

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष  
BEFORE: HON'BLE SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No. 1008/JP/2024  
निर्धारण वर्ष/Assessment Year : 2016-17.

Shri Umesh Saboo, 657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur.	बनाम Vs.	Dy. Commissioner of Income- tax, Central Circl-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./ PAN/GIR No. ADGPS 6659 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar, Advocate

राजस्व की ओर से / Revenue by : Shri Monisha Choudhary, Addl. CIT D/R

सुनवाई की तारीख / Date of Hearing : 02/09/2024

उद्घोषणा की तारीख / Date of Pronouncement : 18/9/2024

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 14.06.2024 of Id. CIT (Appeals), Jaipur-5 passed under section 250 of the Income Tax Act, 1961 for the assessment year 2016-17. The grounds raised in the appeal are reproduced as under :-

1. In the facts and circumstances of the case, the learned CIT (A) has erred in confirming the action of the learned Assessing Officer in imposing the penalty u/s 271AAB(1)(c) of the Income Tax Act, 1961 is void ab-initio and deserves

- to be quashed as no satisfaction was recorded with reference to initiation of penalty proceedings.
2. In the facts and circumstances of the case, the learned CIT (A) has erred in confirming the action of the learned Assessing Officer in imposing the penalty of Rs. 33,00,000/- under section 271AAB(1)(c) of the Income Tax Act, 1961 without considering the submission of the assessee.
  3. The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.

2. The brief facts of the case are that the assessee is an individual, having income from salary, house property, business and other sources. A search and seizure action u/s 132 of the IT Act, 1961 was carried out 28.07.2016 at the residential and business premises of "Chandra Prakash Agarwal Group", of which the assessee is one of the members covered therein. The assessee filed return of income for the A.Y. 2016-17 on 30.09.2016 declaring total income of Rs.8,96,630/- under section 139(1) of the IT Act. The AO issued notice under section 153A dated 06.03.2017, which was served upon the assessee on 09.03.2017 requiring the assessee to furnish return of income within 15 days of the service of the said notice i.e. on or before 24.03.2017. Complying with the notice, the assessee furnished the return of income on 24.03.2017 declaring total income of Rs. 1,18,96,630/- i.e. within the time specified in the notice under section 153A. The return filed under section 153A on 24.03.2017 disclosing income of Rs. 1,18,96,630/- overrides the return filed on 30.09.2016 wherein only income of Rs. 8,96,630/- was disclosed. In this return, the assessee surrendered a lump sum amount of Rs. 1,10,00,000/- as admitted in the statement recorded u/s 132(4) on 30/07/2016

during the course of search u/s 132 just to purchase of peace of mind. The assessment stands completed on total income of Rs. 1,79,48,800/- vide order u/s 143(3) r.w.s. 153A dated 21/12/2018. While framing the assessment, the Assessing Officer made an addition of Rs. 60,52,172/- as brokerage income by invoking provisions of section 68 of the IT Act, 1961. Accordingly, the AO issued show cause notice dated 21.12.2018 requiring the assessee to show cause as to why penalty under section 271AAB(1)(a)/271AAB(1)(c) should not be initiated against the assessee. Subsequently, the Assessing Officer has imposed penalty u/s 271AAB(1)(c) of Rs. 33,00,000/- vide penalty order dated 27.06.2019. Being aggrieved by the penalty order, the assessee went in appeal before the Learned CIT(A), who has also dismissed the appeal of the assessee vide appeal order dated 14.06.2024 without considering the detailed submission made before him vide letter dated 24/02/2024.

Now the assessee is in appeal before us.

3. Before us, the Id. A/R of the assessee reiterated the submissions as made before the Id. CIT (A) and also filed his written submissions as under :-

“ Before coming to discuss the individual grounds of appeal, the assessee considers it preferable to submit a gist of the submissions made before the Learned CIT(A), which are relevant material for deciding the appeal.

**1. Recording of satisfaction for initiation of penalty in the assessment order is not in accordance with law.**

In this case, the Learned Assessing Officer has initiated penalty proceedings without recording satisfaction for initiation of the penalty

proceedings. Penalty proceedings have been initiated in para 8 of the assessment order on Page 25. The relevant para is quoted below :-

***"Penal proceedings u/s 271AAB(1)(a) and 271AAB(1)(c) are initiated separately by way of issue of notice u/s 274 r.w.s. 271AAB of the Act."***

Apparently, the initiation of penalty proceedings under two different limbs – 271AAB(1)(a) and 271AAB(1)(c) – is not in accordance with law and this invalidates the very initiation of the penalty proceedings. Similar submissions were made before the Learned CIT(A), who has not considered the issue at all. It is submitted that it is settled position of law that initiation of penalty proceedings should be limb-specific of the particular section so that it enables the assessee to furnish its reply. When penalty proceedings have been initiated under two different limbs, the assessee was not certain regarding the default and, as such, this creates confusion in the mind of the assessee. The assessee should know the ground which he has to meet specifically, otherwise the principle of natural justice is offended. On the basis of such proceedings, no penalty could be imposed. **(CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565).**

**2. Two show-cause notices have been issued separately for levy of penalty – u/s 271 AAB(1)(a) and 271AAB(1)(c), which invalidates the levy of penalty.**

It is submitted that not only the Learned Assessing Officer recorded unlawful satisfaction under two different limbs of Sec. 271 AAB(1)(a) and 271 AAB(1)(c), but he also issued on 21/12/2018 two separate notices asking the assessee why penalty should not be imposed u/s 271 AAB(1)(a) and u/s 271AAB(1)(c). Copies of these notices **are scanned below :-**

**Copy of notice issued u/s 271AAB(1)(a)**

Office of the  
**Dy. Commissioner of Income tax**  
Central Circle-2, Jaipur  
Room No. NA -105, New Central Revenue Building,  
Bhagwan Das Road, Jaipur Tele/Fax : 91-141-2227574

**NOTICE FOR IMPOSITION OF PENALTY UNDER  
INCOME TAX ACT, 1961**

Dated : 21-12-2018

To  
**Shri Umesh Saboo**  
657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur

**PAN - ADGPS6659C**

Whereas in the course of proceedings in your case before me for **Assessment Year 2016-17** it appears to me that you have [checked one in below table] -

SrN.	Provisions of Section	Read with Section
A	Concealment of particulars of income	271(1)(e)
B	Furnished inaccurate particulars of income	271(1)(e)
<b>C</b>	<b>Undisclosed income in a case where search has been initiated after july-2012</b>	<b>271AAB(1)(a)</b>

You are hereby requested to appear before me on **4/1/2019 at 11:00 AM** and show Cause as to why the aforesaid penalty(s) under section 274 read with the relevant section(s) of the Income Tax Act, 1961 should not be initiated in your case? If you do not wish to avail this opportunity of being heard in person or through your duly authorized representative, you may show cause in writing on or before the said date. The submissions made by you will be considered before any Order imposing penalty under the aforesaid relevant section(s) of the Income Tax Act, 1961 is made in your case.



Pen-R No. 08/33

  
**(Jagdish)**  
Dy. Commissioner of Income-tax  
Central Circle-2, Jaipur

**Copy of notice issued u/s 271AAB(1)(c)**

Office of the  
**Dy. Commissioner of Income tax**  
Central Circle-2, Jaipur  
Room No. NA -105, New Central Revenue Building,  
Bhagwan Das Road, Jaipur Tele/Fax : 91-141-2227574

**NOTICE FOR IMPOSITION OF PENALTY UNDER**  
**INCOME TAX ACT, 1961**

Dated : 21-12-2018

To  
**Shri Umesh Saboo**  
657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur

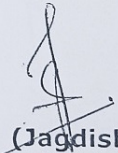
PAN - ADGPS6659C

Whereas in the course of proceedings in your case before me for **Assessment**  
**Year 2016-17** it appears to me that you have [checked one in below table] -

SrN.	Provisions of Section	Read with Section
A	Concealment of particulars of income	271(1)(e)
B	Furnished inaccurate particulars of income	271(1)(e)
<b>C</b>	<b>Undisclosed income in a case where search has been initiated after july-2012</b>	<b>271AAB(1)(C)</b>

You are hereby requested to appear before me on **4/1/2019 at 11:00 AM** and show Cause as to why the aforesaid penalty(s) under section 274 read with the relevant section(s) of the Income Tax Act, 1961 should not be initiated in your case? If you do not wish to avail this opportunity of being heard in person or through your duly authorized representative, you may show cause in writing on or before the said date. The submissions made by you will be considered before any Order imposing penalty under the aforesaid relevant section(s) of the Income Tax Act, 1961 is made in your case.

pen. R. No. 139/33



(Jagdish)

Dy. Commissioner of Income-tax  
Central Circle-2, Jaipur

The position being so, it is established beyond doubt that initiation of penalty proceedings and issuing of show-cause notice under two different limbs of the same section was not in accordance with law. This has invalidates the penalty proceedings.

**3. There is no undisclosed income within the meaning of Sec. 271AAB(1) Explanation (c).**

It is submitted that penalty u/s 271 AAB is leviable on undisclosed income. The definition of undisclosed income is mentioned in provisions of Sec. 271AAB Explanation (c). The same are quoted below :-

***(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 perusal of the above reveals that for imposition of penalty, the Learned Assessing Officer is required to give a finding that undisclosed income was found in the case of the assessee represented by any money, bullion, jewellery or valuable article or any entry in the books of account etc. There is no such finding in the order passed by the Learned Assessing Officer u/s 271AAB(1)©. The Learned CO has referred only to the admission of the assessee in surrendering income of Rs. 1,10,0,000/- on lump sum basis. The assessee surrendered the income not with reference to any specific entry, but on lump sum basis to purchase peace of mind. Therefore, the surrendered income does not fall in the category of undisclosed income as per definition quoted above. In view of this, it was submitted before the Learned CIT(A) that there was no undisclosed income in the case of the assessee and hence, levy of penalty was not justified. The Learned CIT(A) has not considered this submission of the assessee. The penalty deserves to be deleted.

**4. The return has been filed within the time allowed in notice u/s 153A.**

The Learned Assessing Officer has levied penalty on the ground that return of income was not filed in time by the assessee. The issue has been discussed in para 11 (ii) of the penalty order. The Learned Assessing Officer has mentioned as under :-

***"However, the assessee filed return of income after due date on 30/09/2016, the due date of filing the return for the year under consideration is 31/07/2016. Therefore, the penalty is also leviable on this account and the same is squarely covered as per clause (c) of sub-section (1) of Section 271 AAB of the I.T.Act, 1961"***

In the above regard, it is submitted that the Learned Assessing Officer was not aware about the correct position of the provisions of Sec. 271AAB. As per these provisions, the specified date for filing return of income is the date mentioned in the notice u/s 153A. The relevant portion of the section 271 AAB Explanation (a) is quoted below :-

**(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"**

In view of this specific provision, the Learned Assessing Officer was not justified in holding that the assessee did not file return of income in time. The Learned Assessing Officer erred in considering the specific date for filing of return of income only with reference to Sec. 139(1) whereas the section quoted above mentions the alternate date as per notice u/s 153A. The assessee filed return of income on 24/03/2017 within the time allowed under section 153A. The notice u/s 153A was served on the assessee on 09/03/2017 requiring the assessee to furnish the return of income within 15 days of the service of notice,

which means by 24/03/2017, on which date the return stood filed. In the facts and circumstances of the case, the Learned Assessing Officer erred in imposing penalty on the ground that return was not filed within time. These facts were submitted before the Learned CIT(A) in detail, but there is no murmur about this issue in the appeal order passed by the Learned CIT(A). The Hon'ble Tribunal is requested to delete the penalty on this ground also.

#### **5. Order passed by the Learned CIT(A) contains contradictions.**

It is submitted that the Learned CIT(A) has failed to pass a reasoned order. In para 5.8 (vii) appearing on page 7 of the appeal order, the Learned CIT(A) has discussed the issue of the limbs/clauses (a)/(b)/(c) of Section 271AAB. **The same is scanned below :-**

critically examined this brokerage income is not correct.

(vii) The appellant had claimed that the AO had issued both notices u/s 271AAB(1)(a) and 271AAB(c) which shows the confusion and uncertainty in the mind of the AO. The argument of the appellant is not correct. The penalty provision u/s 271AAB of the Act is specifically for the cases wherein search has been initiated. Sub section (1) is applicable for search initiated u/s 132 on or after 1 July 2012. Later on Sub section (1A) was inserted for search initiated u/s 132 on or after the date on which the Taxation law 2<sup>nd</sup> amendment bill, 2016 received the ascent of the President. Now the clause (a) or (b) or (c) is just for the rate of penalty i.e. if assessee falls in (a) clause then penalty is 10%, if falls in clause (b) then penalty is 20% and if both not applicable then clause (c) will apply and the rate of calculation of penalty is 30%. Therefore these three clauses is just for the calculation part for applying for rate of penalty depending upon condition and situation. For applying the clause, it is important to give opportunity and hear the assessee's argument that which clause will be applicable. For deciding the rate as per clause (a)/(b)/(c), various facts needs to be consider like whether during search, undisclosed income was surrendered, whether that surrender income was admitted while recording statement or whether the assessee was able to substantiate the manner in which that surrendered income was derived or whether on or before due date ROI was filed and whether the due taxes has been paid or not etc. Thus, for applying the clause (a)/(b)/(c) under section 271AAB(1), it is important to give opportunity to the assessee to explain its case and applicability of clause. Thus it is not necessary for the AO to specify exact clause while initiating the penalty in the assessment order. Initiating the penalty u/s 271AAB(1) is sufficient to fulfil the legal requirement and technicalities of the Act. Thus, the AO has rightly initiated the penalty under provisions of section 271AAB(1).

The assessee had raised objections that satisfaction of the Learned Assessing Officer in the assessment order was not limb/clause specific and similarly, notices were also issued under two different clauses – 271AAB(1)(a) and 271AAB(1)(c). The case of the assessee was that assessee should know the grounds which has to meet specifically, otherwise the principle of natural justice is violated and no penalty should be imposed in such circumstances. The Learned CIT(A), in the aforesaid para, on the one hand admits that it is important to give opportunity and hear the assessee's argument that which clause is applicable, but on the other hand, he has stated that it was not necessary for the Assessing Officer to specific exact clause. The Learned CIT(A) has not specified as to how the assessee shall furnish his argument unless the specific clause is not mentioned in the notice issued to him. In view of this, the Learned CIT(A) has not been able to pass a reasoned order in view of the aforesaid contradictions. Therefore also, the penalty deserves to be deleted.

**Now the assessee comes to discuss the individual grounds of appeal hereunder. Grounds No. 1& 2 are taken together for discussion :-**

**Ground No.1**

**In the facts and circumstances of the case, the Learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in imposing the penalty u/s 271 AAB(1)(c) of the Income Tax Act, 1961, which is void ab-initio and deserves to be quashed as no satisfaction was recorded with reference to initiation of penalty proceedings.**

**&**

**Ground No.2**

**In the facts and circumstances of the case, the learned CIT(A) has erred in confirming the action of the Learned Assessing Officer in imposing the penalty of Rs. 33,00,000/- u/s 271AAB(1)(c) of the Income Tax Act without considering the submission of the assessee.**

It is submitted that in this case, the Learned Assessing Officer has wrongly imposed penalty u/s 271AAB(1)(c) and the Learned CIT(A) has also erred in confirming the action of the Learned Assessing Officer without considering the detailed submissions made on 24/2/2024. A copy of the submissions is available on Paper Book cited supra. As discussed in the foregoing paras, the imposition of penalty is unlawful in this case inasmuch as the satisfaction recorded by the Learned Assessing Officer in the assessment order was vague and unambiguous inasmuch as simultaneously the Learned Assessing Officer referred to the provisions of Sec. 271AAB(1)(a) and 271AAB(1)(c). The satisfaction of the Learned Assessing Officer was not specific and hence invalid. Similarly, the Learned Assessing Officer issued notices on 21/12/2018 separately asking the assessee to show-cause why penalty should not be imposed u/s 271AAB(1)(a) and 271AAB(1)(c). Again this created ambiguity as the charge was not

specific and assessee was not sure of the default. In view of this, the penalty imposed is unlawful and deserves to be deleted.

It is further submitted that there was no undisclosed income in the case of the assessee and hence, the provisions of Sec. 271AAB were not attracted. The surrender made by the assessee was on lump sum basis to purchase peace of mind. It was in round figures of Rs. 1,10,00,000/-. The surrender was not specific with reference to any documents or incriminating material. Hence, such surrender of income could not be treated as undisclosed income. In the penalty order, the Learned Assessing Officer has also mentioned another ground for levy of penalty that the return of income was not filed in time. The assessee furnished return on 24/03/2017 within the time allowed u/s 153A. Thus, the grounds taken for imposition of penalty are patently wrong. Therefore, the levy of penalty deserves to be deleted.

**The assessee considers it relevant to resubmit the main paras of submissions made before the Learned CIT(A), which he has failed to consider. The Hon'ble Tribunal is requested to kindly consider the submissions of the assessee quoted**

*" 2.The penalty levied in this case is unlawful, illegal and unjust. The same deserves to be deleted on the following counts :-*

**(a) No initiation of penalty u/s 271AAB(1)(c)**

3. It is submitted that the Learned Assessing Officer has passed assessment order in the case of the assessee u/s 143(3) r.w.s. 153A on 21/12/2018, but penalty proceedings u/s 271AAB(1)(c) have not been initiated. The last line of para 8 of the assessment order is quoted below.

**Para 8 of the assessment order**

**"Penal proceedings u/s 271AAB(1)(a) and 271AAB(1)(c) are initiated separately by way of issue of notice u/s 274 r.w.s. 271AAB of the Act."**

3.1 In this para, the Learned Assessing Officer has observed that for initiating penalty proceedings separately by issuance of notice u/s 274 r.w.s. 271AAB. **The Learned Assessing Officer has issued notice on 21/12/2018 asking the assessee why penalty proceedings u/s 271AAB(1)(c) should not be initiated. The relevant copy of the notice is scanned below.**

Office of the  
**Dy. Commissioner of Income tax**  
Central Circle-2, Jaipur  
Room No. NA -105, New Central Revenue Building,  
Bhagwan Das Road, Jaipur Tele/Fax : 91-141-2227574

**NOTICE FOR IMPOSITION OF PENALTY UNDER  
INCOME TAX ACT, 1961**

Dated : 21-12-2018

To  
Shri Umesh Saboo  
657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur

PAN - ADGPS6659C

Whereas in the course of proceedings in your case before me for **Assessment Year 2016-17** it appears to me that you have [checked one in below table] -

SrN.	Provisions of Section	Read with Section
A	Concealment of particulars of income	271(1)(e)
B	Furnished inaccurate particulars of income	271(1)(e)
C	<b>Undisclosed income in a case where search has been initiated after july-2012</b>	<b>271AAB(1)(C)</b>

You are hereby requested to appear before me on **4/1/2019 at 11:00 AM** and show Cause as to why the aforesaid penalty(s) under section 274 read with the relevant section(s) of the Income Tax Act, 1961 should not be initiated in your case? If you do not wish to avail this opportunity of being heard in person or through your duly authorized representative, you may show cause in writing on or before the said date. The submissions made by you will be considered before any Order imposing penalty under the aforesaid relevant section(s) of the Income Tax Act, 1961 is made in your case.

pen. R. No. 139/33

(Jagdish)  
Dy. Commissioner of Income-tax  
Central Circle-2, Jaipur

*The perusal of the aforesaid notice reveals that while completing assessment on 21/12/2018, the Learned Assessing Officer **did not initiate the penalty proceedings u/s 271AAB(1)(c) and in view of this issued this notice asking the assessee why penalty proceedings u/s 271AAB(1)(c) should not be initiated.** Thus, it is a case where the Learned Assessing Officer has proceeded to **impose penalty without initiating the same. There is no observation or satisfaction of the Learned Assessing Officer for initiating the penalty proceedings u/s 271AAB(1)(c).** In view of this, the process and procedure of law has been vitiated. Therefore, the penalty levied deserves to be deleted.*

**(b) Show-cause notice dated 21/12/2018 issued for initiation of penalty both under section 271AAB(1)(a)/271AAB(1)(c)**

4. It is further submitted that the Learned Assessing Officer has issued notices on 21/12/2018 asking the assessee to show-cause why penalty proceedings should not be initiated u/s 271AAB(1)(a) as well as u/s 271AAB(1)(c). Notices issued u/s 271AAB(1)(a) and 271AAB(1)(c) are scanned below :-

Office of the  
**Dy. Commissioner of Income tax**  
Central Circle-2, Jaipur  
Room No. NA -105, New Central Revenue Building,  
Bhagwan Das Road, Jaipur Tele/Fax : 91-141-2227574

**NOTICE FOR IMPOSITION OF PENALTY UNDER  
INCOME TAX ACT, 1961**

Dated : 21-12-2018

To  
**Shri Umesh Saboo**  
657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur

**PAN - ADGPS6659C**

Whereas in the course of proceedings in your case before me for **Assessment Year 2016-17** it appears to me that you have [checked one in below table] -

SrN.	Provisions of Section	Read with Section
A	Concealment of particulars of income	271(1)(e)
B	Furnished inaccurate particulars of income	271(1)(e)
<b>C</b>	<b>Undisclosed income in a case where search has been initiated after july-2012</b>	<b>271AAB(1)(a)</b>

You are hereby requested to appear before me on **4/1/2019 at 11:00 AM** and show Cause as to why the aforesaid penalty(s) under section 274 read with the relevant section(s) of the Income Tax Act, 1961 should not be initiated in your case? If you do not wish to avail this opportunity of being heard in person or through your duly authorized representative, you may show cause in writing on or before the said date. The submissions made by you will be considered before any Order imposing penalty under the aforesaid relevant section(s) of the Income Tax Act, 1961 is made in your case.



Am-R No/08/33

  
**(Jagdish)**  
Dy. Commissioner of Income-tax  
Central Circle-2, Jaipur

Office of the  
**Dy. Commissioner of Income tax**  
Central Circle-2, Jaipur  
Room No. NA -105, New Central Revenue Building,  
Bhagwan Das Road, Jaipur Tele/Fax : 91-141-2227574

**NOTICE FOR IMPOSITION OF PENALTY UNDER  
INCOME TAX ACT, 1961**

Dated : 21-12-2018

To  
Shri Umesh Saboo  
657, Jai Lal Munshi Ka Rasta, Chandpole Bazar, Jaipur

PAN - ADGPS6659C

Whereas in the course of proceedings in your case before me for **Assessment Year 2016-17** it appears to me that you have [checked one in below table] -

SrN.	Provisions of Section	Read with Section
A	Concealment of particulars of income	271(1)(e)
B	Furnished inaccurate particulars of income	271(1)(e)
C	<b>Undisclosed income in a case where search has been initiated after july-2012</b>	<b>271AAB(1)(C)</b>

You are hereby requested to appear before me on **4/1/2019 at 11:00 AM** and show Cause as to why the aforesaid penalty(s) under section 274 read with the relevant section(s) of the Income Tax Act, 1961 should not be initiated in your case? If you do not wish to avail this opportunity of being heard in person or through your duly authorized representative, you may show cause in writing on or before the said date. The submissions made by you will be considered before any Order imposing penalty under the aforesaid relevant section(s) of the Income Tax Act, 1961 is made in your case.

pen. R. No. 139/33

(Jagdish)

Dy. Commissioner of Income-tax  
Central Circle-2, Jaipur

**4.1 Issuing notices for section 271AAB(1)(a) and 271AAB(1)(c) on the one hand discloses the confusion and uncertainty in the mind of the Learned Assessing Officer not being sure and certain as which provision is applicable and on the other hand creates ambiguity and confusion in the mind of the assessee as which show-cause notice is applicable in his case for furnishing defence and response.** In these circumstances, issuing show-cause notices under both these sections 271AAB(1)(a) and 271AAB(1)(c) has destroyed the very basis for levy of penalty. The assessee submits that in the facts and circumstances of the case, the Learned Assessing Officer was unable to reach to a conclusion and record his satisfaction whether provisions of Sec. 271AAB(1)(a) or Sec. 271AAB(1)(c) were applicable. The assessee cannot be faulted on this matter. The subsequent levy of penalty by the Learned Assessing Officer u/s 271AAB(1)(c) is unlawful and illegal as in the same, it has not been specified as why the Sec. 271AAB(1)(a) was ignored and why section 271AAB(1)(c) was made applicable. The Learned CIT(A) is requested to delete the penalty in the aforesaid circumstances.

**(c) Penalty not leviable as return has been filed within due date provided in notice u/s 153A**

6. In this case, the only ground on which penalty u/s 271AAB(1)© has been levied is that the return of income was not filed within the due date. The relevant provisions of Section 271AAB(1)(c) along with Explanation are quoted below :-

**Penalty where search has been initiated.**

**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, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

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

- (i) *in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;*
    - (ii) *substantiates the manner in which the undisclosed income was derived; and*
    - (iii) *on or before the specified date—*
      - (A) *pays the tax, together with interest, if any, in respect of the undisclosed income; and*
      - (B) *furnishes the return of income for the specified previous year declaring such undisclosed income therein;*
  
  - (b) *a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—*
    - (i) *in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and*
    - (ii) *on or before the specified date—*
      - (A) *declares such income in the return of income furnished for the specified previous year; and*
      - (B) *pays the tax, together with interest, if any, in respect of the undisclosed income;*
  
  - (c) *a sum which shall not be less than thirty per cent but which shall not exceed ninety per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b).*
- (2) *No penalty under the provisions of clause (c) of sub-section (1) of [section 271](#) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*
- (3) *The provisions of [sections 274](#) and [275](#) shall, as far as may be, apply in relation to the penalty referred to in this section.*

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

***(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued 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;*

*The aforesaid provisions very clearly state that the specified date for filing of return shall be the period specified in the notice issued u/s 153A. In this case, notice u/s 153A was issued on **06/03/2017** as mentioned in the assessment order (para 3). Copy of age 1 and 2 of the assessment order is scanned below :-*

## INCOME TAX DEPARTMENT

1	Name & Address of the Assessee	Shri Umesh Saboo 657, Jai Lal Munsi Ka Rasta, Chandpole Bazar, Jaipur.
2	PAN	ADGPS6659C
3	Ward/Circle/Range	Central Circle - 2, Jaipur
4	Status	Individual
5	Assessment Year	2016-17
6	Residential Status	Resident
7	Method of Accounting	Mercantile
8	Previous Year	2015-16
9	Nature of business / Source(s) of income	Salary, House property, Business and Other sources.
10	Date of Hearing(s)	As per Order Sheet
11	Date of Order	21.12.2018
12	Section and sub-section of enactment under which assessment is made	143(3) r.w.s 153A of the Income-tax Act, 1961.

## Assessment Order

1 A search and seizure action u/s 132 of the Income Tax Act, 1961 ("the Act") and/or survey action u/s 133A of the Act was carried out by the Income Tax Department on the members of Chandra Prakash Agarwal Group on 28-07-2016 of which the Assessee is one of the members covered u/s 132. The jurisdiction over the case was assigned to Central Circle - 2, Jaipur by the Commissioner of Income Tax,

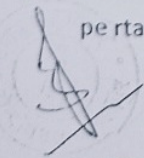
Jaipur-II, Jaipur by means of an Order u/s 127 of the Act circulated vide Pr. CIT-II/JPR/127/16-17/4887 dated 14-10-2016.

2 Notice under section 153A of the Act dated 06-03-2017 was issued and served upon the Assessee on 09-03-2017 requiring it to file a true and correct return of income as prescribed under Rule 12 of the Income Tax Rules, 1962 within 15 days of the service of the said notice.

3 In response to the said notice(s), a return declaring an income of Rs. 11896630/- was filed by the Assessee on 24-03-2017. In the return of income originally filed by the Assessee u/s 139(1) of the Act on 30-09-2016 an income of Rs. 896630/- was declared. It pertinent to mention here that the search operation relevant to this case has been conducted on 28-07-2016 i.e. FY 2016-17 relevant to AY 2017-18 but due date for filing the Return of Income u/s 139(1) of the I.T. Act was due as on date of search hence as per clause (b)(ii) of explanation to section 271AAB, the year under consideration falls within the definition of 'specified year'. The total income declared in the ROI for the 'specified year' included the undisclosed income of Rs. 1,10,00,000/- which represented the undisclosed income. Accordingly, penalty u/s 271AAB(1)(c) of the Act is initiated on such amount of Rs. 1,10,00,000/- by way of issue of notice u/s 274 r.w.s 271AAB of the Act.

4 The Assessee primarily derives its income from Salary, House property, Business and Other sources. The assessee is a finance broker and earned brokerage income in his proprietary concern M/s Vihan Associates.

5 The proceedings of assessment of income were commenced by issue of notice u/s 143(2) of the Act on 19-09-2017, and notice u/s 142(1) dated 05-07-2018, and 20-07-2018 were also issued to the assessee and information and details pertaining to the case relevant to assessment of his income were called by means of a questionnaire. Later queries were raised vide notices under section 142(1) and/or Order Sheet Entries wherever deemed fit. In response to the above referred notice(s), Shri S.L. Poddar, Advocate attended the hearings. The information furnished by the Assessee's Counsel was examined and placed on record. The issues pertaining to assessment of income were discussed with the Counsel of the assessee.



DCI T, Central Circle-2, Jaipur

5.1 The return of income in response to this notice was filed on **24/03/2017**. The same was well within the period of 15 days specified in the notice u/s 158. In view of this, the Learned Assessing Officer has erred in concluding that the return was filed late. In fact, the Learned Assessing Officer has erred in taking the specified date for filing return of income u/s 139(1) whereas the Explanation provides the alternate date given in the notice issued u/s 153A. In view of these statutory provisions, the levy of penalty by the Learned Assessing Officer on the ground that the assessee failed to file the return on due date is wrong. No penalty is, therefore, leviable u/s 271AAB(1)(c). The same deserves to be deleted.

**(d) Penalty has been levied without meeting the requirements/stipulations of Sec. 271AAB Expl. (c)**

6. The provisions of Sec. 271AAB(1) are quoted below in order to bring on record that the requirements of this Section have not been met mandating levy of penalty.

**Penalty where search has been initiated.**

**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<sup>16</sup> [but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President<sup>17</sup>], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—
- (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;
  - (ii) substantiates the manner in which the undisclosed income was derived; and
  - (iii) on or before the specified date—

- (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and
  - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—
- (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), does not admit the undisclosed income; and
  - (ii) on or before the specified date—
    - (A) declares such income in the return of income furnished for the specified previous year; and
    - (B) pays the tax, together with interest, if any, in respect of the undisclosed income;
- (c) a sum <sup>18</sup>[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).

<sup>19</sup>[(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 <sup>20</sup>[[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) <sup>21</sup>[or sub-section (1A)].

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

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

(a) "specified date" means the due date of furnishing of return of income under sub-section (1) of [section 139](#) or the date on which the period specified in the notice issued 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.*

**6.1** *The above provisions mandate that the undisclosed income means --*

- (i) Income represented by any money, bullion jewellery etc or any entry in the books of accounts or transactions which has not been recorded in the regular books of account before the date of search ;*
- (ii) Any income represented by any entry of expenses recorded in the books of account which is found to be false ;*

*In the case of the assessee, the Learned Assessing Officer has imposed penalty with reference to undisclosed income of Rs.1,10,00,000/- surrendered by the assessee during the course of statement recorded u/s 132(4). The relevant para 11(i) of the penalty order is quoted below :-*

- (i) The assessee admitted the undisclosed income of Rs. 1,10,00,000/- derived from brokerage and surrendered the same for taxation as his undisclosed income for A.Y. 2016-17 during the course of search in his statement recorded u/s 132(4) of the IT Act, 1961 on dated 28/07/2016.*

**6.2** *It is submitted that in the definition of "undisclosed income" as per provisions quoted above (Explanation (c) to Sec. 271AAB), there is no reference to surrender of income in statement recorded u/s 132(4). The penalty u/s 271AAB is leviable with reference to undisclosed income found in the course of search represented in shapes discussed above. The provisions of Sec. 271AAB are attracted with reference to undisclosed income found in the course of search and not on undisclosed income surrendered by the assessee in statement u/s 132(4), that too for purchase of peace. It is submitted that the assessee normally to get rid off the harassing*

*proceedings of search comes to terms with the revenue authorities and toes to their call for surrender of income. Although such obtaining of surrender of income is in violation of various circulars issued by the CBDT from time to time. The CBDT Circular No. 286/2/203-IT (Inv) dated 10/03/2003 is quoted below :-*

*F. No. 286/2/2003-IT (Inv)*

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

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

*Sir*

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

*Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these eircumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.*

*Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of*

*search/survey operations or thereafter while framing the relevant assessment orders.*

*Yours faithfully,*

*Sd/-  
(S. R. Mahapatra]  
Under Secretary (Inv. II)*

*The CBDT Circular No. 286/98/2013-IT(Inv.II) dated 18/12/2014 is quoted below :-*

*F.No. 286/98/2013-IT (Inv.I1)  
Government of India  
Ministry of Finance Department of Revenue  
Central Board of Direct Taxes  
Room No. 265A, North Block New Delhi,  
the 18th December, 2014*

- To 1. All Principal Chief Commissioners of Income Tax  
2. All Chief Commissioners of Income Tax  
3. All Directors General of Income Tax (Inv.)  
4. Director General of Income Tax (I & CI), New Delhi*

*Subject: Admissions of Undisclosed Income under coercion/pressure during Search/Survey - reg.*

*Ref: 1) CBDT letter F.No. 286/57/2002-IT(Inv.11) dt. 03-07-2002 2) CBDT letter F.No. 286/2/2003-IT(Inv.II) dt. 10-03-2003 3) CBDT letter F.No. 286/98/2013-IT(Inv.11) dt. 09-Q1-2014*

*Sir/Madam,*

*Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assesseees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey*

*operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.*

*2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.*

*3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T.Act,1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion shall be viewed by the Board adversely.*

*4. These guidelines may be brought to the notice of all concerned in your Region for strict compliance.*

*5. I have been further directed to request you to closely observe/oversee the actions of the officers functioning under you in this regard.*

*6. This issues with approval of the Chairperson, CBDT*

*(K. Ravi Ramchandran)  
Director (Inv) CBDT*

*6.3 The submission of the assessee is that there is nothing on record to specifically substantiate the surrender of income of Rs. 1,10,00,000/- by the assessee during the course of statement recorded u/s 132(4). There are no details of this surrender of Rs.1,10,00,000/- made purely on lump sum basis. Penalty is not attracted on such surrender of income on estimate basis. The provisions of Sec. 271AAB specifically the Expl. (c) require that the undisclosed income has to be 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."*

*6.4 While imposing the penalty the Learned Assessing Officer has miserably failed to specify the transactions/documents which quantify the undisclosed income of Rs.1,10,00,000/-. Hence, the levy of penalty violates the provisions of Sec. 271AAB Expl. (c). The undisclosed income of Rs.*

*1,10,00,000/-, as treated by the Learned Assessing Officer, as undisclosed income does not meet the stipulations and requirements mentioned in the Expl. (c) to Sec. 271AAB. The Learned CIT(A), therefore, is requested to kindly delete the penalty.*

*The following case laws are quoted in support :-*

**(1) ASSISTANT COMMISSIONER OF INCOME TAX vs. MARVEL ASSOCIATES**

*ITAT VISHAKAPATNAM*

*(2018) 166 DTR 0409 (Visakha)(Trib), (2018 (2018) 65 ITR (Trib) 0023 (Visakhapatnam), (2018) 194 TTJ 0338 (Visakha)*

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

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

9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material.

**(2) DCIT Vs. Manish Agarwala**

**ITAT, Kolkata Bench**

**ITA No. 1479/Kol/2015**

**Feb 9, 2018**

**(2018) 167 DTR 0369 (KolTrib), (2018)**

**194 TTJ 0346 (Kol)**

*"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.*

**(3) M/s Rambhajo's Vs. ACIT**

**ITAT, Jaipur Bench, Jaipur**

**175 DTR 161 (JP)**

*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.*

*For the purposes of levy of penalty, what has to be seen is that whether the surrender so made, in terms of statement of the assessee's partners recorded u/s 132(4) during the course of search, falls in the definition of "undisclosed income" which has been specifically laid down in terms of clause (c) of explanation to section 271AAB.*

*In absence of any such discrepancy so found by the AO either during the assessment or penalty proceedings, the said surrender may be the basis for assessment but can't form the basis for levy of penalty in absence of a specific finding as to how the same qualify as an undisclosed income so defined u/s 271AAB of the Act. Hence, penalty levied thereon is liable to be set-aside.*

**(4) Padamchand Pungliya Vs. ACIT**

***ITAT, Jaipur Bench, Jaipur***

***446/181 ITD 261 (Jp.Tr)***

*The Hon'ble Tribunal held that penalty u/s 271AAB is not mandatory, but the Assessing Officer has discretion to take a decision and the same should be based on judicious decision of the Assessing Officer. Further, the statement recorded u/s 132(4) itself would not either constitute an incriminating material or undisclosed income in the absence of any corroborating asset or entry in the seized document representing the undisclosed income.*

**(5) Laxman Nainani Vs. DCIT**

***ITAT, Jaipur Bench, Jaipur***

***204 DTR 97***

*Held that so far as the penalty u/s 271AAB is concerned, in the absence of any inquiry by the Assessing Officer that the entries/notings on the loose papers found during the course of search represent real transactions or any finding in the penalty order that the income surrendered by the assessee during the search is undisclosed income as define in Sec. 271AAB, penalty levied u/s 271AAB cannot be sustained, more so as the entries in the loose papers are related to the business of the company in which the assessee is director and not to the assessee in his individual capacity.*

**(6) Smt. Aparna Agrwal Vs. DCIT****ITAT, Jaipur bench, Jaipur****(2019) 105 taxmann.com 233/176 ITD 753**

*Held that disclosure of income in statement recorded u/s 132(4) would not ipso facto be regarded as undisclosed income unless and until it is tested as per definition provided in Explanation to Sec. 271AAB.*

**(7) Shiv Bhagwan Gupta Vs. ACIT****ITAT, Patna****200 DTR (65) (Pat)**

*Held that Assessing Officer has been given discretion in the matter of levy of penalty u/s 271AAB and if the surrendered income does not fall in the definition of "undisclosed income" as defined under section 271AAB, penalty is not warranted*

**(8) Shri Paras Mal Jain Vs. DCIT****I.T.A. No.353/JP/2022****Hon'ble ITAT, JAIPUR**

*Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132 (4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserves to be set-aside."*

**In view of the aforesaid discussion, the Hon'ble ITAT is requested to delete the penalty.**

The Hon'ble Tribunal is requested to consider the submissions and case laws cited by the assessee and decide the appeal in favour of the assessee by deleting the penalty levied by the Learned Assessing Officer and sustained by the Learned CIT(A)."

4. On the other hand, the Id. D/R supported the orders of the revenue authorities and submitted that the order of the Id. CIT (A) be upheld.

5. We have heard the rival contentions and perused the material available on record. Briefly stated the facts of the case are that the assessee is an individual having income from salary, house property, business and other sources. A search u/s 132 was carried out at the residential and business premises of " Chandra Prakash Agarwal Group" on 28.07.2016, of which the assessee is one of the members covered therein. For the year under consideration, return under section 139(1) of the IT Act, 1961 declaring total income of Rs. 8,96,630/- was filed on 30.09.2016. Thereafter the AO issued notice under section 153A dated 06.03.2017 which was served upon the assessee on 09.03.2017, requiring the assessee to furnish a return of income within 15 days of the service of the said notice. The assessee filed the return declaring total income of Rs. 1,18,96,630/- on 24.03.2017 i.e. within the time specified in the notice under section 153A. The return filed under section 153A on 24.03.2017 disclosing income of Rs. 1,18,96,630/- overrides the return filed on 30.09.2016 wherein income of Rs. 8,96,630/- was disclosed. In the return filed on 24.03.2017 in response to the Notice under section 153A, the assessee included surrendered income of Rs.

1,10,00,000/- on lump sum basis, as admitted in the statement recorded under section 132(4) on 30.07.2016, in order to purchase peace of mind. The department treated the sum of Rs. 1,10,00,000/- as surrendered income by the assessee for the year. The AO completed the assessment on total income of Rs. 1,79,48,800/- vide order dated 21.12.2018 under section 143(3) read with section 153A of the IT Act, 1961. The AO while framing the assessment, made an addition of Rs. 60,52,172/- as brokerage income etc. The AO simultaneously initiated penalty proceedings under section 271AAB(1)(c) of the Act by issuing show cause notice issued on 21.12.2018 to which the assessee filed its explanation. The AO held the explanation of the assessee as not acceptable and levied a penalty of Rs. 33,00,000/- being thirty percent of the undisclosed income of Rs. 1,10,00,000/- under section 271AAB(1)(c) of the IT Act, 1961 on the assessee vide impugned penalty order dated 27.06.2019. On appeal filed by the assessee before the Id. CIT (A) against the penalty order, the Id. CIT (A) dismissed the appeal of the assessee vide appeal order dated 14.06.2024 without considering the detailed submissions filed by the assessee before him on 24.02.2024. On perusal of record, it is noted that the Assessing Officer was not justified in imposing penalty of Rs. 33,00,000/- under section 271AAB(1)(c) of the Act simply on the basis that the assessee admitted/surrendered the income of Rs. 1,10,00,000/- and disclosed in the return as brokerage income, without proving that the said income was " undisclosed income " of assessee within the meaning of section 271AAB(1)(c) of the IT Act, 1961. The AO has not brought on record any incriminating material to treat the surrender as undisclosed income of the assessee. The surrender was not specific with reference to

any documents or incriminating material. Hence such surrender of income could not be treated as undisclosed income. The Id. A/R submitted that penalty under section 271AAB is leviable on undisclosed income. The definition of undisclosed income mentioned in provisions of section 271AAB Explanation (c) is reproduced hereunder :-

**“ (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.”**

Thus, the Id. A/R submitted that it is only by admission/surrender of assessee on which the assessee included the said amount in the return filed as his income of year involved and paid tax thereon. There is no iota of evidence that surrendered income was

undisclosed income. The Id. A/R submitted that the revenue authorities had exerted undue pressure and obtained surrender of income from the assessee. It is worthwhile to mention that CBDT Circular F.No.286/2/2003-IT(Inv.) dated 10-03-2003 indicates that practice of confession of additional income during search and seizure operation does not serve any useful purpose and there should be concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. The Bench noted that the Board Circular dated 10-03-2003 (supra) submitted by the Id. A/R of the assessee through his written submission has merit. I have taken into consideration the case laws cited by both the parties. I find that the Coordinate Bench of the Jaipur Tribunal, recently, in the case of Shri Paras Mal Jain vs. DCIT in ITA No. 353/JP/2022 dated 22.06.2023 has decided the issue in favour of the assessee by placing reliance on the decision in the case of Rajendra Kumar Gupta vs. DCT in ITA No. 359/JP/2017 dated 18.01.2019 on similar issue, wherein the Bench has discussed the issue in its order very elaborately and judiciously. The relevant extract of the same is reproduced as under :-

*"2.1. During the course of search, a note book (diary) has been found referred to as Ann. AS wherein there are certain notings relating to cash advances given to various persons totaling to Rs. 82,80,000. Referring to the statement of the assessee in respect of these notings recorded u/s 132 (4), Ld. CIT (A) has given a finding that the assessee has given a generalized statement without specifying the complete particulars of persons to whom loans were given and also failed to substantiate the same. The said findings have not been disputed by the Revenue and*

*therefore, merely based on surrender and generalized statement of the assessee, in absence of anything specific to corroborate such entries, can it be said that such entries/notings represent undisclosed income of the assessee. As per the definition of undisclosed income u/s 271AAB, the said cash advances cannot be stated to be income which is represented by any money, bullion, jewellery or other valuable particle or thing. Whether it can then be said that such undisclosed cash represents income by way of any entry in books of account or other documents or transactions found in the course of a search under section 132. A cash advance per se represents an outflow of funds from the assessee's hand and an income per se represents an inflow of funds in the hands of assessee. Therefore, once there is an inflow of funds by way of income, there can be subsequent outflow by way of an advance to any third party. Giving an advance and income thus connotes different meaning and connotation and thus cannot be used inter-changeably. In the definition of undisclosed income, where it talks about "income by way of any entry in the books of account or other documents or transactions found in the course of a search under section 132", what perhaps has been envisaged by the legislature is an inflow of funds in the hands of the assessee which has been found by way of any entry in the books of accounts or other documents, and which has not been recorded before the date of search in the books of accounts or other documents maintained by the assessee in the normal course and not vice-versa. We are also conscious of the fact that there are deeming provisions in terms of section 69 and 69B wherein such amounts may be deemed as income in absence of satisfactory explanation. In our view, the deeming fiction so envisaged under Section 69 and Section 69B cannot be extended and applied automatically in context of section 271AAB. It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought*

*on the statute book and have therefore to be applied in the context of provisions wherein they have been brought on the statute book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the A.O. has not even invoked the said deeming provisions in the quantum proceedings. Therefore, even on this account, the deeming fiction cannot be extended to the penalty proceedings which are separate and distinct from the assessment proceedings and more so, where the provisions of section 271AAB provide for a specific definition of undisclosed income. Where a specific definition of undisclosed income has been provided in Section 271AAB, being a penal provision, the same must be strictly construed and in light of satisfaction of conditions specified therein and it is not expected to examine other provisions where the same has been defined or deemed for the purposes of bringing the amount to tax. In light of the same, the undisclosed investment by way of advances can be subject matter of addition in the quantum proceedings, as the same has been surrendered during the course of search in the statement recorded u/s 132 (4) and offered in the return of income, however the same cannot be said to qualify as an undisclosed income in the context of section 271AAB read with the explanation thereto and penalty so levied thereon deserves to be set-aside.”*

I, therefore, respectfully following the above decisions of the coordinate bench on the identical issue, in the cases of Paras Mal Jain (supra) and Rajendra Kumar Gupta (supra) and in view of the above deliberation that the income surrendered is not an undisclosed income as specified in Explanation (c) of Section 271AAB of the Act, I do

not concur with the findings of the Id. CIT(A) sustaining the addition. The order of the Id. CIT (A) is set aside. Thus, the grounds of appeal raised by the assessee in his appeal are allowed.

6. In the result, the appeal of the assessee is allowed .

Order pronounced in the open court on 18/09/2024.

Sd/-  
(संदीप गोसाईं)  
(SANDEEP GOSAIN)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 18/09/2024.

Das/

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

1. अपीलार्थी / The Appellant- Shri Umesh Saboo, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT Central Circle-2, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1008/JP/2024}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

