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

श्री रमेश सी. शर्मा, लेखा सदस्य एवं श्री विजय पाल रॉव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 307/JP/2018
निर्धारण वर्ष/Assessment Year : 2015-16.

Shri Shyam Sundar Khandelwal 1839, Barah Gangore Ka Rasta, Johari Bazar, Chaura Rasta, Jaipur.	बनाम Vs.	The Deputy Commissioner of Income Tax, Central Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. ADRPK 5862 C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri S.R. Sharma (CA) &
Shri Rajnikant Batra (CA)

राजस्व की ओर से/ Revenue by: Shri Varinder Mehta (CIT)

सुनवाई की तारीख/ Date of Hearing : 27.03.2019.
घोषणा की तारीख/ Date of Pronouncement : 11/04/2019.

आदश/ ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 13th December, 2017 of ld. CIT (A)-4, Jaipur arising from the penalty order passed under section 271AAB of the IT Act for the assessment year 2015-16. The assessee has raised the following grounds :-

" 1. That the notice issued by assessing officer for initiating the penalty u/s 271AAB of the I.T. Act, 1961 is not in accordance with law not being specifically pointing out the default for which the ld. A.O. sought to impose penalty u/s 271AAB.

2. That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case the ld. CIT (A) is wrong,

unjust and has erred in law in confirming penalty of Rs. 90,06,900/- imposed by the ld. Assessing Officer u/s 271AAB of the IT Act, 1961.

3. That the appellant craves the permission to add to or amend to any of the above grounds of appeal or to withdraw any of them."

Ground No. 1 is regarding validity of initiation of penalty proceedings under section 271AAB of the IT Act for want of specifying the default as per clause (a) to (c) of section 271AAB(1) of the IT Act.

2. The assessee is an individual deriving income from business, LTCG and STCG on sale of shares and income from other sources. A search and seizure action under section 132(1) of the I.T. Act was carried out on 15th October, 2014 in case of Surana group, Jaipur in which the case of assessee was also covered. In the course of search and seizure action, certain documents were found and seized marked as Annexure-A Exhibit No. 3, Annexure-B Exhibit No.4, Annexure A Exhibit No. 1 and Annexure A Exhibit No. 2 containing the entries of advances for land and other loans/advances, expenditure on renovation of house and household expenses. In the statement recorded under section 132(4) of the Act the assessee offered an additional income of Rs. 9,00,69,004/- as recorded in the seized documents. The assessee filed his return of income under section 139(1) on 30th September, 2015 declaring total income of Rs. 12,39,96,820/- including the amount of Rs. 9,00,69,004/- disclosed during the course of search and seizure action. The assessment was completed under section 143(3) read with section 153B(1)(b) of the Act on 23rd December, 2016 accepting the returned income. The AO initiated the penalty proceedings under section 271AAB by issuing show cause notices dated 23rd

December, 2016 and thereafter on 15th May, 2017. The assessee filed his reply to the show cause notice but the same was not accepted by the AO and consequently a penalty of Rs. 90,06,900/- was imposed under section 271AAB of the Act while passing the order dated 14th June, 2017. The assessee challenged the action of the AO before the ld. CIT (A) being wrong, unwarranted and bad in law. However, the ld. CIT (A) has confirmed the levy of penalty by holding that the penalty under section 271AAB is mandatory in nature.

3. Before us, the ld. A/R of the assessee has submitted that the AO while issuing the show cause notice under section 274 read with section 271AAB has not specified the default of the assessee in terms of clause (a) to (c) of section 271AAB of the Act. Therefore, the initiation of penalty proceedings is illegal due to show cause notice is defective. Therefore, the notices were issued in routine manner without mentioning under which clause of section 271AAB(1) of the Act the assessee is liable for penalty. He has referred to the provisions of section 271AAB(1) and submitted that there are three clauses (a) to (c) and each clause of sub-section (1) provides the circumstances and violation attracting the penalty @ 10%, 20% and 30% of undisclosed income of the specified previous year. The assessee should know the grounds which he has to meet specifically otherwise the principles of natural justice are violated. Even in the assessment order the AO has not specified under which clause the penalty is liable to be imposed but the AO has mentioned that the penalty proceedings under section 271AAB of the Act are being initiated. There is no application of mind at the time of issuing the show cause notices as the AO has not specified the undisclosed income on which the assessee is required to show cause.

Even the AO has not given any ground for levy of penalty for which the assessee could put his defence. Thus in the absence of specific charge against the assessee, the assessee was not given the proper opportunity to counter the show cause notice issued by the AO as well as to file the cogent reply to the same. In the absence of any grounds specified in the show cause notice as well as any amount to be treated as undisclosed income of the assessee for the purpose of levy of penalty under section 271AAB, the initiation of penalty is not valid and, therefore, the consequential order passed under section 271AAB of the Act is also liable to be quashed. In support of his contention, he has relied upon the following decisions :-

CIT vs. Manjunatha Cotton & Ginning Factory
359 ITR 565 (Karnataka)

Muninaga Reddy vs. ACIT
396 ITR 398 (Karnataka

CIT vs. SSA's Emerald Meadows
73 taxmann.com 248 (SC)

Ravi Mathur vs. DCIT
ITA No. 969/JP/2017 dated 13.06.2018.

Apart from the above decisions, the ld. A/R has also referred to a series of decisions on this point that penalty proceedings under section 271AAB is not mandatory but discretionary and the AO has to take a decision by considering the reply and explanation of the assessee and giving a finding whether the income disclosed by the assessee during the search and seizure action is undisclosed income as per the definition provided in the explanation to section 271AAB of the IT Act.

4. On the other hand, the ld. D/R has submitted that the levy of penalty under section 271AAB is mandatory in nature and, therefore, the AO is not required to specify the clause as per sub-section (1) of section 271AAB of the Act in the show cause. He has referred to the explanatory note of Finance Bill, 2012 whereby the provisions of section 271AAB is inserted in the Statute and submitted that the legislature has made it clear that the penalty under section 271AAB is mandatory in nature. The ld. D/R has submitted that the assessee was very well aware about the default and the nature of income he has disclosed and surrendered during the statement recorded under section 132(4) of the IT Act. The surrender in question was made because the assessee was unable to explain the source of the investment in question. It is a clear case of undisclosed income detected during the course of search and seizure action and, therefore, the surrender made by the assessee himself is self-explanatory to the nature of income surrendered by the assessee. The ld. D/R has contended that the assessee has participated in the penalty proceedings and has not ra sed any objection or has demanded before the AO about his unawareness of the nature of default attracting the levy of penalty under section 271AAB. It is not the case of the assessee that the disclosure was taken under coercion and further the assessee has offered the said amount to tax in the return of income which rules out the scope of any pressure or coercion by the search team for taking disclosure from the assessee. Thus the objection raised by the assessee that the AO has not specified the clause under section 271AAB(1) of the Act has no merit when the assessee himself has explained the nature of income disclosed and surrendered and also paid the tax on the same. The ld. D/R has submitted that as

per the explanatory note of Finance Bill, 2012, the provisions of section 271AAB are mandatory in nature and the AO has no discretion but the assessee shall pay the penalty in addition to the tax on the undisclosed income surrendered under section 132(4) of the Act. He has relied upon the orders of the authorities below.

4.1. The ld. D/R has also relied upon the decision of Hon'ble Allahabad High Court in case of Principal CIT vs. Sandeep Chandak and Others dated 27th November, 2017 in I.T. Appeal No. 122, 128 and 129 of 2017 and submitted that even otherwise if the show cause notice does not mention the section correctly it will not be invalid as the AO will get the benefit of section 292BB of the Act. The ld. D/R has also relied upon the decision of Kolkata Bench of the Tribunal in the case of DCIT vs. Amit Agarwal, 88 taxmann.com 288.

5. We have considered the rival submissions as well as the relevant material on record. During the course of search and seizure action under section 132 of the Act conducted on 15th October 2014, the assessee disclosed income of Rs. 9,00,69,004/- in his statement made under section 132(4) of the Act. The said disclosure was made in pursuant to the entries on account of advances for land and other loans/advances, expenditure on renovation of house, household expenses, excess cash found, excess jewellery and excess silver found in the seized documents. The details of the undisclosed income surrendered by the assessee are as under :-

Annexure/Exhibit No.	Relevant Page No.	Amount	Particulars
Ann. A Exhibit No. 3	1 to 7	6,00,00,000/-	Advances for land and other loans/advances
Ann. B Exhibit No. 4	31-35	2,60,00,000/-	Advances for land and Other loans/advances
Ann. A Exhibit No. 1	21	7,32,475/-	Expenditure on renovation of house
Ann. A Exhibit No. 2	1 to 11	7,00,000/-	Household expenses
Excess Cash Found		6,33,055/-	
Excess Jewellery found		11,59,100/-	
Excess Silver found		8,44,374/-	
Total Declaration		**9,00,69,004/-**	

It is pertinent to note that the disclosure of additional ncome in the statement recorded under section 132(4) itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be conside ed and decided in the penalty proceedings. Since the assessee has offered the said income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings under section 271AAB has to examine all the facts of the case as

well as the basis of the surrender 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 the said section. Therefore, we do not agree with the contention of the ld. D/R that the levy of penalty under section 271AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact that all the conditions provided under section 271AAB are satisfied. At the outset, we note that an identical issue has been considered by the Coordinate Bench of this Tribunal in the case of Ravi Mathur vs. DCIT (supra) in para 4 to 6 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 no 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 President[50]], 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 [51][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).

[52][(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)].

(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 [54][Principal Chief Commissioner or] Chief Commissioner or [54][Principal Commissioner or] Commissioner before the date of search; or

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

The 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 ld. 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 ld. 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 ld. A.R. before me. It is seen that the ld. 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 ld. 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 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;

271AAB [Penalty where search has been initiated]:

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

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

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

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

(iii) On or before the specified date—

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

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

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

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

(ii) on or before the specified date—

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

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

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

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

Section 158BFA(2):

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

Thus the Tribunal has analyzed all the relevant provisions of the Act as well as various decisions on this point including the decision of Hon'ble Allahabad High Court

in the case of Pr. CIT vs. Sandeep Chandak, 405 ITR 648 (Allahabad) relied upon by the ld. D/R and then arrived at the conclusion that the penalty under section 271AAB is not mandatory but the AO has the discretion to take a decision and the same should be based on judicious decision of the AO. Accordingly following the earlier decision of this Tribunal in the case of Ravi Mathur vs. DCIT (supra), we hold that the levy of penalty under section 271AAB is not mandatory but the AO has a discretion after considering all the relevant aspects of the case and then to satisfy himself that the case of the assessee falls in the definition of undisclosed income as provided in the explanation to section 271AAB of the Act.

5.1. The second limb of challenging the validity of initiation of penalty proceedings for not specifying the ground and default in the show cause notice issued under section 274 has been considered by the Coordinate Bench of this Tribunal in the case of Ravi Mathur vs. DCIT (supra) in para in para 7 as under :-

> *"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 exists, 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 Channai 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 farc Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income o 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 if 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 op nion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed''.

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

''Notice un er 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 o 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."

We further note that in the case in hand, the AO in the show cause notice has neither specified the grounds and default on the part of the assessee nor even specified the undisclosed income on which the penalty was proposed to be levied. For ready reference we reproduce the show cause notices issued by the AO under section 274 read with section 271AAB on 23rd December, 2016, and 15th May, 2017 as under :-

NOTICE UNDER SECTION 274 READ WITH SECTION 271 READ WITH SECTION 271AAB OF THE INCOME TAX ACT, 1961.

Dated : 23.12.2016.

To,

M/s. Shri Shyam Sunder Khandelwal,
1839, Barah Gangore Ka Rasta,
Johri Bazar, Jaipur.
PAN-ADRPK 5862 C

Whereas in the course of assessment proceedings for the AY 2015-16 penalty proceedings were initiated u/s 274 and 275 read with the section u/s 271AAB of the IT Act and a penalty notice was issued accordingly.

You are hereby allowed further opportunity of being heard and to show cause why an order imposing penalty on you should not be made u/s 271AAB of the Income Tax Act 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through Authorized Representative, you may show cause in writing on or before the date fixed for hearing on 19.01.2017 at 11.00 AM which will be considered before any such order (s) is/are made.

Sd/-
(Kamlesh Kumar Meena)
Dy. Commissioner of Income-tax,
Central Circle-2, Jaipur.

NOTICE UNDER SECTION 274 READ WITH SECTION 271 READ WITH SECTION 271AAB OF THE INCOME TAX ACT, 1961.

Date : 15-05-2017.

To,

Name	M/s/Shri/Smt. Shyam Sunder Khandelwal
Address	1839, Rasta Barah Gangore, Johari Bazar, Jaipur.
PAN	ADRPK 5862 C

Whereas in the course of assessment proceedings for the AY 2015-16 penalty proceedings were initiated u/s 274 and 275 read with the section u/s 271AAB of the IT Act and a penalty notice was issued accordingly.

You are hereby allowed further opportunity of being heard and to show cause why an order imposing penalty on you should not be made u/s 271AAB of the Income Tax Act 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through Authorized Representative, you may show cause in writing on or before the date fixed for hearing on 25.05.2017 at 11.00 AM which will be considered before any such order (s) is/are made.

Sd/-
(Kamlesh Kumar Meena)
Dy. Commissioner of Income-tax,
Central Circle-2, Jaipur.

Thus it is clear that both the show cause notices issued by the AO for initiation of penalty proceedings under section 271AAB are very vague and silent about the default of the assessee and further the amount of undisclosed income on which the penalty was proposed to be levied. Even the Hon'ble Jurisdictional High Court in case of Shevata Construction Co. Pvt. Ltd in DBIT Appeal No. 534/2008 dated 06.12.2016 has concurred with the view taken by Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Karnataka) which was subsequently upheld by the Hon'ble Supreme Court by dismissing the SLP filed by the revenue in the case of CIT vs. SSA's Emerald Meadows, 242 taxman 180 (SC). Accordingly, following the decision of the Coordinate Bench as well as Hon'ble Jurisdictional High Cou t, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and consequently the order passed under section 271AAB is not sustainable and liable to be quashed.

Ground No. 2 is regarding levy of penalty under section 271AAB of the Act being unjust and against the provisions of law.

6. The ld. A/R of the assessee has submitted that the AO while passing the penalty order under section 271AAB has not given a finding that the income disclosed by the assessee is an undisclosed income as per definition provided in the

explanation to section 271AAB(1) of the Act. He has further submitted that when the levy of penalty is not mandatory but to be imposed on merits of each case, then the AO is duty bound to first hold that the income disclosed by the assessee is undisclosed income as per the provisions of section 271AAB and then take a decision of imposing the penalty. He has referred to the relevant disclosure made by the assessee in the statement recorded under section 132(4) and submitted that it is a clear case of obtaining the disclosure from the assessee without any incriminating material disclosing any undisclosed income. The alleged seized material of Annexure-A Exhibit No. 3 and Annexure-B Exhibit No. 4 are nothing but containing some imaginary names and details and some figures which were specifically stated by the assessee in his statement. The ld. A/R has thus contended that the said seized documents are nothing but dumb and deaf papers without indicating any undisclosed income of the assessee. The assessee has surrendered the income just to buy peace and avoid unnecessary litigation, however, there is no iota of evidence that the surrendered income was undisclosed income of the assessee. All the entries in the seized documents are written against some imaginary names and figures and do not represent any actual transaction but only for sake of obtaining the surrender from the assessee, the search party has forced upon these documents on the assessee. The ld. A/R has referred to the CBDT Circular No. 286 of 2003 dated 10th March, 2003 and submitted that the CBDT expressed its concern about the practice of confession of additional income during the course of search and seizure proceedings which do not serve any useful purpose in the absence of any evidence of income which leads to information on what has not been disclosed or is

not likely to be disclosed. Hence the ld. A/R has submitted that the Board has time and again advised the taxing authorities to avoid obtaining an admission/confession of undisclosed income under coercive/undue influence. He has then referred to the Circular dated 18th December, 2018 and submitted that the CBDT has repeated its earlier instructions. Thus the ld. A/R has submitted that in the absence of any undisclosed income indicated or discovered on the basis of seized material, the disclosure made in the statement under section 132(4) is not sufficient to levy the penalty under section 271AAB of the Act. In support of his contention, he has relied upon the following decisions :-

Ravi Mathur vs. DCIT
ITA No. 969/JP/2017 dated 13.06.2018.

Dinesh Kumar Agarwal vs ACIT
ITA Nos. 855 & 856/JP/2017 dated 24.07.2018.

Raja Ram Maheshwari vs. DCIT
ITA No. 992/JP/2017 dated 10.01.2019.

M/s. Rambhajo's vs. ACIT
ITA No. 991/JP/2017 dated 11.01.2019.

Rajendra Kumar Gupta vs. DCIT
ITA No. 359/JP/2017 dated 18.01.2019.

Thus the ld. A/R has submitted that even if the seized material discloses some out-flow of funds from the assessee's hands, the same cannot necessarily be an income of the assessee. Therefore, in the absence of any other material or evidence to show the undisclosed income of the assessee, only the entries in the seized material which is dumb and deaf document cannot be the basis of levy of penalty under

section 271AAB of the IT Act. Thus no incriminating document was found during the course of search and seizure action and the alleged seized papers on the basis of which surrender was taken by the Department contains only imaginary names and some figures. Neither during the search proceedings nor the AO has made any enquiry or investigation regarding the entries made in the seized papers. The surrender of the said income by the assessee was just to buy peace as it is evident from the statement recorded under section 132(4) of the Act The said entries in the pocket diary giving advances itself is not an undisclosed income but due to undue pressure exerted by the revenue authorities to obtain the surrender, the assessee has made the surrender of the said income.

7. On the other hand, the ld. D/R has submitted that the assessee has disclosed undisclosed income based on the seized material containing the entries on account of advances for land. The entries in the seized material pertains to the specified previous year and, therefore, all the conditions as provided under section 271AAB of the Act are satisfied for levy of penalty. He has relied upon the orders of the authorities below.

8. We have considered the rival submissions as well as the relevant material on record. As apparent from the seized documents, the assessee disclosed the income of Rs. 8,60,00,000/- (Rs. 6,00,00,000 + Rs. 2,60,00,000/-) on account of advances for land and other loans/advances. On careful perusal and consideration of the seized documents, we find that various entries are made against various names from the month of May, 2014 to 8th October, 2014. These entries are in respect of certain amounts against some imaginary names and the department has not made any

effort or conducted any enquiry either during the search and seizure action or during the assessment proceedings or in the penalty proceedings to ascertain the particulars of these persons whether these are real existing persons or only fake names are written in the seized documents. Further, there is no description of any land for which the alleged advances are found to be noted in the seized material. Apart from these entries, there is nothing on record or even any enquiry was conducted by the department to find out the particulars of the details or transactions for which the alleged advances were given by the assessee. The mere entries in these documents do not reveal the correct nature of transaction and the existence of the corresponding asset for which the alleged advances were given. The department has concentrated only to obtain the surrender from the assessee but no relevant question or enquiry was conducted to find out the particulars of the land and the full particulars of the persons to whom the advances were given. In the absence of the existence of the land for which the alleged advances were given, these entries alone would not ipso facto be undisclosed income of the assessee. Even otherwise, these entries itself are not having any element of income but these are all expenditure entries and, therefore until and unless the full particulars of the land or the asset against which the advances were given is identified along with the persons to whom the advances were given, it would not be regarded as representing the undisclosed income of the assessee. Further, the advances given in the month of May, 2014 may not necessarily be representing the undisclosed income of the year under consideration. Neither any other document like agreement to purchase and sale of land or receipt to indicate the real transaction entered into by the assessee

with the persons whose names are recorded in the seized material are either found or brought on record by the AO. The existence of the asset being land for which the alleged advances were given is essential to establish that the assessee has actually entered into these transactions and paid the advances. In the absence of such fact or the land for which the advances were given or the full particulars of the persons to show that the names appearing in the seized documents are real existing persons, these entries in the seized documents would not constitute undisclosed income on account of advances for land. Therefore, without ascertaining the full particulars of the persons in whose names the entries are made, it is possible that all these names are imaginary and not the names of any existing persons. The vague entries itself do not represent the real transaction and consequently the undisclosed income of the assessee. The Coordinate Bench of this Tribunal in case of Rajendra Kumar Gupta vs. DCIT (supra) has considered the issue of out flow of funds from the assessee can be an undisclosed income for the purpose of section 271AAB of the Act in para 21 as under :-

> *"21. 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 article or thing. Whether it can then be said that such undisclosed cash advances represents 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. 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 the 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 statue 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 AO 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 deserved to be set-aside."

Accordingly in view of the facts and circumstances as discussed above as well as the order of the Coordinate Bench of this Tribunal, we hold that the entries in the seized documents representing the payment on account of land in the absence of the other

essential facts regarding the particulars of the land as well as the persons do not constitute undisclosed income of the assessee as defined in the explanation to section 271AAB of the Act. Accordingly, the penalty levied under section 271AAB by the AO and confirmed by the ld. CIT (A) is not sustainable and liable to be deleted.

Expenditure on renovation of house :

9. During the course of search and seizure action, loose paper marked as Annexure A-1 was found and seized containing the entries on account of renovation work. The assessee disclosed an amount of Rs. 7 32,475/- on account of expenditure on renovation in his statement recorded under section 132(4) of the Act. The assessee has also offered the said income to tax in the return of income. The ld. A/R of the assessee has submitted that as per the seized document containing the entries of the amount of Rs. 7,32,475/-, it is apparent that it is only an estimate for renovation work. Therefore, no incriminating material was found during the search to disclose undisclosed income on account of expenditure but it is only an estimate for renovation work to be carried out. The department has obtained the surrender without actual expenditure incurred by the assessee on this account. In support of his contention, he has relied upon the decision of the Coordinate Bench of this Tribunal dated 10.01.2019 in case of Shri Raja Ram Maheshwari in ITA No. 992/JP/2017 and submitted that the alleged entries in the seized document do not represent or disclose any undisclosed income of the assessee.

10. On the other hand, the ld. D/R has submitted that the disclosure and surrender was made by the assessee based on the seized material containing the

entries of expenditure on account of renovation of house. He has relied upon the orders of the authorities below.

11. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the document found and seized during the course of search and seizure containing these entries is having the caption of Estimate for Renovation Work. Thus it is clear that the document itself does not reveal any actual expenditure incurred by the assessee much less the income of the assessee for the specified previous year. Even the expenditure itself do not represent the income but it is only out go from the assessee and only the source of out go can be considered as income. Therefore, surrender of the income by the assessee in the statement recorded under section 132(4) itself would not constitute undisclosed income until and unless the alleged expenditure has finally represented the corresponding asset. Neither the search party nor the AO has conducted any enquiry or made any effort to find out the fact whether any renovation has actually carried out by the assessee during the year under consideration. In the absence of such fact of actual renovation carried out by the assessee during the year under consideration, the estimate for renovation work recorded in the seized paper cannot regarded as undisclosed income of the assessee. The Coordinate Bench of this Tribunal in case of Raja Ram Maheshwari vs. DCIT (supra) has considered an identical issue in para 22 as under :-

> "*22. Regarding undisclosed investment in the construction of house, we find that such undisclosed investment has been worked out based on assessee's statement of approximate investment in the construction*

of house and after determining the amount which has been reflected in the books of account, and the difference has been estimated at Rs. 31,77,000. There has been nothing tangible in terms of any entries or documents relating to actual expenditure on construction of house which has been incurred which is found to be false during the course of search and therefore penalty levied thereon deserve to be set-aside."

Accordingly, in view of the facts and circumstances of the case where the department has not brought on record the fact of actual expenditure incurred by the assessee on the renovation work of the house or carried out during the year under consideration as well as following the decision of the Coordinate Bench of this Tribunal, the penalty levied under section 271AAB of the Act is not sustainable and the same is deleted.

Household expenditure :

12. As per the seized document Annexure-A Exhibit-2, household expenditure amounting to Rs. 7,00 000/- were recorded. The assessee has surrendered the said amount in the statement recorded under section 132(4) of the Act as well as in the return of income filed under section 139(1) of the Act. The ld. A/R of the assessee has submitted that the expenses as recorded in the seized document were incurred out of the household withdrawals of the assessee and the family members. The said seized paper does not represent any undisclosed income but it is only household expenditure. The AO has not determined it as income from other sources under section 69 of the Act but accepted the business income of the current year. Therefore, merely on the basis of surrender made in the statement recorded under

section 132(4), it cannot be held as undisclosed income for the purpose of levy of penalty under section 271AAB of the Act.

13. On the other hand, the ld. D/R has submitted that the surrender was made by the assessee based on the seized material and, therefore, it is undisclosed income of the assessee in terms of section 271AAB of the Act. He has relied on the orders of the authorities below.

14. We have considered the rival submissions as well as the relevant material on record. The assessee has surrendered Rs. 7,00,000/- on account of household expenditure as found recorded in the seized material Exhibit-2. It is pertinent to note that without considering the drawings of the assessee as well as other family members, the entire household expenditure recorded in the seized material cannot be treated as undisclosed income of the assessee. The family of the assessee is consisting of 8 members and at least 3 members are earning persons including assessee and two sons. Therefore, the household expenditure without considering the drawings of the earning members of the family cannot be treated as undisclosed income. Neither during the search proceedings or in the assessment proceedings any enquiry was conducted to find out the mis-match of drawings made by the family members as well as the household expenditure recorded in the seized document. Therefore, merely because of the expenditure recorded in the seized document, it would not ipso facto constitute the undisclosed income in terms of explanation to section 271AAB of the Act. An identical issue has been considered in the preceding para in respect of the expenditure on account of renovation work and, therefore, the expenditure itself is not an income of the assessee much less the

undisclosed income for the specified previous year without bringing the relevant facts of the withdrawal/drawings of the family members of the assessee. Accordingly, the penalty levied under section 271AAB on account of household expenditure is deleted.

Excess Cash Found :

15. As regards the excess cash of Rs. 6,33,055/- found during the course of search and seizure action, the ld. A/R of the assessee has submitted that the assessee has duly explained the cash as past savings of the family members. The ld. A/R has submitted that the said cash does not belong to one person but belong to all the family members found from various places of residence of the assessee. It was accumulated savings of all the family members out of withdrawal made for household expenses. The AO has not determined it as income from other sources under section 69 of the Act in the assessment but accepted as business income of the current year. Therefore, despite the source explained by the assessee, an amount of Rs. 6,33,055/- was disclosed due to insistence of the search party. Thus, merely on the basis of surrender made in the statement under section 132(4), this cannot be held as undisclosed income for the purpose of levy of penalty under section 271AAB of the Act.

16. On the other hand, the ld. D/R has submitted that when the cash was found during the course of search and the assessee has surrendered the same in the statement recorded under section 132(4) of the Act, then it is an undisclosed income as per the definition provided in the explanation to section 271AAB of the Act. He has relied upon the orders of the authorities below.

17. We have considered the rival submissions as well as the relevant material on record. Since the cash was found from the residential premises of the assessee during the course of search and seizure action, then the assessee was required to explain the source of cash. For the purpose of considering the cash found during the search as undisclosed income of the assessee, the definition as provided under section 271AAB clearly contemplates that any income of the specified previous year inter alia represented by any money and not 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. Thus so far as the amount of money recorded in the books of account, the same would not fall in the definition of undisclosed income. However, the cash which was not found recorded in the books of account as on the date of search would definitely fall in the ambit of undisclosed income as per clause (c) of explanation to section 271AAB of the Act. We find that the assessee has explained the source of the cash found during the search as accumulated savings of all the family members out of withdrawal made for household expenses. The ld. A/R has submitted that it represents the past savings of the family members of the assessee and not the cash of the assessee alone. We find merit in this contention that when the cash was found from the residence of the assessee and from different rooms of the house, then the savings of the other family members cannot be ignored while considering the undisclosed income on account of cash found at the residential premises of the assessee. From the statement recorded under section 132(4) itself, the department has pointed out that the cash was found from different rooms of the residential premises and, therefore, the benefit of past savings of other

family members is required to be given on this account. Accordingly, in the absence of any clear cut finding about the cash not representing and belonging to the other family members as their past savings, the same cannot be treated as undisclosed income of the assessee for the year under consideration. Hence the penalty levied by the AO in respect of the cash found during the search is deleted.

Excess jewellery & silver found :

18. During the course of search and seizure action, gold jewellery and silver was found at the residence of the assessee. The assessee has declared a sum of Rs. 20,03,474 (Rs. 11,59,100 + Rs. 8,44,374) in his statement recorded under section 132(4) of the Act on account of the excess gold jewellery and silver found from the residence. The said income was also declared in the return of income. The ld. A/R of the assessee has submitted that the family of the assessee consisting of 10 members i.e. assessee himself, wife, 2 sons, 2 daughters-in-law and 3 grandsons and 1 grand daughter. The said jewellery found during the search was received from both sides of relatives and friends at the time of marriage and thereafter on various other festivals and auspicious occasions. It is customary in Indian society that every parent, friends & relatives to present gold ornaments etc. to her daughter & son in law at the time of marriage. The family of assessee is repute and means. Thus looking to the status of the family, customs of the society and other facts and circumstances the total weight of gold is reasonable and source of acquisition was explained. However, the assessee to buy peace and avoid litigation with department offered the said valuation of jewellery as his additional business income of the current year. The ld. AO has not determined it as income from other sources u/s 69

of Income Tax Act in the assessment but accepted as business income of current year. Therefore merely on the basis of surrender made in the search statement, this cannot be held as "undisclosed income" for the purpose of levy of penalty under section 271AAB.

19. On the other hand, the ld. D/R has submitted that once the jewellery was found at the residence and the assessee has admitted the fact that the jewellery was not recorded in the books of account, therefore, it is an undisclosed income of the assessee for the specified previous year for the purpose of section 271AAB of the Act. He has relied upon the orders of the authorities below.

20. We have considered the rival submission as well as the relevant material on record. There is no dispute that what is found is the jewellery belong to the family members of the assessee and it is not disputed by the department that the jewellery do not belong to assessee alone. Therefore, merely because the assessee has declared the income in the statement recorded under section 132(4), it would not ipso facto be regarded as undisclosed income of the assessee in the absence of the fact or any other material to establish that the entire jewellery found at the time of search and seizure action was only acquired by the assessee and belong to the assessee alone. We find that in the Indian family most of the jewellery belong to the women of the family. It is also customary in Indian society that the women and particularly the married women used to receive the jewellery from the relatives and friends on various occasions including marriage, birth of child as well as other auspicious occasions like anniversaries etc. The department has not made any effort to find out the fact whether the jewellery was acquired during the year under

consideration or it is old jewellery. Therefore, once the jewellery was not found to be purchased during the year under consideration, then the same cannot be treated as an undisclosed income for the year under consideration which is specified previous year. The jewellery belong to the family members of the assessee and found at the residence was old jewellery and, therefore, the valuation of the jewellery for the purpose of computing the undisclosed income by applying the current rates on the gross weight is not permissible. Hence when the department has not made any efforts to ascertain the year of acquisition of the jewellery and then to apply the rates as prevailing in the year of acquisition and some of the jewellery even not acquired by the assessee or the family members but is inherited, then the manner in which the disclosure is obtained on account of the jewellery would not represent the undisclosed income as defined in the explanation to section 271AAB of the Act. We find that the order passed by the AO under section 271AAB as well as the order of the ld. IT (A) are silent on the issue of incorrect valuation as well as the timing of acqu ring of the personal jewellery of the assessee and the family members. Therefore, in the facts and circumstances of the case, the personal jewellery of the assessee and family members acquired in the past and some part of which was also inherited will not fall in the ambit of undisclosed income. Hence the penalty levied by the AO against such disclosure is not sustainable. It may be pertinent to mention that the statement recorded under section 132(4) itself would not either constitute an incriminating material or undisclosed income in the absence of any corresponding asset or entry in the seized document representing the

undisclosed income. Accordingly, the penalty levied by the AO under section 271AAB of the Act is deleted.

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

Order is pronounced in the open court on 11/04/2019.

Sd/-	Sd/-
(रमेश सी. शर्मा)	(विजय पाल रॉव)
(RAMESH C. SHARMA)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 11/04/2019.

Das/

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

1. The Appellant- Shri Shyam Sundar Khandelwal, Jaipur.
2. The Respondent – The DCIT, Central Circle-2, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File ITA No. 307/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar