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. 295/JP/2018
निर्धारण वर्ष/Assessment Year : 2015-16.

Shri Ram Das Sonkia, Pitaliyon Ka Chowk Johari Bazar, Jaipur.	बनाम Vs.	The Deputy Commissioner of Income Tax, Central Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AJTPS 9679 M		
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.

70,20,000/- 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 house property and income from other sources besides profit from partnership firm. 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-2 of Exhibit-2 containing the entries of advances for land. In the statement recorded under section 132(4) of the Act the assessee offered an additional income of Rs. 7,02,00,000/- as recorded in the seized document. The assessee filed his return of income under section 139(1) on 30th September, 2015 declaring total income of Rs. 8,12,64,560/- including the amount of Rs. 7,02,00,000/- 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 14th December, 2016 accepting the returned income. The AO initiated the penalty proceedings under section 271AAB by issuing show cause notices dated 22nd 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. 70,20,000/- 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 raised 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. 7,02,00,000/- 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 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-2 Exhibit No.2	1-6	6,52,00,000/-	Advances for land
Ann. A-2 Exhibit No.2	1-6	50,00,000/-	Advances for land
Total Amount		7,02,00,000/-	

It is pertinent to note that the disclosure of additional income 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 considered 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 p eceding 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 fo 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 cour e 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) Sub tantiates 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 b sis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable.

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

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

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

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

Sub section (3) of section 271AAB:

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

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

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

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 Se tion 271 AAB that Sections 274 and Section 275 of the Act shall, so fa 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 fa ce. Notice issued to the assessee reproduced (supra), does not show whether penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of income or for having undisclosed income within the meaning of Section 271AAB of the Act. Notice in our opinion was vague. Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra) relying in its own judgment in the case of Manjunatha Cotton and Ginning Factory (supra) had held as under:-

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

(1) Whether, omission 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 22th 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 : 22.12.2016.

To,

Name	Shri Ram Das Sonkia
Address	Pitaliyon Ka Chowk, Johari Bazar, Jaipur.
PAN	AJTPS 9679 M

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 11.01.2017 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. Ram Das Sonkia
Address	Pitaliyon Ka Chowk, Johari Bazar, Jaipur
PAN	AJTPS 9679 M

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 Court, this issue is decided in favour of the assessee by holding that the initiation of penalty is not valid and consequently the order passed under section 271AAB is not sustainable and liable to be quashed.

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 ma erial of Annexure A-2 Exhibit No. 2 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. Alternatively, the ld. A/R has further submitted that since the assessee is an individual and not doing any business, therefore, the assessee is not required to maintain regular books of account as per the provisions of section 44AB of the Act. From the assessment order it is clear that the assessee has maintained a separate diary for the income surrendered during the course of search. The diary was also maintaining as books of account. In this diary all the entries are for the current financial year i.e. from 01.04.2014 to the date of search i.e. 15.10.2014. Nothing adverse was found which suggest that the assessee's income was not disclosed in the income recorded in the seized documents. Therefore, there is no material or evidence to show that the surrendered income was undisclosed income of the assessee. Therefore, in view of the various decisions on this point, the penalty levied by the AO and confirmed by the ld. CIT (A) is not sustainable in law.

8. 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.

9. 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. 7,02,00,000/- on account of advances for land. 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 10th 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 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. Therefo e, 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 deem ng 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.

10. As regards the alternative plea regarding the requirement of maintaining the regular books of account by the assessee, we find that the assessee is not engaged in any business activity or any other professional activity requiring the regular books of account. The income derived by he assessee is only from Income from house property and income from other sources as well as the profit from partnership firm for which regular books of account are not required to be maintained. An identical issue was considered by this Bench of the Tribunal in case of Ravi Mathur vs. DCIT (supra) at page 25 as under :-

"Since in the case of assessee the transactions of investment were found in the diary, therefore, whether these entries in the diary constitute undisclosed income as per clause (c)(i) of Explanation to Section 271AAB of the Act. The assessee is an Individual and for the year under consideration the assessee has not reported any business income nor it was assessed by the AO. Therefore, it is clear that the assessee was not required by any mandate of law to maintain regular

books of accounts. In the computation of income, the assessee has shown income from Salary, income from house property and income from other sources. The returned income was accepted by the AO while framing the assessment under section 143(3) and hence assessee's case does not fall in the category where the regular books of accounts are mandatory. The entries of investment in real estate were found recorded in the diary and in the absence of any other document maintained in the normal course relating to the year under consideration, the entries in the diary are to be considered as recorded in the documents maintained in the normal cou se. It is not the case of the revenue that the assessee has recorded the other transactions in the other documents maintained in the regular course relating to the year under consideration and only these entries are recorded in the diary. Since the levy of penalty under section 271AAB is not based on the addition and enquiry conducted by the AO in the assessment proceedings, therefore, it is incumbent on the AO to conduct a proper examination of facts, circumstances and explanation furnished by the assessee before arriving to the conclusion that penalty under section 271AAB is leviable and further whether it is 10% or 20% or 30% of such undisclosed income. Therefore, the AO is under statutory obligation to examine all the issues during the proceedings under section 271AAB after giving the assessee an opportunity to explain the charges/grounds on which the penalty is proposed to be levied. Hence it is a pre-requisite condition that the AO first specify the charges against the assessee and to make known the assessee of his default so as to afford an opportunity to explain the default/charges so brought against the assessee. Without considering the explanation of the assessee on the specific default, the order passed by the AO under section 271AAB suffers from serious illegality and therefore not sustainable in law. When a stringent action is provided in the Statute against the default committed by the assessee, then it also cast an

equally stringent and strict duty on the authority responsible to take such action. Therefore, when the provisions for levy of penalty under section 271AAB is a specific provision to deal with the undisclosed income and it provides a strict penal action then the corresponding duty of the tax authority is also equally stringent. The AO cannot escape from following the strict mandatory requirement of law and particularly the principle of natural justice. The AO has neither specified the grounds and clause of section 271AAB nor has dealt with the same in the impugned order passed under section 271AAB. The AO has also not given a finding that the case of the assessee falls in the definition of undisclosed income provided under clause (c)(i) of Explanation to section 271AAB. When the transactions of investment in real estate are recorded in the diary being other documents maintained by the assessee for the said purpose, then in the absence of any requirement of maintaining regular books of accounts by the assessee, the case of the assessee would not fall in the definition of undisclosed income as per clause (c) of Explanation to section 271AAB of the Act.

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

> "3. We have heard rival submissions and gone through the facts and circumstances of the case. We find that the issue involved herein is squarely covered in favour of the assessee in the case of DCIT vs Manish Agarwala (another member in the same Nezone Group) in ITA No. 1479/Kol/2015 for AY 2013-14 dated 9.2.2018 by the order of this tribunal , wherein it was held as under:-
>
> *3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has levied the penalty u/s. 271AAB on the ground that the income from commodity profit has been found during search u/s.132 of the Act which is not reflected in the regular books of account. The AO has accepted that during search*

the assessee has admitted u/s. 132(4) of the Act the income from speculative trading. The undisputed facts the AO has given finding pertaining to this case is as follows:

i) The assessee has substantiated the manner in which the income was derived.

ii) Furnished the return of income therein and

iii) Paid the tax along with interest.

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

4. The Ld. DR brought to our notice that in the very same group case of Manoj Beswal & Ors. the Tribunal had confirmed the levy of penalty and contended before us that penalty u/s. 271AAB of the Act is mandatory and therefore, according to Ld. DR, the Ld. CIT(A) erred in deleting the penalty by stating that the assessee did not had any 'mens rea' not to disclose the amount in question. According to him, penalty has to be mandatorily levied u/s. 271AAB of the Act on the undisclosed income found during search. On the other hand, Ld. AR Shri Miraz D. Shah, supporting the decision of Ld. CIT(A) made contentions though taken up before the Ld. CIT(A) but has not been adjudicated on those averments, which the Ld. AR urges before us to consider while adjudicating the appeal of the Revenue. The Ld. AR also pointed out that the contentions which he is going to raise has been taken up before the AO a so, however, according to Ld. Counsel, those legal arguments were not considered by the AO in the right perspective. The first contention of the Ld. AR is that since Sec. 271AAB of the Act is a penalty section it should be construed strictly, which we agree being it is a trite law that penalty provisions have to be strictly interpreted. Next contention of Ld. AR is that sec. 271AAB of the Act is not mandatory because Parliament in its wisdom has used the word 'may' and not 'shall'. So, according to him, it is the discretion bestowed upon the AO whether to initiate and impose penalty u/s. 271AAB of the Act. We agree with the said contention of Ld. AR because when a similar issue was adjudicated by ITAT Lucknow (the author of this order was a member of the Bench) in Sandeep Chandak & Ors. Vs. CIT (2017) 55 ITR (Trib) 209 and 2017 (5) TMI 675- ITAT-Lucknow in ITA No. 416, 417 and 418/LKW/2016 dated 30.01.2017 while adjudicating a case where penalty was levied under section 271AAB of the Act it was held that the provisions of Sec. 271AAB of the Act are not mandatory, which means that penalty need not be levied in each and every case wherever the assessee has made default as stated in clauses (a), (b) and (c) of the Act. Sub-section (1) of Sec. 271AAB of the Act uses the word "may" not "shall". "May" cannot be equated with "shall" especially in penalty proceeding. Using the word "may" in

our opinion, gives a discretion to the AO to levy the penalty or not to levy, even if the assessee has made the default under the said provision." Therefore, the 2nd ground of Revenue fails and we hold that penalty u/s. 271AAB of the Act is not mandatory and is discretionary. Before proceeding further, we note that the ex parte order passed by the Coordinate Bench relied upon by Ld. DR, Manoj Beswal, supra, have been recalled in MA Nos. 218 to 220/Kol/2017 dated 12.01.2018 by observing as under:

"By virtue of these miscellaneous applications, the assessee seeks to recall the order passed by this Tribunal in I.T.A. Nos. 1471, 1475&1476/Kol/2015 in the hands of Amit Agarwal, Madan Lal Beswal and Manoj Beswal respectively for the assessment year 2013-14 on the ground that notice was not served on the assessee for the hearing and on certain factual error that had crept in the order of the Tribunal. The first preliminary objection raised by the Ld. AR was that the notice of hearing was not served on the assessee for the hearing scheduled on 06.11.2017 and hence, the assessee could not be present on the said date by way of personal appearance. The second objection raised by the Ld. AR was that the Tribunal had stated in para 9 of its order that the assessee himself had accepted that he is engaged in commodities trading business and therefore mandated to maintain books of accounts in terms of section 44AA of the Act and thereby inferring that the assessee had reported the profit from commodities trading business under the head "income from business or profession". Based on this crucial finding, the Tribunal had concluded that since the transaction of commodities trading had not been entered by the assessee in his books of accounts as on the date of search on 01.08.2012 and thereby it takes the character of undisclosed income for which penalty u/s 271AAB of the Act is exigible. In this regard, we find that the Ld. AR drew our attention to the computation of the total income wherein the assessee had offered income from commodity trading only under the head income from other sources. We also find that the Ld. AO had also specifically stated in the body of the assessment order vide column no. 10 that the assessee is having only salary income and income from other sources. We find that due to the absence of the assessee at the time of hearing this particular fact had escaped the attention of the Tribunal. On perusal of the fact available on record, we find that the finding recorded by this Tribunal in para 9 of its order dated 10.11.2017 that the assessee is mandated to maintain books of accounts u/s 44AA of the Act is factually incorrect and deserves to be rectified. This mistake of primary fact had lead to a conclusion of upholding the levy of penalty u/s 271AAB of the Act. Hence, in these facts and circumstances and in view of the aforesaid mistake of primary fact rightly pointed out by the ld. AR , we deem it fit to recall the orders of this Tribunal dated 10.11.2017 in the case of aforesaid assessees."

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

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

> *"44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act. (2) Every person carrying on business or profession [not being a profession referred to in subsection (1)] shall,—*
>
> *(i) if his income from business or profession exceeds [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds [ten lakh] rupees in any one of the three years immediately preceding the previous year; or*

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

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

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

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

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

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

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

Income from Salary	*Rs. 45,57,600*
Income from Other sources	*Rs.3,00,24,047*
	Rs.3,45,81,647

6. We note that the AO has accepted the aforesaid statement of total income filed before him without contesting the claim of the assessee as to whether the assessee's claim of income other than from salary should be from "Income from Business". The confusion that has arisen in this case, we note is on the misdirection of AO in the assessment proceedings wherein the assessment order of the assessee, the AO has observed "during search and seizure operation, Shri Manoj Beswal had made a consolidated disclosure of Rs.32 crore vide his disclosure petition. Out of this consolidated disclosure, the assessee owned up Rs. 3 cr. In the disclosure petition Shri Manoj Beswal it was stated that the source of such undisclosed income was out of commodity profit. It has been submitted that the amount has already been disclosed in his Income & Expenditure account for the AY 2013-14 under the head 'Income out of Speculative Business from sale of commodities'. Verification of accounts confirms his claim." This observation is flawed because, we note that AO got carried away by perusal of the "Income & Expenditure Account for AY 2013-14" submitted by the assessee before him, wherein it was shown in the income side that is right hand column as "Income from Speculative Business from sale of commodities" and left hand side column reflects the expenditure; and AO came to the conclusion that assessee has disclosed under the heading income out of Speculative Business from sale of commodities. The character of a receipt and the head under which it has to be taxed is not based on the nomenclature of receipt of income shown in Income & Expenditure Account. All the incomes of revenue nature will be posted in the right hand side column of 'income' in the Income & Expenditure Account and the description given therein cannot determine the head of income prescribed under chapter IV of the Act. Therefore, the observation of the AO in assessment order in the light of his action of accepting the statement of total income filed by the assessee along with return which without being contested, is erroneous, unless the AO was able to negate the claim of the assessee by bringing the income from commodity transactions as part of business income. It should be remembered that under the Income Tax Act 1961, the total income of an assessee individual/company is chargeable to tax u/s. 4 of the Act. The total income has to be computed in accordance with the provisions of the Act. Section 14 of the Act lays down that for the purpose of computation, income of an assessee has to be classified under five heads. It is possible for an assessee/individual/company to have five different sources of income, each one of it will be chargeable to Income Tax Act. Profits and gains of business or profession is only one of the heads under which an assessee's income is liable to be assessed to tax. If an assessee has not commenced business there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the assessee commences its business, its income from any other source will

not be taxed as held by the Hon'ble Supreme Court in the case of Tuticorin Alkali & Chemicals Ltd. Vs. CIT (1997) 227 ITR 172 (SC). It has been further held that when the question is whether a receipt of money is taxable or not or whether certain deduction from that receipt is principles of law and not in accordance with accountancy practice. Further, the Hon'ble Apex Court held that the question as to whether a principal receipt is of the nature of income and falls within the charge of sec. 4 of the Act is a question of law which has to be decided by the Court on the basis of the provisions of the Act and interpretation of the term 'income' given in a large number of decisions of the Hon'ble Supreme Court, High Court and Privy Council. After taking note of the Apex Court order as above, we note that the AO in the assessment order after having accepted the statement of total income (supra) and the return wherein the assessee has shown the income from commodities under the head "Income from Other Sources" cannot now after perusal of "Income & Expenditure Account" determine the character of transaction in the penalty proceedings as "Income from Business or Profession" which approach/action is erroneous. We note that the assessee in his statement of total income along with return has classified his income under two heads (i) Salary and (ii) from other sources and the income of Rs. 3 cr. as income from other sources, which we find the AO has not contested in the assessment order, has thus crystallized and the necessary inference drawn is that assessee an individual who was admittedly a salaried person engaged in the previous year relevant to the assessment year under consideration (that too for the first time) in an activity from which he derived "Income from Other Sources" are not required to maintain books of account which are applicable only if the assessee was engaged in Business or Profession. However, we further note that the transactions which yielded income, the assessee had in fact maintained records from which the AO was able to deduce the true income and expenditure of the assessee. We note the AO in the assessment order has accepted the returned income comprising of income from salary and income from other sources by observing as under :

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

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

7. Finally, the Ld. AR submitted that during the search, the search party found the records of the assessee's transactions in speculative commodity from the drawer of assessee's accountant from which the AO could compute the income of the assessee from the said transaction which amount assessee declared during search and which was duly returned and which figure was accepted by the AO. According to Ld. AR,

the fact that search happened on 01.08.2012 need to be taken note of since undisputedly there was enough and more time for the assessee to submit the accounts during assessment proceedings which fact has been taken note of and concurred by the Ld. CIT(A). Thereafter, the Ld. AR drew our attention to the definition of undisclosed income given under section 271AAB which reads as under:

*"**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—*

****

Explanation – For the purposes of this section, -

(a) …….

(b) …….

*(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."

According to the Ld. AR, from the facts and circumstances described above, since the assessee is not engaged in business or profession, he does not require

to maintain the books of account as per sec. 44AA or sec. 44AA(2) of the Act, therefore, the assessee's case falls in the second limb i.e. "or other documents" as stipulated u/s. 271AAB Explanation (c) (supra) which describes undisclosed income for the purposes of this section which is very important to adjudicate this issue. Therefore, the question is when the search took place, the assessee's transactions (in this case, the speculative transaction) has been found to be recorded in the "other documents" which is (retrieved from the assessee's accountant's drawer) and based on that the assessee declared Rs. 3 cr. during search and later returned income of Rs. 3 cr. as income under the head "Income from Other Sources" which was accepted by the AO in toto. We note that since the income under question (Rs. 3 cr.) was in fact entered in the "other documents" maintained in the normal course relating to the AY 2013-14, which document was retrieved during search, hence, the amount of Rs. 3 cr. offered by the assessee does not fall in the ken of "undisclosed income" defined in Sec. 271AAB of the Act. So, Rs. 3 cr. which was commodity profit recorded in the other document maintained by the assessee which was retrieved during search cannot be termed as "undisclosed Income" in the definition given u/s. 271AAB of the Act. Since Rs. 3 cr. cannot be termed as "Undisclosed Income" as per sec. 271AAB of the Act, no penalty can be levied against the assessee. Therefore, we uphold the order of the Ld. CIT(A) on the aforesaid reasoning rendered by us.

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

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

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

Accordingly this issue is also decided in favour of the assessee and against the revenue.

11. 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 राव)
(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 Ram Das Sonkia, 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. 295/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar