'Explanation' while interpreting a statute.

In the Income-tax Act, there are three mutually exclusive sections for levying penalty on an assessee viz. section 270A, section 271(1)(c) and section 271AAB. Here one is referring to cases where there is a discrepancy between the assessee's returned income and the income determined by the I.T. Authorities. It will be seen that each of these penalty sections deals with a different species of income:-

- (i) Section 270A imposes a penalty for '**under-reporting**' and '**misreporting of income**'. Sections 270A(2) and 270A(9) give the various instances that would constitute 'under-reporting' or misreporting of income and finally section 270A(6) states that underreported income would not include the amount of undisclosed income referred to in section 271AAB.
- (ii) Section 271(1)(c) deals with the imposition of penalty in cases where the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. The provisions of this section further elaborate on what it means to have concealed the particulars of income or to have furnished inaccurate particulars of such income.
- (iii) Section 271AAB deals specifically with cases of imposition of penalty where a search and seizure action u/s 132 was initiated against the assessee and 'undisclosed income' was unearthed by the I.T. Authorities.

4.1.5. Having examined the scheme of the penal provisions in the I.T. Act, 1961 we must now briefly look at the role played by an 'Explanation' in interpreting a statute:-

An Explanation is at times appended to a section to explain the meaning of the words contained in the section. It becomes a part and parcel of the enactment and the meaning to be given to an 'Explanation' must depend upon its terms and the language used therein. The Hon'ble Supreme Court in *Sundaram Pillai vs Pattabiraman (1985)/SCC 591* culled out the following as objects of an 'Explanation' to a statutory provisions:-

- (a) To explain the meaning and intendment of the Act itself.
- (b) Where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which is seems to subserve.
- (c) To provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.
- (d) An 'Explanation' cannot in anyway interfere with or change the enactment or any part thereof, but, where some gap is left which is relevant for the purpose of the 'Explanation', in order to suppress the mischief and advance the object of the Act, it can help or assist the court in interpreting the true purport and intendment of the enactment.
- (e) The 'Explanation cannot take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

4.1.6. Now, we will examine section 271AAB and more particularly the 'Explanation' to section 271AAB which purports to give the meaning of

'Undisclosed Income' for the levy of the penalty. Having looked at the penal provisions of the I.T. Act, it is clear that the income which is not shown by the assessee to the I.T. Authorities falls broadly into (a) underreported or misreported income (b) cases where particulars of income have been concealed or inaccurate particulars have been furnished (c) a residual category of 'Undisclosed Income' unearthed by I.T. Authorities during the search action u/s 132 of the Act.

Hence, the purpose of the Explanation in section 271AAB is to set apart and distinguish 'Undisclosed income' from under-reported income, misreported income and income suppressed by the concealment of particulars of income or by furnishing inaccurate particulars of income. To this end, the 'Explanation' cites the various ways in which 'Undisclosed income' can be manifested viz. money, bullion, jewellery or other valuable articles or things or any entry in the books of accounts or other documents or transactions. The purpose of this 'Explanation' is not to define 'Undisclosed Income' exhaustively but only to differentiate it from other species of suppressed income.

4.1.7. Now, if the language used is capable of bearing more than one construction, then in selecting the true meaning regard must be held to the consequences resulting from adopting the alternative constructions. Constructions that results in an anomaly or absurdity or tend to impair the working of the statute must be avoided.

The construction which is sought to be placed by the appellant on section 271AAB and the Explanation to that section is the following:-

- (i) The Explanation to section 271AAB defines 'Undisclosed Income' exhaustively.*
- (ii) Even though the appellant has voluntarily offered undisclosed income for taxation during the search u/s 132 of the Act, no penalty u/s 271AAB can be levied unless the Assessing Officer is able to establish a direct correspondence between the documents impounded and the undisclosed income surrendered.*

The consequence of the above described construction would be to reduce section 271AAB to a nullity. Indeed, all penal provisions in the I.T. Act which aim at penalizing errant taxpayers whose undisclosed income is unearthed during a search operation would be set at naught. This construction would negate the intention of the legislature to penalize taxpayers, who, but for the search operation u/s 132 of the Act, would not disclose their true income. The resulting situation would be one where even though the assessee has been found to be concealing income during a search operation and has voluntarily surrendered the same, no penalty proceeding would be initiated since a one to one correspondence between the impounded documents and the amount of income surrendered could not be established.

The correct interpretation is that the explanation to section 271AAB does not seek to define 'undisclosed income' exhaustively but only seeks to differentiate it from other species of suppressed income as enumerated in sections 270A and 271(1)(c). 'Undisclosed income' as appearing in section 271AAB can be seen as a residual category which seeks to cover all the various manifestations of suppressed income which come to light as a result of a search operation u/s 132 and which do not fall within the ambit of suppressed income as defined in sections 270A and 271(1)(c). In the case of the appellant various loose documents and papers were impounded during the search and in light of the anomalies therein the appellant offered his undisclosed income for taxation in the statement recorded u/s 132(4). **On being confronted with the various seized documents the appellant made a voluntary surrender because he was in possession of special and private knowledge of the undisclosed income represented by those documents. In order that the IT Department might not probe further, he offered the undisclosed income represented therein to tax and thereby brought further investigation to an end.** The relevant extract of the statement u/s 132(4) Shri.Sushil Jain (Partner of Shri Mukesh Ranka) is reproduced hereunder:-

"9. आयकर search एवम seizure की कार्यवाही के दौरान आपका शपथ पूर्वक बयान आयकर की धारा 132(4) में दर्ज किया गया जिसमें आपने अपने परिवार एवम अपने फर्म से संबंधित अघोषित आय रु.9.24 करोड़ को अघोषित आय मानते हुए एकरारोपण हेतु समर्पित किया था कृपया उक्त राशि रु.9.24 करोड़ को अघोषित आय का पूर्ण विवरण दे ?

विभागीय कार्यवाही के दौरान मैंने अपने परिवार एवं अपने फर्म से संबंधित अघोषित आय रु.9.24 करोड़ को अघोषित आय मानते हुए एकरारोपण हेतु समर्पित किया था जिसे मैं पुनः स्वीकार करता हूँ जैसा कि मैंने आयकर कार्यवाही के दौरान उक्त रु.9.24 करोड़ का bifurcation दिया था उसे एक बार पुनः दोहराता हूँ ।

(1) रु. 44 लाख जिसे कार्यवाही के दौरान नकद बरामद किया गया था एवं विभाग द्वारा जब्त किया गया था को चालू वित्तीय वर्ष 2017 -18 की विभिन्न तरीकों से अर्जित की गई मेरे एव मेरे घरेलू मित्र श्री मुकेश रांका (उनकी स्वीकृति से) अघोषित आय के रूप में स्वीकार करता हूँ ।

(2) रु. 3.60 करोड़ अघोषित आय जो एक कंपनी जे.पी.जे एक्सिम प्रा.लि.के books में शेयर कैपिटल /प्रिमियम के रूप में दर्ज हैं को मैं अपनी एवं अपने पार्टनर /घरेलू रिश्तेदार श्री मुकेश रांका की अघोषित आय बराबर-बराबर भाग में स्वीकार करता हूँ उक्त शेयर कैपिटल /प्रिमियम का proper justification नहीं होने से उक्त राशि को अपनी एवं अपने घरेलू मित्र श्री मुकेश रांका (उनकी स्वीकृति) से अघोषित आय के रूप में स्वीकार करता हूँ ।

(3) रु . 3.50 करोड़ को मेरे एव मेरे घरेलू मित्र श्री मुकेश रांका (उनकी स्वीकृति से) एवम् हम लोगों से संबंधित फर्म की अघोषित व्यवसायिक आय एवं हम लोगों के परिसरों से प्राप्त विभिन्न

दस्तावेजों में पाये गये अनिमित्ततायो को ध्यान में रखकर consolidate रूप में दोनों लोगों के head में बराबर-बराबर (50 -50 प्रतिशत) अर्थात रु. 1.75 करोड़ एवं रु. 1.75 करोड़ के रूप में अघोषित आय स्वीकार करता हूँ, जिसमें मेरे द्वारा पूर्व के प्रश्नों के जवाब में स्वीकार किया गया अघोषित आय रु . 4,00,000 / -एवं रु. 72,000 / - सम्मिलित है ।

*Hence, to conclude, the appellant's plea that 'Undisclosed income' as appearing in section 271AAB is defined exhaustively by the explanation therein is not acceptable for the detailed reasons given in the earlier part of this order. The appellant offered the 'Undisclosed income' for taxation, duly paid the taxes thereon and furnished the return of income for the specified previous year declaring such undisclosed income therein. Since the appellant was unable to specify and substantiate the manner in which this undisclosed income had been derived, the Ld AO correctly imposed penalty u/s 271AAB (1A)(b) of the IT act 1961. The Ld AO's order is hereby upheld and the appellant's appeal is **dismissed.**"*

11. Referring to same, Ld. AR submitted that the CIT(A) has, although taken into account the assessee's submission *qua* the provision of section 271AAB(1A) read with Explanation thereto, but he has made a mis-interpretation of those provisions. He submitted that in Para 4.1.4 to 4.1.6 of his order, the CIT(A) has made an unnecessary/wrong comparison of section 270A, section 271(1)(c) and section 271AAB so as to paint a picture that the Explanation to section 271AAB was not exhaustively defining the term "Undisclosed income" and thereafter, in next Para No. 4.1.7, went on observing that if the definition of "undisclosed income" is interpreted as exhaustive, the section 271AAB shall be reduced to a nullity and the resulting situation would be one where even though the assessee has been found to be concealing income during a search and has voluntarily surrendered the same, no penalty could be initiated. Ld. AR submitted that it is a settled law, which nobody can dispute, that penalty provisions have to be interpreted strictly. That apart, the Explanation itself states "*for the*

purposes of this section... (c) 'Undisclosed income' means". The phraseology used by Parliament clearly shows that the Explanation as well as definition of "undisclosed income" are exhaustive.

12. Ld. AR submitted that the CIT(A) has also made a wrong observation qua the facts of assessee's case by saying *"on being confronted with the various seized documents, the appellant made a voluntary surrender because he was in possession of special and private knowledge of the undisclosed income represented by those documents. In order that the IT department might not probe further, he offered the undisclosed income represented therein to tax and thereby brought further investigation to an end."* Ld. AR submitted that this self-made, baseless observation by CIT(A) is contrary to the facts of assessee accepted by AO in assessment-order, more particularly the 'Office Notes', in which the AO has himself mentioned that nothing incriminating had been found in seized-material. Ld. AR submitted that as per settled judicial rulings, pure statement u/s 132(4) does not constitute an incriminating material.

13. Lastly, Ld. AR submitted that there are numerous judicial rulings wherein the said Explanation/definition of "Undisclosed income" have been interpreted and it has been categorically held that unless there is (i) any income 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 in the course of a search, or (ii) any income represented

by any entry of an expense recorded in the books of account or documents maintained in the normal course which is found to be false, the penalty u/s 271AAB is not attracted. Ld. AR has quoted as many as 11 decisions and also filed copies of orders, as under:

1.	Order dated 22.03.2019 in I.T.A. No. 1375/JP/2018 – Shri Rajendra Agarwal v. The Deputy Commissioner of Income-tax, Central, Kota – ITAT, Jaipur
2.	Order dated 22.06.2023 in I.T.A. No. 353/JP/2022 - Shri Paras Mal Jain v. The Dy. CIT, Central Circle-I, Jaipur – ITAT, Jaipur
3.	Aeswarya Jain v. Dy. CIT, Central Circle Kota – ITAT, Jaipur – (2020) SCC online ITAT 2258
4.	Vasudev Agrawal v. The Dy. CIT, Kota – ITAT, Jaipur (2019) SCC online 5446
5.	Order dated 30.08.2023 in I.T.A. No. 469/Mum/2023 - Shri Prafulla Shashikant Vaidya v. Dy. CIT, Central Circle-1, Thane – ITAT, Mumbai
6.	ACIT Central Circle-2, Vishakapatnam v. Marvel Associate – ITAT, Vishakapatnam - (2018) 92 Taxmann.com 109 (Vishakhapatnam-Trib)
7.	Smt. Aparna Agarwal v. Dy. CIT, Central Circle, Kota – ITAT, Jaipur (2019) 105 Taxmann.com 233 (Jaipur Trib).
8.	Lajwantiben M. Manglani v. Dy. CIT, Cir-I, Baroda 2020 SCC online ITAT 2690
9.	Order dated 13.06.2018 - I.T.A. No. 971/JP/2017 - Anuj Mathur v. Dy. CIT, Central Circle-4, Jaipur - Jaipur ITAT

10.	Shiv Bhagwan Gupta v. ACIT, Central Circle-I, Patna (2021) 125 Taxmann.com (Patna-Trib)
11.	Order dated 20.12.2021 - I.T.A. No. 125 & 126/Nag/2021 - Chandra Suresh Kothari v. Dy. CIT, Central Circle 2(2) - Nagpur ITAT

14. Ld. AR prayed that the case of assessee is squarely covered on facts and in law by the above decisions. Therefore, in the light of those decisions, the AO is wrong in imposing penalty and the CIT(A) is also wrong in upholding AO's order. Hence, the penalty imposed upon assessee is not tenable and must be quashed.

15. Then, Ld. AR submitted that if the assessee's grievance is resolved and penalty is quashed, the Ground No. 8 would become academic and would not require any adjudication.

16. Per contra, Ld. DR for revenue re-iterated the observations made in orders passed by lower-authorities. He submitted that the assessee has made surrender for covering irregularities in business and only because there was a search by department. He contended that that once the assessee has surrendered undisclosed income in statements u/s 132(4), the payment of tax on such income is not sufficient and the assessee must suffer penalty also. He supported the CIT(A)'s observation that the

Explanation/definition of "undisclosed income" is not exhaustive. With these submissions, he requested to uphold the penalty.

17. We have considered rival contentions of both sides and perused the case-record. We have also examined the provisions of section 271AAB in the light of judicial rulings cited before us. At first, we would like refer 2 prominent decisions out the long list of 11 decisions quoted by Ld. AR to understand the judicial view on section 271AAB. In ***I.T.A. No. 1375/JP/2018 – Shri Rajendra Agarwal v. The Deputy Commissioner of Income-tax, Central, Kota – ITAT, Jaipur***, which is a decision authored by same Judicial Member as forming part of this Bench, the ITAT observed and held thus:

"4..... 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.

This Tribunal in the case of Ravi Mathur vs. DCIT (supra) while considering an issue of levy of penalty under section 271AAB has held in para 4 to 9 as under :-

"4. We have considered the rival submissions as well as relevant material on record. A search was conducted under section 132 of the IT Act on 30th

October, 2014 at the premises of the assessee. The assessee in his statement recorded under section 132(4) has disclosed an income of Rs. 10,02,00,000/- in pursuant to the entries of advances given for purchase of land recorded in the pocket diary which was found and seized during the course of search and seizure action. This is year of search and the financial year would end on 31st March, 2015. However, the assessee disclosed this amount of Rs. 10,02,00,000/- based on the entries in the diary regarding investment in real estate. The due date of filing of return of income under section 139(1) was 30th September, 2015. It is undisputed fact that the assessee is an Individual and was not maintaining regular books of account. Therefore, the transactions recorded in the pocket diary found during the course of search itself would not lead to the presumption that the assessee would not have offered this income to tax if the search is not conducted on 30th October, 2014. Further, the entries in the diary itself do not represent the income of the assessee during the year under consideration though the assessee was required to explain the source of investment in question and that source would be the income of the assessee. It is most likely that the investment in question was made from the unaccounted income of preceding years. Hence the investment in the real estate itself would not reveal the nature of income and the source of income of the year under consideration. It is a pre-condition for invoking the provisions of section 271AAB that the assessee admitted the undisclosed income in the statement under section 132(4). The definition of 'undisclosed income' is provided in section 271AAB itself and, therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case and then arrive to the conclusion that the income disclosed by the assessee falls in the definition of undisclosed income as stipulated in the explanation to said section. The first question arises is whether the levy of penalty under section 271AAB is mandatory and consequential to the disclosure of income by the assessee under section 132(4) or the AO has to take a decision whether the given case has satisfied the requirements for levy of penalty under section 271AAB of the Act. In order to consider this issue, the provisions of section 271AAB are to be analyzed. For ready reference, we quote section 271AAB as under :-

"271AAB. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012 49[but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President⁵⁰], 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

***Mukesh Kumar Ranka & Anju Jain L/H of Late Sushil Jain, Indore
ITA Nos.97 & 98/Ind/2024 and 104 & 103/ Ind/2024 - AYs. 2017-18 & 2018-19***

- (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 may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—
- (a) a sum computed at the rate of thirty per cent of the undisclosed income of the specified previous year, if the assessee—
- (i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;
- (ii) substantiates the manner in which the undisclosed income was derived; and
- (iii) on or before the specified date—
- (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
- (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;
- (b) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (a).]
- (2) No penalty under the provisions of 53[section 270A or] clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) 52[or sub-section (1A)].

***Mukesh Kumar Ranka & Anju Jain L/H of Late Sushil Jain, Indore
ITA Nos.97 & 98/Ind/2024 and 104 & 103/ Ind/2024 - AYs. 2017-18 & 2018-19***

- (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 subsection (1) of section 139 or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;
- (b) "specified previous year" means the previous year—
- (i) which has ended before the date of search, but the date of furnishing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or
- (ii) in which search was conducted;
- (c) "undisclosed income" means—
- (i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—
- (A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or
- (B) otherwise not been disclosed to the 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."

The section begins with the stipulation that the AO "may" direct the assessee shall pay by way of penalty if the conditions as prescribed under clauses (a) to (c) are satisfied. As per sub-section (3) of section 271AAB the provisions of section 274 and 275 as far as may be applied in relation to the penalty referred in this section which means that before imposing the penalty under sec. 271AAB, the AO has to issue a show cause notice and give a proper opportunity of hearing to the assessee. Thus the levy of penalty u/s. 271AAB is not automatic but the A.O. has to take a decision to impose the penalty after giving a proper opportunity of hearing to the assessee. It is statutory requirement that the explanation of the assessee for not fulfilling the conditions as prescribed u/s 271AAB of the Act is required to be considered by the AO and particularly whether the explanation furnished by the assessee is

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

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

"The Id. A.Rs have also challenged that the caption of the notice mentioned only Section 271 and not 271AAB. In this respect, the copy of notice has been produced by the Id. A.R. before me. It is seen that the Id. A.R is correct in observing that the section of penalty has not been correctly mentioned by the AO in the caption. However, the AO will get the benefit of section 292BB of the Income Tax Act, 1961 because firstly, the assessee has raised no objection before the AO in this regard. Secondly, last line of the notice clearly mentions section 271AAB. Thirdly, the assessee has given reply to said notice which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB.

The assessee has also challenged that the principles of natural justice has not followed by the AO. The detailed submissions of A.R in this regard has already been reproduced above. The A.R did not produce any evidence to show that he was not given proper opportunity of hearing. It is clear from the penalty order that the AO has given penalty notice and which was also replied by the assessee. Therefore, in my opinion, principle of natural justice has not been violated. Thus in view of above discussion penalty imposed by AO u/s 271AAB of the Act is confirmed."

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

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

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

XXX

Section 158BFA(2):

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

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

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

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

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

Sub section (3) of section 271AAB:

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

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

271AAB and 274 of the Act indicates that the imposition of penalty u/s 271AAB of the Act is not mandatory but directory. Accordingly we hold that the penalty u/s 271AAB is not mandatory but to be imposed on merits of the each case."

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

7. As regards the validity of notice under section 274 for want of specifying the ground and default, we find that when the basic condition of the undisclosed income not recorded in the books of accounts does not exist, then the same has to be specified by the AO in the show cause notice and further the AO is required to give a finding while imposing the penalty under section 271AAB. Even if the AO is satisfied and come to the conclusion that the assessee has not recorded the undisclosed income in the books of accounts or in the other documents / record maintained in normal course relating to specified previous year, the show cause notice shall also specify the default committed by the assessee to attract the penalty @ 10% or 20% or 30% of the undisclosed income. There is no dispute that the AO has not specified the default and charge against the assessee which necessitated the levy of penalty under section 271AAB of the Act. Consequently, the assessee was not given an opportunity to explain his case for specific default attracting the levy of penalty in terms of clauses (a) to (c) of section 271AAB(1) of the Act. The Chennai Bench of the Tribunal in the case of DCIT vs. Shri R. Elangovan (supra) at pages 7 to 10 has held as under :-

"It is clear from the Sub Section (3) of Section 271 AAB that Sections 274 and Section 275 of the Act shall, so far as may be, apply. Sub Section (1) of Section 274 of the Act mandates that order imposing penalty has to be imposed only after hearing the assessee or giving a assessee opportunity of hearing. Opportunity that is to be given to the assessee should be a meaningful one and not a farce. Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of Section 271AAB of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra) relying in its own judgment in the case of Manjunatha Cotton and Ginning Factory (supra) had held as under:-

"2. This appeal has been filed raising the following substantial questions of law:

(1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of Section 271(1B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

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

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

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

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

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

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

The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the

proceedings on the merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared invalid in the penalty proceedings”.

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

6. Since we have set aside the penalty order for the impugned assessment year, the appeal filed by the Revenue has become infructuous.”

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

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

expenses recorded in the books of accounts or other documents maintained in the normal course. Therefore, the clause (ii) contemplates undisclosed income in the form of false entries of expenses recorded in the books of accounts which is not relevant for the case in hand.

Since in the case of assessee the transactions of investment were found in the diary, therefore, whether these entries in the diary constitute undisclosed income as per clause (c)(i) of Explanation to Section 271AAB of the Act. The assessee is an Individual and for the year under consideration the assessee has not reported any business income nor it was assessed by the AO. Therefore, it is clear that the assessee was not required by any mandate of law to maintain regular books of accounts. In the computation of income, the assessee has shown income from Salary, income from house property and income from other sources. The returned income was accepted by the AO while framing the assessment under section 143(3) and hence assessee's case does not fall in the category where the regular books of accounts are mandatory. The entries of investment in real estate were found recorded in the diary and in the absence of any other document maintained in the normal course relating to the year under consideration, the entries in the diary are to be considered as recorded in the documents maintained in the normal course. It is not the case of the revenue that the assessee has recorded the other transactions in the other documents maintained in the regular course relating to the year under consideration and only these entries are recorded in the diary. Since the levy of penalty under section 271AAB is not based on the addition and enquiry conducted by the AO in the assessment proceedings, therefore, it is incumbent on the AO to conduct a proper examination of facts, circumstances and explanation furnished by the assessee before arriving to the conclusion that penalty under section 271AAB is leviable and further whether it is 10% or 20% or 30% of such undisclosed income. Therefore, the AO is under statutory obligation to examine all the issues during the proceedings under section 271AAB after giving the assessee an opportunity to explain the charges/grounds on which the penalty is proposed to be levied. Hence it is a pre-requisite condition that the AO first specify the charges against the assessee and to make known the assessee of his default so as to afford an opportunity to explain the default/charges so brought against the assessee. Without considering the explanation of the assessee on the specific default, the order passed by the AO under section 271AAB suffers from serious illegality and therefore not sustainable in law. When a stringent action is provided in the Statute against the default committed by the assessee, then it also cast an equally stringent and strict duty on the authority responsible to take such action. Therefore, when the provisions for levy of penalty under section 271AAB is a specific provision to deal with the undisclosed income and it provides a strict penal action then the corresponding duty of the tax authority is also equally stringent. The AO cannot escape from following the strict mandatory requirement of law and particularly the principle of natural justice. The AO has neither specified the grounds and clause of section 271AAB nor has dealt with the same in the impugned order passed under section 271AAB. The AO has also not given a finding that the case of the assessee falls in the definition of undisclosed income provided under clause (c)(i) of Explanation to section 271AAB. When the transactions of investment in real estate are recorded in the diary being other documents maintained by the assessee for the said purpose, then in the absence of any requirement of maintaining regular books of accounts by the assessee, the case of the assessee would not fall in the definition of undisclosed income as per clause (c) of Explanation to section 271AAB of the Act.

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

"3. We have heard rival submissions and gone through the facts and circumstances of the case. We find that the issue involved herein is squarely covered in favour of the assessee in the case of DCIT vs Manish Agarwala (another member in the same Nezone Group) in ITA No. 1479/Kol/2015 for AY 2013-14 dated 9.2.2018 by the order of this tribunal , wherein it was held as under:-

"3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has levied the penalty u/s. 271AAB on the ground that the income from commodity profit has been found during search u/s.132 of the Act which is not reflected in the regular books of account. The AO has accepted that during search the assessee has admitted u/s. 132(4) of the Act the income from speculative trading. The undisputed facts the AO has given finding pertaining to this case is as follows:

- i) The assessee has substantiated the manner in which the income was derived.
- ii) Furnished the return of income therein and
- iii) Paid the tax along with interest.

Based on the said finding, according to AO, the assessee satisfies the conditions enumerated in sec. 271AAB(i)(a) of the Act and thereafter levied ten per cent of Rs. 3 cr., which have been deleted by the impugned order of Ld. CIT(A).

4. The Ld. DR brought to our notice that in the very same group case of Manoj Beswal & Ors. the Tribunal had confirmed the levy of penalty and contended before us that penalty u/s. 271AAB of the Act is mandatory and therefore, according to Ld. DR, the Ld. CIT(A) erred in deleting the penalty by stating that the assessee did not had any 'mens rea' not to disclose the amount in question. According to him, penalty has to be mandatorily levied u/s. 271AAB of the Act on the undisclosed income found during search. On the other hand, Ld. AR Shri Miraz D. Shah, supporting the decision of Ld. CIT(A) made contentions though taken up before the Ld. CIT(A) but has not been adjudicated on those averments, which the Ld. AR urges before us to consider while adjudicating the appeal of the Revenue. The Ld. AR also pointed out that the contentions which he is going to raise has been taken up before the AO also, however, according to Ld. Counsel, those legal arguments were not considered by the AO in the right perspective. The first contention of the Ld. AR is that since Sec. 271AAB of the Act is a penalty section it should be construed strictly, which we agree being it is a trite law that penalty provisions have to be strictly interpreted. Next contention of Ld. AR is that sec. 271AAB of the Act is not mandatory because Parliament in its wisdom has used the word 'may' and not 'shall'. So, according

to him, it is the discretion bestowed upon the AO whether to initiate and impose penalty u/s. 271AAB of the Act. We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak & Ors. Vs. CIT (2017) 55 ITR (Trib) 209 and 2017 (5) TMI 675- ITAT-Lucknow in ITA No. 416, 417 and 418/LKW/2016 dated 30.01.2017 while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word "may" not "shall". "May" cannot be equated with "shall" especially in penalty proceeding. Using the word "may" in our opinion, gives a discretion to the AO to levy the penalty or not to levy, even if the assessee has made the default under the said provision." Therefore, the 2nd ground of Revenue fails and we hold that penalty u/s. 271AAB of the Act is not mandatory and is discretionary. Before proceeding further, we note that the ex parte order passed by the Coordinate Bench relied upon by Ld. DR, Manoj Beswal, supra, have been recalled in MA Nos. 218 to 220/Kol/2017 dated 12.01.2018 by observing as under:

"By virtue of these miscellaneous applications, the assessee seeks to recall the order passed by this Tribunal in I.T.A. Nos. 1471, 1475 & 1476/Kol/2015 in the hands of Amit Agarwal, Madan Lal Beswal and Manoj Beswal respectively for the assessment year 2013-14 on the ground that notice was not served on the assessee for the hearing and on certain factual error that had crept in the order of the Tribunal. The first preliminary objection raised by the Ld. AR was that the notice of hearing was not served on the assessee for the hearing scheduled on 06.11.2017 and hence, the assessee could not be present on the said date by way of personal appearance. The second objection raised by the Ld. AR was that the Tribunal had stated in para 9 of its order that the assessee himself had accepted that he is engaged in commodities trading business and therefore mandated to maintain books of accounts in terms of section 44AA of the Act and thereby inferring that the assessee had reported the profit from commodities trading business under the head "income from business or profession". Based on this crucial finding, the Tribunal had concluded that since the transaction of commodities trading had not been entered by the assessee in his books of accounts as on the date of search on 01.08.2012 and thereby it takes the character of undisclosed income for which penalty u/s 271AAB of the Act is exigible. In this regard, we find that the Ld. AR drew our attention to the computation of the total income wherein the assessee had offered income from commodity trading only under the head income from other sources. We also find that the Ld. AO had also specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income

from other sources. We find that due to the absence of the assessee at the time of hearing this particular fact had escaped the attention of the Tribunal. On perusal of the fact available on record, we find that the finding recorded by this Tribunal in para 9 of its order dated 10.11.2017 that the assessee is mandated to maintain books of accounts u/s 44AA of the Act is factually incorrect and deserves to be rectified. This mistake of primary fact had lead to a conclusion of upholding the levy of penalty u/s 271AAB of the Act. Hence, in these facts and circumstances and in view of the aforesaid mistake of primary fact rightly pointed out by the Id. AR , we deem it fit to recall the orders of this Tribunal dated 10.11.2017 in the case of aforesaid assessees."

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

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

“44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act. (2) Every person carrying on business or profession [not being a profession referred to in subsection (1)] shall,

(i) if his income from business or profession exceeds [one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds [ten lakh] rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ten lakh rupees, during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under [section 44AE] [or section 44BB or section 44BBB], as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such [previous year; or]]

(iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income tax during such previous year,

keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act.

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

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

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

Income from Salary Rs.	45,57,600
Income from Other sources	<u>Rs.3,00,24,047</u>
	Rs.3,45,81,647

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

assessment order in the light of his action of accepting the statement of total income filed by the assessee along with return which without being contested, is erroneous, unless the AO was able to negate the claim of the assessee by bringing the income from commodity transactions as part of business income. It should be remembered that under the Income Tax Act 1961, the total income of an assessee individual /company is chargeable to tax u/s. 4 of the Act. The total income has to be computed in accordance with the provisions of the Act. Section 14 of the Act lays down that for the purpose of computation, income of an assessee has to be classified under five heads. It is possible for an assessee/individual/company to have five different sources of income, each one of it will be chargeable to Income Tax Act. Profits and gains of business or profession is only one of the heads under which an assessee's income is liable to be assessed to tax. If an assessee has not commenced business there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the assessee commences its business, its income from any other source will not be taxed as held by the Hon'ble Supreme Court in the case of Tuticorin Alkali & Chemicals Ltd. Vs. CIT (1997) 227 ITR 172 (SC). It has been further held that when the question is whether a receipt of money is taxable or not or whether certain deduction from that receipt is principles of law and not in accordance with accountancy practice. Further, the Hon'ble Apex Court held that the question as to whether a principal receipt is of the nature of income and falls within the charge of sec. 4 of the Act is a question of law which has to be decided by the Court on the basis of the provisions of the Act and interpretation of the term 'income' given in a large number of decisions of the Hon'ble Supreme Court, High Court and Privy Council. After taking note of the Apex Court order as above, we note that the AO in the assessment order after having accepted the statement of total income (supra) and the return wherein the assessee has shown the income from commodities under the head "Income from Other Sources" cannot now after perusal of "Income & Expenditure Account" determine the character of transaction in the penalty proceedings as "Income from Business or Profession" which approach/action is erroneous. We note that the assessee in his statement of total income along with return has classified his income under two heads (i) Salary and (ii) from other sources and the income of Rs. 3 cr. as income from other sources, which we find the AO has not contested in the assessment order, has thus crystallized and the necessary inference drawn is that assessee an individual who was admittedly a salaried person engaged in the previous year relevant to the assessment year under consideration (that too for the first time) in an activity from which he derived "Income from Other Sources" are not required to maintain books of account which are applicable only if the assessee was engaged in Business or Profession. However, we further note that the transactions which yielded income, the assessee had in fact maintained records from which the AO was able to deduce the true income and expenditure of the assessee. We

note the AO in the assessment order has accepted the returned income comprising of income from salary and income from other sources by observing as under :

“Total income assessed as per return Rs.3,44,65,120/-”.

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

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

XXX

According to the Ld. AR, from the facts and circumstances described above, since the assessee is not engaged in business or profession, he does not require to maintain the books of account as per sec. 44AA or sec. 44AA(2) of the Act, therefore, the assessee's case falls in the second limb i.e. "or other documents" as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section which is very important to adjudicate this issue. Therefore, the question is when the search took place, the assessee's transactions (in this case, the speculative transaction) has been found to be recorded in the "other documents" which is (retrieved from the assessee's accountant's drawer) and based on that the assessee declared Rs. 3 cr. during search and later returned income of Rs. 3 cr. as income under the head "Income from Other Sources" which was accepted by the AO in toto. We note that since the income under question (Rs. 3 cr.) was in fact entered in the "other documents" maintained in the normal course relating to the AY 2013-14, which document was retrieved during search, hence, the amount of Rs. 3 cr. offered by the assessee does not fall in the ken of "undisclosed income" defined in Sec. 271AAB

of the Act. So, Rs. 3 cr. which was commodity profit recorded in the other document maintained by the assessee which was retrieved during search cannot be termed as "undisclosed Income" in the definition given u/s. 271AAB of the Act. Since Rs. 3 cr. cannot be termed as "Undisclosed Income" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. Therefore, we uphold the order of the Ld. CIT(A) on the aforesaid reasoning rendered by us.

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

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

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

Thus 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 Shri Raja Ram Maheshwari vs. DCIT vide order dated 10th January, 2019 in ITA No. 992/JP/2017 in para 12 to 14 as under :-

"12. Now, coming to another contention of the Id AR where he has challenged the findings of the Id. CIT(A) that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. It was submitted by the Id AR that in section 271AAB, the word 'may' is used instead of 'shall' so it is not mandatory but same is discretionary. It was submitted that it is settled position of law that penalties are not compulsory, not mandatory but are also discretionary considering the overall facts and circumstances of the case. In support, reliance was placed on provisions of section 158BFA(2) wherein similar phrasology has been used by the legislature and decision of Hon'ble A.P High Court in case of Radha Krishna 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 may be 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 vs 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 parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:

XXX

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

Sub section (3) of section 271AAB:

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

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

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

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

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 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. Accordingly, the penalty levied by the AO and sustained by the Id. CIT(A) is not sustainable and the same is deleted."

[Emphasis supplied]

18. In another case of ***Aeswarya Jain v. Dy. CIT, Central Circle Kota - ITAT, Jaipur - (2020) SCC online ITAT 2258***, which is again a decision authored by same Judicial Member as forming part of this Bench, the ITAT observed and held thus:

“So far as the penalty u/s 271AAB is concerned, the AO has to take the decision after considering the explanation of the assessee and based on the facts and circumstances of the case as well as by considering the satisfaction of the conditions as provided [u/s 271AAB](#) of the Act. The Tribunal has held that levy of penalty [u/s 271AAB](#) of the Act is not mandatory but the AO has discretion to take the decision and the same shall be based on judicious decision of the AO. Therefore, the AO is required to first examine the facts and circumstances under which the assessee surrendered the income as well as the seized material to arrive at a conclusion that the income so disclosed by the assessee during the course of search and seizure proceedings falls in the definition of undisclosed income as provided in the Explanation to [Section 271AAB](#) of the Act. The definition of undisclosed income provided in clause (c) of Explanation to [Section 271AAB](#) Act contemplates any income represented by any money, bullion, or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of search [u/s 132](#) of the Act which has not been recorded in the books of account or other documents maintained in normal course on or before the date of search. If the definition of undisclosed income provided under Explanation to Section 271AAB is applied to the facts of the present case, we find the seized documents which is Plan and Map of a residential house in the name of assessee's wife Smt. Usha Jain containing only the design of the house as well as electric plan. Therefore, the said seized documents itself does not reveal any undisclosed income or any other unaccounted expenditure but it is a electric plan which means that house was to be constructed as per the said plan whether the said work as given in the Plan and design has been actually carried out or not, was not the subject matter of the search and seizure action. The said seized documents also do not reveal the actual expenditure or tentative expenditure for carrying out the electric work as per plan. Thus the said seized documents in the absence of any other materials revealing the unexplained expenditure cannot be said to be an incriminating materials. The searched party has not made any allegation about the actual expenditure incurred by the assessee in the construction of residential house, if any. There is nothing either in the proceedings [u/s 132](#) or in the statement recorded [u/s 132\(4\)](#) of the Act regarding unaccounted expenditure incurred by the assessee on construction of house. Further, there is no mention of the actual construction of the house Shri Aeshwarya Jain vs DCIT, Central Circle, Kota by the assessee or the timing the construction period or completion of construction work. Even the alleged expenditure not recorded in the books of account is not based on any documentary evidence or even on physical verification of the Electrical items as well as furniture and fixture installed in the house of the assessee. **When the said income is not 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 then even if the assessee has surrendered a sum of Rs. 10.00 lacs as unaccounted expenditure, the same would not fall in the ambit of undisclosed income as defined in explanation to [Section 271AAB](#) of the Act. A bare surrender of income not representing the money, bullion, jewellery or other valuable article or thing or any entry in the books of account will not be regarded as undisclosed income for the purpose of levy of penalty [u/s 271AAB](#) of the Act. In the case in hand,**

it is clear from the records that the assessee in his statement recorded u/s 132(4) of the Act has made a surrender of Rs. 10.00 lacs based on said seized materials marked as Annexure A-2 Page 60 to 62 which is Electric Plan and Site Map of the house. Therefore, in the absence of any undisclosed income revealed by said sized materials, the income surrendered by the assessee cannot be said to be undisclosed income for the purpose of Section 271AAB of the Act. Hence, in the facts and circumstances of the case when income surrendered by the assessee does not fall in the ambit of undisclosed income as defined in Section 271AAB of the Act, the same would not attract the levy of penalty u/s 271AAB of the Act. Accordingly, the penalty levied by the AO is deleted."

[Emphasis supplied]

19. Thus, the above decisions clearly hold that mere surrender by assessee during search does not constitute an incriminating material. It is further held that penalty u/s 271AAB is imposable only if there is 'undisclosed income' in the form of (i) 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, or (ii) entry of an expense recorded in the books of account or documents maintained in the normal course which is found to be false. As noted by us in Para No. 6, the AO has made following "Office Note" in assessment-order:

"1. The seized material has also been examined so far as considered relevant but nothing incriminating was found in relation to this case.

2. The Bank account of the assessee was examined and no adverse view is required."

Thus, the AO has himself acknowledged that there was nothing incriminating in seized-material. When it is so, there is nothing of the nature (i) or (ii) as mentioned in the definition of "Undisclosed Income"

prescribed in clause (c) of the Explanation to Section 271AAB. Faced with this situation, we have no hesitation in accepting assessee's claim that the penalty u/s 271AAB(1A) was not imposable in the light of judicial decisions. We therefore allow the grounds raised by assessees and delete the penalties imposed by AO in all cases. The assessees succeed in these appeals.

20. Since we have already deleted penalties in foregoing discussion, the Ground No. 8 raised by assessees does not require any adjudication at this stage as prayed for by Ld. AR. Therefore, the Ground No. 8 is kept upon.

21. Resultantly, all appeals are allowed.

Order pronounced in open court on 21.03.2024.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/ Dated : 21.03.2024
CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore