

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

ITA. No. 1029 to 1034/JP/2019
Assessment Years : 2008-09 to 2013-14

Shri Laxman Nainani M/s Nainani Medico, Rampura, Kota.	Vs.	The DCIT, Central Cricle-3, Jaipur.
PAN/GIR No.: AAGPH 9024 D		
Appellant		Respondent

Assessee by : Shri Mahendra Gargieya (Adv) &
Shri Fazlur Ramham Khan (Adv)
Revenue by : Smt. Runi Pal (JCIT)

Date of Hearing : 22/01/2020
Date of Pronouncement : 15/04/2020

ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are six appeals filed by the assessee against the orders of Id. CIT(A)-IV, Jaipur dated 06.10.2017 confirming the levy of penalty U/s 271(1)(c) of the Act for the assessment years 2008-09 to 2012-13 and against the order of Id. CIT(A), Jaipur dated 06.02.2017 for the assessment year 2013-14 confirming the levy of penalty U/s 271AAB of the IT Act.

2. Since all this matters are arising out of the same search proceedings conducted on 19.12.2012 in the case of Nainani Group, Kota to which the assessee belongs and involves common issues of levy

of penalty, all these appeals were heard together and are being disposed off by this consolidated order.

3. At the outset, it is noted that all these appeals have been filed with a delay of 583 days. In this regard, the assessee has filed a prayer along with an affidavit for condonation of delay and has requested for admittance of appeals for adjudication on merits.

4. In this regard, the Id. AR has submitted that the assessee had appealed against the levy of penalty in all these cases before the Id CIT(A) who has confirmed the levy of penalty U/s 271(1)(c) of the Act for the assessment years 2008-09 to 2012-13 vide his consolidated order dated 06.10.2017 and separately has confirmed the levy of penalty U/s 271AAB of the IT Act earlier vide his order dated 06.02.2017 for the assessment year 2013-14. It was submitted that on the receipt of the orders of the Id. CIT(A), the issue of dismissal of the appeals against penalties by the Id. CIT(A) was discussed by the assessee with his local and regular counsel Shri V.K. Jain, FCA and he was of the view that no further appeal is required to be filed against these orders before the Tribunal looking into the facts involved in the case and the legal position. In view of Shri V.K. Jain, considering the facts of admission made by the assessee, the penal provisions were attracted. He was more influenced by the fact that while co-operating with the Department, when the assessee made the surrender, he was given to understand that no prosecution proceedings would be launched. Search was carried out long back in 2012 and till the year 2016, there was no whisper of any proposed prosecution proceedings

against the assessee. Hence, the assessee and the Id. Counsel were confident that there was no further chance of such an extreme and unpleasant action. Consequently, they never anticipated any seriousness in the matter. In addition, also with a view to further co-operate with the Department and to bring the litigation to an end, the Id. Counsel advised not to file further appeal. It is under this background that the assessee acted on the advice of the Id. Counsel and no further action was taken by him in terms of filing appeal before the Tribunal.

5. It was further submitted by the Id AR that the assessee is a layman, who is not aware of the complexities of tax laws. He even went to the extent of making surrender of such income even though there was no actual "undisclosed income" but only because of the pressure exerted by the Department to make the search successful and also on the assurance of the search team that no prosecution proceeding would be launched, he had agreed to make the surrender and pay taxes. He never expected such an action against him and hence no appeal was filed. Thus, evidently the assessee acted ignorantly and also because of the advice of his Counsel, who had been rendering his services to the best of his capabilities and knowledge.

6. It was further submitted by the Id AR that to the surprise of assessee, show cause notices dated 06.07.2017 were issued to the assessee for all these years u/s 279(1) by the Id. PCIT, Central, Rajasthan Jaipur for initiation of prosecution proceedings u/s 276C(1) of I.T. Act for willful attempt to evade tax. Even then the assessee was further advised by his Counsel that he had a good case on merits and

once he admitted the income to co-operate with the Department, he should avoid prolong litigation with the Department and a detailed reply dated 16.10.2017 were filed before the Id. PCIT. It was further submitted by the Id AR that the subject income which got surrendered, was based on the evidence which were falsely created by the search team itself without there being any real income remaining undisclosed. Therefore, the income which got admitted had no legal sanctity. Hence the assessee made specific request to Id. PCIT of getting opinion of a technical expert, in the following words:

"5. That a large amount of income got admitted was based on the evidence which falsely got created by the search team without there being any real income remaining undisclosed. Therefore, the income got admitted has no sanctity.

6. That the assessee wishes to get the evidences, on the basis of which admission was obtained, examined by a handwriting expert to bring the truth on the surface. Such report by the expert is being obtained which may take 2 weeks' time.

7. That your honour is also requested to obtain a report of an expert u/s 151 of the Civil Procedure Code, 1908 r.w Section 45 in The Indian Evidence Act, 1872.

8. It is therefore prayed that the subjected proceedings may kindly be dropped or alternatively be kept pending till the availability of the report."

7. It was submitted that in view of the above, the Id. Counsel was expecting that such proceedings u/s 279(1) would be dropped and hence there was still no need to file further appeals before the Tribunal against the confirmation of penalties and the assessee also kept quiet. It was further submitted that the Id. Counsel of the assessee in the

month of July, 2019 when he was in the Department for his other matters, however, came to know that the Department has decided to launch prosecution u/s 276C(1) r.w.s. 277 of the Act before the Economic Offence Court, Jaipur which was an unexpected and most unfortunate development to the utter dismay of the assessee and his Counsel.

8. It was submitted by the Id AR that the prosecution where so launched, being very serious in nature and therefore, the assessee and his Counsel discussed the matter with another Counsel in Jaipur, who advised him that these prosecution proceedings are linked to confirmation of penalty by the Id CIT(A) and to immediately file second appeals before the Tribunal against the penalty orders passed by the Id. CIT(A) in all the years without any further delay. However, the assessee, who was all along under the impression that no further appeal was required to be filed as advised by his local Counsel earlier and hence the appeal papers might not be taken into use at a later point of time, had misplaced the original copies of the impugned orders Id. CIT (A) somewhere in his premises. Thereafter, efforts were made to search out the original appeal orders passed by the Id CIT(A) and the same were handed over to the Counsel at Jaipur, who then prepared the appeal papers. Finally, all these appeal could be filed with the Registry on 14.08.2019, however, this entire exercise resulted in delay in filing the present appeals beyond the prescribed period.

9. It was submitted by the Id AR that the aforesaid circumstances and events were beyond the control and anticipation of the assessee though the assessee was diligent and relied on the advice of his Counsel

from time to time and therefore, the assessee should not be made to suffer so seriously whereby he is subject to prosecution proceedings. It was submitted that by not filing the present appeals or by a delayed filing thereof, the assessee was not going to gain anything. The conduct of the applicant assessee was not therefore, contumacious or dishonest. There was no deliberate intention on his part to delay the filing of the present appeals. In support of the aforesaid facts, affidavit of the assessee and his counsel Shri V.K. Jain, FCA was also placed on record.

10. Further, reliance was placed on the decisions in case of Collector, Land Acquisition vs MST Katiji 1987 AIR 1353, 1987 SCR (2) 387, United Christmas Celebration Committee Charitable Trust vs. ITO (2017) 249 Taxman 372 (Mad), Hosanna Ministries vs. ITO, (2017) 152 DTR (Mad) 8, Mukesh Jesangbhai Patel vs. ITO (2013) 29 taxmann.com 389 (Guj), Vijay Vishin Meghani vs. DCIT (2017) 398 ITR 250 (Bom), and Ganesh Chawala vs. ITO (2008) 9 DTR Trib (Jp) (Trib).

11. It was accordingly submitted that delay in filing the present appeals may be condoned in the interest of justice and the appeals for all these years be admitted and heard on merits.

12. Per contra, the Id DR submitted that there is an inordinate delay of 583 days and such delay should not be condoned in a routine manner and that a distinction ought to be drawn between a case where the delay is inordinate, as it is in the case on hand i.e. of 583 days and in cases where the delay is of a few days. The Id DR further contended that the explanation put forward by the assessee for the delay does not amount to reasonable and sufficient cause which were beyond his control and the assessee has certainly not proved beyond doubt that he

was diligent and not guilty of negligence whatsoever in the matter. The Id DR accordingly submitted that the petition for condonation of delay in filing the present appeals be rejected and the appeals being barred by limitation, the same should be dismissed.

13. We have heard the rival contentions and perused the material available on record. There is no dispute that there has been a delay in filing the present appeals by 583 days. There is also no dispute that under section 253(5) of the Act, the Tribunal may admit an appeal filed beyond the period of limitation where it is satisfied that there was sufficient cause for not presenting the appeal within the prescribed time. The explanation of the assessee therefore becomes relevant to determine whether the same reflects sufficient cause on his part in not presenting the present appeals within the prescribed time. In the instant case, the assessee has explained that against the levy of penalty by the Assessing officer, he had pursued the matter before the Id CIT(A) wherein he didn't get any relief and thereafter, based on advice of his legal Counsel, he didn't pursue the matter any further and didn't file further appeal before the Tribunal. He was therefore of the belief that these matters have attained finality where he has paid the necessary taxes, interest and penalty. However, subsequently, he was issued a show-cause by the Id. PCIT for initiation of prosecution proceedings u/s 276C(1) for willful attempt to evade tax. Again, he consulted his legal Counsel and he was advised that there is no legal basis for launch of prosecution against him where he has all along cooperated with the Revenue authorities and has paid the due taxes and interest. At the same time, to safeguard his interest, he was

advised to file his written submissions and accordingly, he responded to the show-cause issued by the Id PCIT and filed written submissions vide letter dated 16.10.2017 against launch of prosecution proceedings. Thereafter, there was no communication or action from the Department and the assessee assumed that the matter has reached a closure. However, in the month of July 2019, the Id Counsel got to hear that the Department has decided to launch the prosecution proceedings u/s 276C(1) r/w section 277 before the Economic Offences Court, Jaipur. On receipt of such information, the assessee again consulted with his local Counsel and another Counsel based in Jaipur and it was advised by the Counsel based in Jaipur that the assessee should immediately file appeal before the Tribunal against the levy of penalty. We therefore find that the assessee is all along diligent in pursuing his legal remedies against the action taken by the Department and has sought advice from his legal Counsels from time to time. Basis the advice of his legal Counsel, he didn't pursue any further appeal before the Tribunal against the order of the Id CIT(A) confirming the levy of penalty by the Assessing officer. However, given the subsequent developments wherein the prosecution proceedings were launched by the Department and the matter was pursued with the Department for dropping the prosecution proceedings and finally, when he came to know that the Department had decided to launch the prosecution proceedings, he again consulted another Counsel and he was advised to file appeal before the Tribunal against the levy of penalty. Such an advice is based on the premise that the Department has decided to launch the prosecution proceedings apparently for the reason that penalty has been confirmed by the Id CIT(A) and there are no further appeals

pending against such levy of penalty and it is therefore advisable to file appeal against such penalty before the Tribunal. The Hon'ble Supreme Court, in G. L. Didwania v. ITO (1995) 224 ITR 687 (SC), has held that "The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case, it may drop the proceedings in the light of an order passed under the Act." In K. C. Builder v. ACIT (2004) 265 ITR 562 (SC), the Hon'ble Supreme Court held that when the penalty is cancelled, the prosecution for an offence u/s 276C for wilful evasion of tax cannot be proceeded with thereafter. Following this legal proposition, the Hon'ble Bombay High Court, in case of Shashichand Jain & Ors. v UOI (1995) 213 ITR 184 (Bom), has quashed prosecution proceedings on the basis of the cancellation of penalty by the Appellate Authority. We therefore find that there is a close connection between penalty and prosecution proceedings and therefore, to safeguard his interest in the prosecution proceedings, where the assessee has filed the present appeals, the assessee cannot be denied and deprived of his legal defence and pleadings which he can take in the course of the prosecution proceedings. The contesting of penalty on merits of the case has therefore seems critical in view of the subsequent development in terms of launch of the prosecution proceedings and where the assessee wants to plead against risk of prosecution, the Tribunal cannot be oblivious of its duty by denying such right to the assessee on mere technicality of delay in filing the present appeals against levy of penalty.

14. In case of Collector, Land Acquisition vs MST Katiji (Supra), the Hon'ble Supreme Court has held that the expression 'Sufficient Cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner to sub-serves the ends of justice that being the life-purpose of the existence of the institution of Courts. It was further held by the Hon'ble Supreme Court that such liberal approach is adopted on one of the principles that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties. Another principle laid down by the Hon'ble Supreme Court is that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It was also held by the Hon'ble Supreme Court that there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of male fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. In the instant case, applying the same principles, we find that the assessee has all along acted diligently in safeguarding his legal rights and availing the remedies available to him and has acted and taken action basis the advice and assistance sought from his legal Counsels. He was initially advised not to file any appeal against the confirmation of levy of penalty. However, due to subsequent developments wherein the assessee runs a serious risk of prosecution where the penalty is confirmed, he was advised to file the present

appeals, we find that there is no culpable negligence or malafide on the part of the assessee in delayed filing of the present appeals and he does not stand to benefit by resorting to such delay.

15. In case of United Christmas Celebration Committee Charitable Trust vs. ITO (Supra), the Hon'ble Madras High Court has condoned the delay of 1631 days in filing the appeal before the Tribunal against the order of Id. CIT(A) refusing registration u/s 12AA of the Act. In that case, the Hon'ble High Court has held that in dealing with the matter, not only the period of delay has to be taken into account but also the quality of the explanation, the legal assistance, if any, sought and rendered to the litigant, and the detriment that condonation of delay would cause to the opposing party. These are aspects, if, looked at, closely, will enable the Court to come to a conclusion as to whether the delay was intentional and/or deliberate. Accordingly, the Hon'ble High Court held that even though the period of delay is large, it is inclined to condone the delay especially in the circumstances of the present case for the reason that if the assessee would succeed on merits, it could hardly be said that it would cause detriment to the Revenue in the matter involving grant of registration. In the present case, we find that where the assessee pursued the matter for closure of prosecution proceedings right from October 2017 and thereafter, the Department finally decided to refer to the matter to the economic offences Court in July 2019, and in order to safeguard himself from risk of such prosecution, he decided to file the present appeals in August 2019, there is sufficient cause for the delay as the assessee all along from 2017 to 2019 carried the belief and understanding that the matter shall

attain finality in view of no further communication from the Department. However, when he came to know in July 2019 that the Department has finally decided to carry the matter further before the Economic offences Court, he filed the present appeals to safeguard himself from risk of prosecution, we find that the delay is not intentional or deliberate and where the delay is not condoned, it would not be in interest of substantial justice as it would deprive the assessee of his legal safeguard against risk of prosecution.

16. Further, we refer to the decision of Hon'ble Madras High Court in case of Hosanna Ministries vs. ITO (Supra) wherein the Hon'ble High Court has condoned the delay of 1902 days in filing the appeal against the Id. CIT(A)'s order refusing the grant of registration u/s 12AA of the Act. In that case, the Hon'ble High Court has held that no doubt, the delay has to be explained with proper reasons but it does not mean that every day's delay must be explained. The Court must take a pragmatic view in appreciating the reasons attributable to the delay caused to the party to approach the Court of law and no pedantic view or approach to be adopted by the Court in considering the reasons given by the parties for delay in approaching the Court.

17. Further, we refer to the decision of Hon'ble Gujarat High Court in case of Mukesh Jesangbhai Patel vs. ITO (Supra) wherein the Hon'ble High Court has condoned the delay of over 600 days in filing the appeal. In that case, the Hon'ble High Court has drawn reference to the decision of Hon'ble Supreme Court in case of N. Balakrishna vs. M. Krishnamuthy [1998] 7 SCC 123 wherein it was held as under:-

"6. In N. Balakrishna (supra), it was reiterated that the word 'sufficient cause' should receive liberal construction and acceptability of the explanation is the criteria, and not the length of delay as such by observing as under:

"In every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

18. Further, we refer to the decision the Hon'ble Bombay High Court in case of Vijay Vishin Meghani vs. DCIT (Supra) wherein it has referred to the decision in case of Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi & Ors. AIR 1979 SC 1666 wherein the Hon'ble Supreme Court has held that a legal advice tendered by a professional and the litigant acting upon it one way or the other could be a sufficient cause to seek condonation of delay and coupled with the other circumstances

and factors for applying liberal principles and then said delay can be condoned. Eventually, an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in bona fides. The Hon'ble High Court thereby condoned the delay of 2984 days in filing the appeals holding that the explanation placed on affidavit was not contested nor we find that from such explanation, can we arrived at the conclusion the assessee was at fault, he intentionally and deliberately delayed the matter and has no bona fide or reasonable explanation for the delay in filing the proceedings and the position is quite otherwise.

19. Further, we refer to the decision of Co-ordinate Jaipur Bench decision in case of Ganesh Chawala vs. ITO (supra) wherein the Coordinate Bench has condoned the delay of about 43 months in filing the appeal wherein under similar circumstances, the assessee ran a risk of prosecution and the relevant findings of the Coordinate Bench reads as under:-

"2. We have heard the rival contentions and perused the facts of the case. The tax due in the impugned case after the order of learned CIT(A) has been stated to be less than Rs. 1 lac and the seriousness has not been anticipated by the assessee and it was advised by the counsel that the tax should be paid to bring the litigation to an end. The taxes were not paid and the penalty under s. 271(1)(c) was imposed and the learned CIT has launched a prosecution under s. 276(1) r/w s.

277 of the Act before the Economic Offence Court. It has been stated that no opportunity had been given to the assessee before serving the order under s. 279 of the Act on 19th March, 2007. The assessee was not aware of this fact before the said service. Thereafter on the advise of the counsel, the matter against the prosecution was taken up before the jurisdictional High Court and the impugned appeal was filed before the Tribunal. Therefore, there appears to be a sufficient cause in filing the appeal before us. No presumption can be made that the delay has been occasioned deliberately or on account of culpable negligence or on account of mala fides. The litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. In our view the assessee has explained the delay of filing the appeal before us. Our views find support from the decision of Hon'ble Supreme Court of India in the case of Collector, Land Acquisition vs. Mst. Katiji & Ors. (1987) 62 CTR (Syn)(SC) 23 : (1987) 167 ITR 471 (SC)."

20. In light of above discussions and in the entirety of facts and circumstances of the case, we are of the considered view that the assessee in his averments has made out a clear case that there was sufficient cause which being beyond the control of the assessee, prevented him from filing the appeals in time before the Tribunal. The assessee was diligent and has sought advice from his counsel from time to time and was not guilty of negligence on his part and it cannot be said that the delay was due to the negligence and inaction on the part of the assessee, which could have been avoided by the assessee if he had exercised due care and attention. Due to subsequent developments

wherein the assessee runs a serious risk of prosecution where the penalty is confirmed, he was advised to file the present appeals, we find that there is no culpable negligence or malafide on the part of the assessee in delayed filing of the present appeals and he does not stand to benefit by resorting to such delay. Therefore, in the factual matrix of the present case, we find that there exists sufficient and reasonable cause for condoning the delay of 583 days in filing the present appeals and as held by the Hon'ble Supreme Court, where substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserved to be preferred. Therefore, in exercise of powers under section 253(5) of the Act, we hereby condone the delay of 583 days in filing the present appeals as we are satisfied that there was sufficient cause for not presenting the appeals within the prescribed time and the appeals are hereby admitted for adjudication on merits.

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21. Now, coming to assessee's appeal relating to levy of penalty u/s 271(1)(c) for AY 2008-09 wherein the grounds of appeal taken by the assessee reads as under:

"1. The impugned penalty order U/s 271(1)(c) of the Act dated 30.07.2015 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.

2. Rs. 6,800/-: The Id. CIT(A) erred in law as well as on the fact of the case in confirming the order of AO dated 30.07.2015 imposing penalty U/s 271(1)(c) of the Act of Rs. 6,800/- The

penalty so imposed and confirmed, being totally contrary to the provisions of law and facts, hence the same kindly be deleted in full.

3. That the impugned show cause notice issued U/s 274 r/w 271(1)(c) of the Act, is quite vague and did not at all specify under which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment particulars of income or furnishing of inaccurate particulars of income. The impugned penalty based on such a notice being contrary to the provisions of law and facts kindly be quashed."

22. Briefly the facts of the case are that the assessee had filed his original return of income on 23.09.2008 declaring total income of Rs. 85,48,910. Thereafter, pursuant to search conducted on the premises of the assessee on 19.12.2012 and issuance of notice U/s 153A, the assessee filed his return of income on 10.12.2013 declaring total income of Rs. 85,68,900/- which includes additional income of Rs. 20,000/- surrendered during the course of search against purchase of gold ornaments. The assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 85,68,900/- and penalty proceedings U/s 271(1)(c) of the Act were separately initiated and show cause notice U/s 271(1)(c) dated 10.03.2015 was issued to the assessee. During the course of penalty proceedings, a further show cause notice dated 10.07.2015 was issued. In response, the assessee submitted that search was conducted at his residence and a piece of paper containing details of purchase of gold ornaments worth Rs. 18,150/- was found. He further submitted that he had withdrawn Rs. 2,20,414/- for his household expenses and purchase of ornament was made out of the said withdrawals. He further submitted that as he was under mental tension, physically tired and was assured that no

penal action will be taken, to avoid litigation and to purchase peace of mind, he surrendered the said amount as income and paid the tax and interest thereon. The reply so filed by the assessee was considered but not found satisfactory to the Assessing Officer. As per the Assessing Officer, the assessee in his return of income filed U/s 153A of the Act had disclosed additional income of Rs. 20,000/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income to the tune of Rs. 20,000/- in the original return filed U/s 139(1) of the Act on 23.09.2008. Therefore, the assessee is liable for penalty U/s 271(1)(c) r.w. explanation 5A thereto. The Assessing Officer accordingly, held that the assessee is guilty for furnishing of inaccurate particulars of income and concealing particulars of his income and penalty U/s 271(1)(c) of Rs. 6,800/- was imposed upon the assessee for concealment of income by furnishing inaccurate particulars of income.

23. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id. CIT(A) vide his consolidated order dated 06.10.2017 has sustained the levy of penalty u/s 271(1)(c) by the Assessing officer. As per Id. CIT(A), the assessee's primarily contention was that the penalty may not imposed as disclosure was offered to buy mental peace and he was not in agreement with this contention as there could not be bargain with the statute. It was further held by the Id. CIT(A) that the AO has specifically invoked explanation 5A while imposing of penalty u/s 271(1)(c) and order of the AO as such remained unrebutted before him. In the facts and circumstances of the case, the penalty imposed by the AO was therefore, confirmed. Against

the said findings of the Id. CIT(A), the assessee is now in appeal before us.

24. During the course of hearing, the Id. AR submitted that the Assessing officer has levied the impugned penalty in all these years only on the basis of findings recorded by him in the respective assessment orders. It was submitted that it is a settled legal proposition that assessment and penalty proceedings are separate and distinct from each other. The order imposing penalty is quasi-criminal in nature and, thus, the burden lies on the Department to establish that the assessee had concealed his income. Since the burden of proof in penalty proceeding varies from that in the assessment proceeding, a finding in the assessment proceeding that a particular receipt is income or that a deduction has wrongly been claimed intentionally, can't automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceeding. In the penalty proceedings, the AO is bound to bring positive material showing intentional concealment. Also therefore, all the evidences filed & explanation submitted requires a consideration afresh. The basic difference between the assessment proceedings and in the penalty proceedings is that whereas in the penalty proceedings, the evidence has to be again evaluated differently and with a view to conclusively ascertain the earning of the undisclosed income beyond any doubt, however, in the assessment proceedings even if the evidence is not conclusive, the income may be assessed. For imposing penalty, the AO must conclusively prove the earning of the undisclosed income. However, in this case, the AO merely alleged but failed to bring any material

whatsoever by making independent inquiries to support the imposition of the impugned penalty.

25. It was further submitted by the Id AR that the from perusal of the show cause notice issued u/s 274 r/w section 271(1)(c) dated 10.03.2015 for A.Y 2008-09, it is not at all clear as to for what precise charge, the appellant was asked to show cause viz. whether the charge is that the assessee has furnished inaccurate particulars of income or it was for concealing particulars of such income in as much as a bare perusal of the said show cause notice clearly reveal that the inappropriate words/unwanted charge has not been struck off. The AO neither scored out nor ticked which particular part of alleged offence, he was relying in as much as the word "or" has been used between the two offences in the SCN. For better appreciation relevant extract from SCN, is reproduced hereunder:

"x x x x it appears that you have concealed the particulars of your income or furnished inaccurate particulars of income."

26. It was further submitted that this confusion with the AO even continued while passing the impugned penalty order in as much as at the end of the order, while concluding and computing the penalty, the AO has stated that a penalty u/s 271(1)(c) of Rs 6,800/- is imposed upon the assessee for concealment of income by furnishing inaccurate particulars of income. Thus, even while imposing the penalty, he was not sure on which limb he has imposed the penalty. It was submitted that the AO did not appreciate that the two limbs i.e. the concealment

of income and furnishing of inaccurate particulars of income carry different connotations, as held in the case of T. Ashok Pai (2007) 292 ITR 11 (SC) which was taken note of in CIT & Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn). The use of both the limbs by the AO mechanically, clearly shows a complete non-application of mind on his part and the requisite satisfaction, this way, is not at all discernable from the assessment orders nor from the SCN of all these years. The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn), has held that notice u/s 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High Court has further laid down that certain printed form where all the grounds given in Sec. 271 are given would not satisfy the requirement of law. It was further submitted that the Hon'ble Rajasthan High Court in case of Shewta Construction Co. Pvt. Ltd. v/s ITO (*in DBITA No. 534/2008 vide their order dated 06.12.2016*) held as under:

"9. Taking into consideration the decision of the Andhra Pradesh High Court which virtually considered the subsequent law and the law which was prevailing on the date the decision was rendered on 27.08.2012. In view of the observations made in the said judgment, we are of the opinion that the contention raised by the appellant is required to be accepted and in the finding of Assessing Officer in the assessment order it is held that the AO, has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He

cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order."

27. It was further submitted that the AO in the proceedings u/s 271(1)(c) has to examine all the facts of the case as well as the basis of the surrender and then arrive at the conclusion that the income disclosed by the assessee falls in the definition of "undisclosed income" as stipulated in the explanation to the section 271(1)(c) of the Act. It was submitted that the AO, in this case, has not given any categorical finding that the income resulted in "undisclosed income" as per definition provided in the Explanation to section 271(1)(c) of the Act. It was submitted that purchase of gold ornaments in the present case and other out going expenditure such as house repair, payment to employees, purchase of LCD, other misc. expenses in other years desnt have any income element. These are all expenditure entries and, therefore, until and unless a corresponding asset is found in the possession of the assessee, the entries alone cannot be regarded as representing the undisclosed income of the assessee. In support, reliance was placed on various decisions including the Coordinate Bench decision in case of Padam Chand Pungliya (2019) 71 ITR_Trib 562(JP). It was further submitted that if a reference is made to the so called admission made by the assessee in the statement recorded u/s 132(4) dated 19.12.2012 & 02.01.2013, it will be a clear case of obtaining the disclosure from the assessee without finding any incriminating material disclosing any undisclosed income. Applying the judicial guidelines in the facts of the present case, it can be very well demonstrated that in this case there was no undisclosed income and the AO merely and blindly relied upon the so called admission of a huge surrender which

was made / obtained by the revenue to make the search a success. As a matter of fact, a careful and honest reading of the seized documents / assets etc. viz a viz the explanation given by the assessee during the course of the statement recorded u/s 132(4) on 19.12.2012 and again on 02.01.2013, will make it evidently clear that there was no occasion at all to make any admission of income. In fact, despite there being source explained, the figures were stressed to meet with the target of the surrender to be obtained by the search team. It was accordingly submitted that there is no basis for levy of penalty u/s 271(1)(c) and the same may be directed to be deleted for all these assessment years.

28. The Id DR is heard who has vehemently argued the matter. The Id DR submitted that it is a case where the search has been conducted on the assessee and pursuant to notice u/s 153A, the assessee has filed his return of income including the income surrendered during the course of search. Once the income has been surrendered during the course of search and thereafter, the assessee filed his return of income disclosing such income doesn't absolve the assessee from levy of penalty as explanation 5A to section 271(1)(c) is clearly attracted in the instant case. It was accordingly submitted that there is no infirmity in the order of the Assessing officer and which has rightly been confirmed by the Id CIT(A). The Id DR accordingly supported the findings of the lower authorities.

29. We have heard the rival contentions and pursued the material available on record. The assessee had filed his original return of income on 23.09.2008 declaring total income of Rs. 85,48,910. Thereafter, pursuant to search conducted on the premises of the

assessee on 19.12.2012 and issuance of notice U/s 153A, the assessee filed his return of income on 10.12.2013 declaring total income of Rs. 85,68,900/- which includes additional income of Rs. 20,000/- surrendered during the course of search against purchase of gold ornaments. The Assessing officer has stated that since the assessee failed to give any details of the nature of undisclosed income and the manner in which it has been earned, the penalty provisions u/s 271(1)(c) are attracted on this enhancement of income. Thereafter, the returned income was accepted and assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 85,68,900/- and it was stated that penalty notice U/s 271(1)(c) of the Act issued for concealment of income/furnish inaccurate particulars of income. Therefore, we find that the penalty proceedings have been initiated *qua* the additional income which has been admitted by the assessee during the course of search in his statement u/s 132(4) of the Act and which has subsequently been reported to tax in the return filed in response to notice u/s 153A of the Act. The penalty proceedings proposed to be initiated is therefore *qua* the additional income admitted during the course of search and not *qua* the addition made while passing the assessment order u/s 143(3) read with section 153A of the Act. The fact that the AO while passing the assessment order has taken note of said disclosure of the additional income by the assessee in his statement recorded u/s 132(4) during the course of search which has been subsequently been reported to tax in the return filed u/s 153A is therefore clear enough reflection of the mind of the AO and which clearly demonstrates that the Assessing Officer at the time of passing the assessment order was satisfied that the assessee is liable for

penalty u/s 271(1)(c) of the Act qua the additional income. Therefore, as far as recording of satisfaction at the time of passing of the assessment order is concerned, we find that the same is clearly discernable from the reading of the assessment order and there is a direction to this effect by the Assessing officer.

30. Now coming to the contention of the Id AR regarding the specific limb/charge for levy of penalty not discernible from the show-cause notice issued u/s 271 r/w 275 dated 10.3.2015 and subsequent penalty order. In this regard, we refer to the notice issued u/s 271 r/w 275 dated 10.3.2015 wherein it has been stated as under:

"whereas in the course of assessment proceedings for AY 2008-09, it appears that as per section 274 and 275 read with section 271(1)(c), you are liable for penalty for concealment of particulars of income or furnishing of inaccurate particulars of income is concerned, you are hereby requested to appear and show cause why an order should not be made imposing penalty u/s 271(1)(c) r/w 274 of the Act."

We therefore find that while issuing the notice u/s 271(1)(c), the specific charge in terms of concealment of particulars of income or furnishing of inaccurate particulars of income is not ascertainable.

31. We now refer to the penalty order dated 30.7.2015, wherein the AO has stated that the assessee in his return of income filed U/s 153A of the Act had disclosed additional income of Rs. 20,000/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income

to the tune of Rs. 20,000/- in the original return filed U/s 139(1) of the Act on 23.09.2008. Therefore, the assessee is liable for penalty U/s 271(1)(c) of the Act. Further, he referred to the explanation 5A to section 271(1)(c) and held as under:

"...I hold the assessee is guilty for furnishing of inaccurate particulars of income and concealing particulars of his income and find it to be a fit case for imposition of as provided U/s 271(1)(c) of Act."

The AO accordingly levied penalty of Rs. 6,800/- on the assessee for concealment of income by furnishing inaccurate particulars of income.

32. We therefore find that even while passing the penalty order, the AO has not given a clear and specific finding as to how it is a case of concealment of income as well as furnishing of inaccurate particulars of income. Once a return of income filed u/s 153A has been accepted by the Assessing officer, we fail to comprehend how it can be a case of furnishing inaccurate particulars of income. It may be a case of concealment of income where the income has been found basis search proceedings conducted at the premises of the assessee, which we shall be discussing in detail subsequently. In this regard, we refer to the decision of the Third Member in case of HPCL Mittal Energy Ltd [2018] 97 taxmann.com 3 (Amritsar-Trib) wherein it has been held that:

" 21. Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has

been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order."

In the instant case, we find that uncertain charge at the time of initiation of penalty proceedings is followed by uncertain charge even at the time of passing the penalty proceedings as the Assessing officer has not specified as to how the assessee is found guilty of both concealment of income as well as furnishing inaccurate particulars of income. Further, the decision of Hon'ble Rajasthan High Court in case

of Sheveta Construction (Supra) wherein the Hon'ble High Court has held that "the AO, has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order" also supports the case of the assessee. Therefore, the penalty order so passed by the Assessing officer cannot be sustained and deserved to be set-aside on this ground itself.

33. Now coming on the merits of the levy of the penalty, let's now examine the provisions of explanation 5A to section 271(1)(c) of the Act which has been invoked by the Assessing officer and the same reads as under:-

"[Explanation 5A - Where, in the course of a search initiated under [section 132](#) on or after the 1st day of June, 2007, the assessee is found to be the owner of—

- (i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or*
- (ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,—*

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."

34. On perusal of the explanation 5A to section 271(1)(c), it lays down the following essential conditions which needs to be satisfied before the assessee is fastened with the penalty u/s 271(1)(c) of the Act:

(1) Firstly, it talks about a situation where the search has been initiated u/s 132 on or after the 1st day of June, 2007. In the present case, the search has been conducted on the assessee on 19.12.2012. Therefore, this condition is satisfied in the instant case.

(2) The second condition is that in the course of search so conducted, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year which has ended before the date of search. In the instant case, there is nothing on record which demonstrates that any money, bullion, jewellery or other valuable

article or thing has been physically found during the course of search and even this is not the case of the Revenue. Therefore, this condition is not relevant in the instant case and has not been dealt upon by us.

(2A) The second alternate condition is that during the course of search, the assessee is found to be owner of any income based on any entry in books of accounts or other documents or transactions and the assessee claims that such entry in the books of accounts or other documents or transactions represent his income wholly or in part for any previous year which has ended before the date of search. We find that this condition is relevant in the instant case and we will examine whether this condition is satisfied or not in the subsequent paragraphs.

(3) The third condition is that where the return of income for "such previous year" has been furnished before the "said date" but such income has not been declared therein. The phrase "such previous year" refers to the previous year which has ended before the date of search and "such income" refers to the income in respect of which the assessee is found to be owner of any money, bullion, jewellery or other valuable article or thing or any income based on any entry in books of accounts or other documents. The phrase "said date" refers to the date of search. Therefore, this condition is to be read along with the second condition in the sense that the assessee has to be found to be owner of the undisclosed income and he admits the same and further, such undisclosed income has not been disclosed in the return of income filed before the date of search. In the instant case, the assessee has originally filed his return of income u/s 139(1) on 23.09.2008 declaring total income of Rs. 85,48,910/- and thereafter, the search was

conducted on the assessee on 19.12.2012. Therefore, it is a case where the return of income for such previous year relevant to the impugned assessment year has been duly furnished by the assessee u/s 139(1) before the date of search. In the said return of income, the undisclosed income of Rs. 20,000/- as per statement u/s 132(4) has not been included and reported by the assessee. Therefore, this condition is satisfied in the instant case.

(3A) Now coming to the third alternate condition, it talks about a situation where the assessee has not filed his return of income and due date for filing the return of income for "such previous year" has expired. In the instant case, the assessee has duly filed his return of income, therefore, this alternate third condition does not apply at first place.

35. Now, coming back to the second alternate condition as referred supra, it need to be examined whether the same is satisfied in the instant case or not. Only in a scenario where this condition is finally held to be satisfied, the levy of penalty can be held justified by invoking explanation 5A to section 271(1)(c) as all the three conditions need to be necessarily satisfied individually as well as cumulatively. This condition in turn has two limbs which needs to be satisfied cumulatively.

36. The first limb provides that whether during the course of search, the assessee is found to be owner of any income based on any entry in books of accounts or other documents or transactions. The second limb states that the assessee claims that such entry in the books of accounts or other documents or transactions represent his income wholly or in part for any previous year which has ended before the date of search.

The first limb relates to findings by the Revenue during the course of search that the assessee is the owner of the income for the relevant previous year and the second limb talks about the claim and the admission by the assessee that such income represents his income for the said previous year. Therefore, there has to be finding by the Revenue that the assessee is the owner of such income for the relevant previous year and acceptance/admission by the assessee that such income represent his income wholly or in part for any previous year ended before the date of search. Further, such findings and admission should be based on any entry in books of accounts or other documents or transactions found during the course of search. Where either of the two limbs is satisfied and other limb is not satisfied, the penalty cannot be levied as the requirement is satisfaction of both the limbs individually and cumulatively and more so, in the context of deeming fiction so created by the explanation 5A which have to be read strictly.

37. In the facts of the present case, we find that the AO has recorded a finding that the assessee has declared additional income of Rs 20,000/- surrendered during the course of search against purchase of gold ornaments and the same has been accepted and offered to tax subsequently in the return of income so filed in response to notice u/s 153A of the Act. In response, the assessee has submitted that during the course of search conducted at his residence, a piece of paper containing details of purchase of gold ornaments worth Rs. 18,150/- was found. He further submitted that he had withdrawn Rs. 2,20,414/- for his household expenses and purchase of ornament was made out of the said withdrawals. What therefore has been found is a piece of paper where the assessee has recorded an outgo towards purchase of

gold ornaments. An outgo towards purchase of an asset cannot be termed as an income in the hands of the assessee. Where the legislature has talked about "income based on any entry in any books of account or other documents or transactions" 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 271(1)(c). It is a well-settled legal proposition that the deeming provisions are limited for the purposes that have been brought on the statute book and have therefore to be applied in the context of provisions wherein they have been brought on the statute book and not otherwise. In the instant case, the deeming provisions contained in section 69 and section 69B could have been applied in the context of bringing to tax such investments to tax in the quantum proceedings, though the fact of the matter is that the 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. Further, the second limb is also not satisfied as the assessee has nowhere claimed that such narration on a piece of paper represents his income wholly or

in part for any previous year which has ended before the date of search. We therefore find that where a specific definition of undisclosed income has been provided in explanation 5A to section 271(1)(c), 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 in gold ornaments 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 271(1)(c) read with the explanation 5A thereto. In any case, we find that there is no finding recorded by the Assessing officer that the assessee is found to be the owner of income based on any entry in books of accounts or other documents or transactions found during the course of search. Therefore, in absence of any finding in the penalty order to the effect that the assessee is found to be the owner of income based on any entry in books of accounts or other documents or transactions found during the course of search and also the fact that the assessee has nowhere claimed that such narration on a piece of paper represent his income wholly or in part for any previous year which has ended before the date of search, the second condition is not satisfied in the instant case and consequentially, all the three conditions specified in explanation 5A to section 271(1)(c) cannot be said to be satisfied individually as well as cumulatively and the impugned penalty proceedings deserve to be set-aside.

38. In light of above discussions and in the entirety of facts and circumstances of the case and respectfully following the decisions referred supra, we are of the considered view that the assessee cannot be fastened with the penalty so envisaged under explanation 5A to section 271(1)(c) and the same is hereby directed to be deleted and the order of the lower authorities are set-aside. The matter is decided in favour of the assessee and against the Revenue.

ITA No. 1030-1033/JP/2019

39. Now, coming to assessee's appeal for A.Y. 2009-10 in ITA No. 1030/JP/2019. The facts of the case are that the assessee had filed original return of income on 22.09.2008 declaring total income of Rs. 74,23,320/- and in response to notice U/s 153A of the IT Act, the assessee filed his return of income on 10.12.2013 declaring total income of Rs. 77,10,470/- including additional income of Rs. 2,87,150/- which includes Rs. 2,50,000/- surrendered on account of payment of good work reward to employees and Rs. 36,350/- on account of expenses for repair/renovation of his house. The assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 95,06,930/- and penalty proceedings U/s 271(1)(c) of the Act were separately initiated and show cause notice U/s 271(1)(c) dated 10.03.2015 was issued to the assessee. During the course of penalty proceeding, a fresh show cause notice dated 10.07.2015 was issued. In response, the assessee submitted that search was conducted at his residential and business premises and a piece of paper containing details of house repair of Rs. 36,350/- and payment of good work reward to the employees of the

shop of Rs. 2,50,800/- was found. It was submitted that he had withdrawn Rs. 2,23,478/- for his household expenses and the expenditure for his house repair was done out of such withdrawals. It was further submitted that the good work reward was paid to the employees of the shop which is for the business only and can be termed either as extra salary or bonus to the employees but it is not an income. He further submitted that as he was under mental tension, physically tired and was assured that no penal action will be taken, to avoid litigation and to purchase peace of mind, he surrendered the said amount as income and paid the tax and interest thereon. The submission so filed by the assessee was considered but not found satisfactory to the Assessing Officer. As per the Assessing Officer, the assessee in his return of income filed U/s 153A of the Act had disclosed additional income of Rs. 2,87,150/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income to the tune of Rs. 2,87,150/- in the original return filed U/s 139(1) of the Act on 22.09.2008. Therefore, the assessee is liable for penalty U/s 271(1)(c) r.w. explanation 5A. The Assessing Officer accordingly held that the assessee has furnished inaccurate particulars of income and concealed particulars of his income and it is a fit case for imposition of penalty U/s 271(1)(c) and penalty of Rs. 1,10,000/- was imposed upon the assessee for concealment of income by furnishing inaccurate particulars of income which, on appeal, has been confirmed by the Id CIT(A).

40. For A.Y. 2010-11 in ITA No. 1031/JP/2019, the facts of the case are that the assessee had filed original return of income on 16.09.2010

declaring total income of Rs. 1,03,47,370/- and in response to notice U/s 153A of the IT Act, the assessee filed his return of income on 10.12.2013 declaring total income of Rs. 1,09,27,620/- including additional income of Rs. 5,80,257/- which includes Rs. 1,10,250/- surrendered on account of purchase of LCD, investment in gold ornaments amounting to Rs. 1,74,807/- and good work reward to employees of Rs. 2,95,200/-. The assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 1,10,00,630/- and the penalty proceeding U/s 271(1)(c) of the Act were separately initiated and show cause notice U/s 271(1)(c) dated 10.03.2015 was issued to the assessee. During the course of penalty proceeding, a fresh show cause notice dated 10.07.2015 was issued. In response, the assessee submitted that search was conducted at his business premises and residential house and a piece of paper containing details of purchase of gold, LCD and payment of good work reward to the employees of the shop of Rs. 2,95,200/- was found. It was further submitted that he had withdrawn Rs. 2,25,572/- for his household expenses and out of the same, his wife purchased gold and LCD. It was further submitted that the good work reward paid to the employees of the shop is for the business only and can be termed either as extra salary or bonus to the employees but it is not an income. He further submitted that as he was under mental tension, physically tired and was assured that no penal action will be taken, to avoid litigation and to purchase peace of mind, he surrendered the said amount as income and paid the tax and interest thereon. The submission so filed by the assessee was considered but not found satisfactory to the Assessing Officer. As per the Assessing Officer, the assessee in his return of income filed U/s

153A of the Act had disclosed additional income of Rs. 5,80,257/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income to the tune of Rs. 5,80,257/- in the original return filed U/s 139(1) of the Act on 16.09.2010. Therefore, the assessee is liable for penalty U/s 271(1)(c) r/w explanation 5A. The Assessing Officer accordingly, held that the assessee has furnished inaccurate particulars of income and concealed particulars of his income and it is a fit case for imposition of penalty U/s 271(1)(c) and penalty of Rs. 2,10,000/- was imposed upon the assessee for concealment of income by furnishing inaccurate particulars of income which, on appeal, has been confirmed by the Id CIT(A).

41. For A.Y. 2011-12 in ITA No. 1032/JP/2019, the facts of the case are that the assessee had filed his original return of income on 19.09.2011 declaring total income of Rs. 1,30,18,640/- and in response to notice U/s 153A of the IT Act, the assessee had filed his return of income on 10.12.2013 declaring additional income of Rs. 18,93,932/- surrendered during the course of search on account of undisclosed cash expenses and investment in jewellery etc. The assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 1,49,68,240/- and penalty proceedings U/s 271(1)(c) of the Act were separately initiated for concealment of income /furnishing inaccurate particulars of income and show cause notice U/s 271(1)(c) dated 10.03.2015 was issued to the assessee. Further, during the course of penalty proceedings, a fresh show cause notice dated 10.07.2015 was issued. In response, the assessee submitted that search was conducted at his business premises

and residential house and during search, a few loose papers/rough papers were found, the entries on said papers were rough entries and does not have any correlation with his business/income. However, as he was under mental tension, physically tired and was assured that no penal action will be taken to avoid litigation and to purchase peace of mind, he surrendered the said amount as income and agreed to pay the tax and interest thereon. The submission so filed by the assessee was considered but not found satisfactory to the Assessing Officer. As per the Assessing Officer, the assessee in his return of income filed U/s 153A of the Act had disclosed additional income of Rs. 18,93,932/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income to the tune of Rs. 18,93,932/- in the original return filed U/s 139(1) of the Act on 19.09.2011. Therefore, the assessee is liable for penalty U/s 271(1)(c) r.w. explanation 5A. The Assessing Officer accordingly held that the assessee has furnished inaccurate particulars of income and concealed particulars of his income and it is a fit case for imposition of penalty U/s 271(1)(c) and penalty of Rs. 6,10,000/- was imposed upon the assessee for concealment of income by furnishing inaccurate particulars of income which, on appeal, has been confirmed by the Id CIT(A).

42. For A.Y. 2012-13 in ITA No. 1033/JP/2019, the facts of the case are that the assessee had filed his original return of income on 19.09.2011 declaring total income of Rs. 1,84,97,550/- and in response to notice U/s 153A of the IT Act, the assessee filed his return of income on 10.12.2013 declaring additional income of Rs. 2,07,17,980/- which

includes Rs. 22,20,428/- surrendered on account of investment in jewellery, repair of house, good work reward, undisclosed payment etc. The assessment was completed U/s 143(3) r.w.s 153A of the Act at Rs. 2,07,29,730/-and penalty proceedings were separately initiated and show cause notice U/s 271(1)(c) dated 10.03.2015 was issued. During the course of penalty proceeding, a fresh show cause notice dated 10.07.2015 was issued. In response, the assessee submitted that search was conducted at his business premises and residential house and during search, a few loose papers/rough papers were found, the entries on said papers were rough entries and does not have any correlation with his business/income. However, as he was under mental tension, physically tired and was assured that no penal action will be taken, therefore, to avoid litigation and to purchase peace of mind, he surrendered the said amount as income and paid the tax and interest thereon. The submission so filed by the assessee was considered but not found satisfactory to the Assessing Officer. As per the Assessing Officer, the assessee in his return of income filed U/s 153A of the Act had disclosed additional income of Rs. 22,20,428/-. It was further held by the Assessing Officer that the assessee deliberately concealed his income and furnished inaccurate particulars of his income to the tune of Rs. 22,20,428/- in the original return filed U/s 139(1) of the Act on 19.09.2011. Therefore, the assessee is liable for penalty U/s 271(1)(c) r.w. explanation 5A. The Assessing Officer accordingly held that the assessee has furnished inaccurate particulars of income and concealed particulars of his income and it is a fit case for imposition of penalty U/s 271(1)(c) and penalty of Rs. 6,90,000/- was imposed upon the

assessee for concealment of income by furnishing inaccurate particulars of income which, on appeal, has been confirmed by the Id CIT(A).

43. Being aggrieved, the assessee carried these matters in appeal before the Id. CIT(A). The Id. CIT(A) vide his consolidated order dated 06.10.2017 has sustained the levy of penalty u/s 271(1)(c) by the Assessing officer. As per Id. CIT(A), the assessee's primarily contention was that the penalty may not imposed as disclosure was offered to buy mental peace and he was not in agreement with this contention as there could not be bargain with the statute. It was further held by the Id. CIT(A) that the AO has specifically invoked explanation 5A while imposing of penalty u/s 271(1)(c) and order of the AO as such remained unrebutted before him. In the facts and circumstances of the case, the penalty imposed by the AO was therefore, confirmed for all the respective assessment years. Against the said findings of the Id. CIT(A), the assessee is now in appeal before us.

44. In the aforesaid factual background, appeals have been filed by the assessee for the respective years wherein similar grounds of appeal have been taken by the assessee except for the change in the penalty amount.

45. During the course of hearing, both the parties fairly submitted that the facts and circumstances of these cases are exactly identical as in ITA No. 1029/JP/2019 and have reiterated their respective contentions and submission made therein. Therefore, our findings and direction contained in ITA No. 1498/JP/2018 shall apply *mutatis*

mutandis to these appeals, the penalty is deleted and the orders of the lower authorities are set-aside. The matter is decided in favour of the assessee and against the Revenue.

1034/JP/2019

46. We now refer to assessee's appeal in ITA No. 1034/JP/2019 for A.Y 2013-14 wherein he has challenged the sustenance of levy of penalty u/s 271AAB and has taken the following grounds of appeal:

"1. The impugned penalty order U/s 271AAB of the Act dated 07.08.2015 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.

2. Rs. 21,54,034/-: The Id. CIT(A) erred in law as well as on the fact of the case in law as well as on the facts of the case in confirming the order of AO dated 07.08.2015 imposing penalty U/s 271AAB of the act of Rs. 21,54,034/-. The penalty so imposed and confirmed, being totally contrary to the provisions of law and facts, hence the same kindly be deleted in full.

3. That the notice issued by the DCIT for initiating the penalty U/s 271AAB of the Act, 1961 is not in accordance with law not being specifically pointing out the default for which the Id. AO sought to impose penalty U/s 271AAB."

47. The facts of the case are that for the year under consideration, the assessee had filed his original return of income on 30.09.2013 declaring total income of Rs. 3,85,23,770/- which includes additional income of Rs. 2,02,00,000/- offered to tax under the head "income from business or profession" as other income disclosed during the search. Thereafter, the assessee revised his return of income on 26.02.2015 declaring total

income of Rs. 3,98,64,110/- wherein additional business income of Rs. 13,40,344/- was declared. The assessment was completed U/s 143(3) r.w.s. 153B at Rs. 3,99,00,230/- and penalty proceedings U/s 271AAB were separately initiated and show cause dated 10.03.2015 was issued U/s 274 r.w.s. 271AAB of the Act. Further, during the course of penalty proceedings, a fresh show cause was issued dated 10.07.2015. Referring to the provisions of Section 271AAB of the Act, the Assessing Officer held that all the requirements of Section 271AAB of the Act are satisfied in the instant case and since the assessee has surrendered undisclosed income of Rs. 2,15,40,344/- under various heads, therefore, it is a fit case for levy of penalty U/s 271AAB of the Act and accordingly, he levied penalty of Rs. 21,54,034/- @ 10% of the undisclosed income under Section 271AAB of the Act.

48. On appeal, the levy of penalty has been confirmed by the Id.CIT(A) stating that the AO has correctly applied the provisions of Section 271AAB and therefore, the action of AO of levy of penalty of Rs. 21,54,034/- was sustained by the Id CIT(A) and against the said findings, the assessee is in appeal before us.

49. During the course of hearing, it was submitted by the Id AR that from a perusal of the show cause notice issued u/s 274 r/w section 271AAB dated 10.03.2015, it is not at all clear as to for what precise charge, the appellant was asked to show cause viz. whether the charge is with regards to clause (a), clause (b) or clause (c) of section 271AAB. Rather the AO has simply mentioned "on assessed undisclosed income". Thus, he has not specified the default of the assessee in terms of clause

(a) to (c) of section 271AAB of the Act. The said impugned show cause notice is issued in a routine manner without mentioning under which precise clause of section 271AAB(1) of the Act, the assessee is found liable for penalty. This has left the assessee hanging in confusion, as to on which limb the AO proposes to impose the said penalty and hence, seeking reply. It was further submitted that this confusion with the AO even continued while passing the impugned penalty order in as much as in the entire penalty order, there is no mention as to the precise charge on which the AO proposes to impose the said penalty. The AO has not even stated the rate at which the penalty is being imposed i.e @10%, 20% or 30 to 90% as specified in clause (a), clause (b) or clause (c) of Section 271AAB respectively. He has simply imposed penalty stating as under:

"7. As discussed above the assessee has made surrender of undisclosed income Rs. 2,15,40,344/- under various heads. I therefore proceed to levy penalty u/s 271 AAB of the IT Act, 1961 on the concealed amount of Rs. 2,15,40,344/- for the surrender made."

Thus, the AO remained inconclusive till last when he imposed the penalty. It was submitted that the AO did not appreciate that the different charges specified in section 271AAB carry different connotation. It was further submitted that under similar circumstances, the Coordinate Benches of the Tribunal have quashed the penalty proceedings on account of deficiency in the show-cause notices.

50. It was further submitted that the impugned penalty u/s 271AAB has been imposed by the AO mainly on account of the so called

admission made by the assessee during the course of the search in the statement recorded u/s 132(4) dated 19.12.2012 & 02.01.2013. It was submitted that a bare reading of S.271AAB goes to show very clearly that it uses the word 'may' which implies that the discretion has been conferred upon the AO to decide as to whether a penalty under that provision has to be levied or not and if yes then under which clause. For this purpose, the AO is required to examine the merits of each case and cannot blindly rely upon the fact of income surrendered by the assessee. The fact is not denied that the income was surrendered by the assessee merely to buy peace and to avoid litigation though on merits, it was possible to strongly argue out the case against the revenue that no undisclosed income at all existed what to talk of imposition of penalty with respect thereto. This way, it can't be said that penalty u/s 271AAB is automatic. Further the said provision has specifically defined what undisclosed income means vide explanation (c) to 271AAB of the Act. Therefore, unless the AO successfully brings the assessed income / surrendered income within the four walls of said definition, he is not empowered to impose penalty as per explanation (c) to S.271AAB(1).

51. It was further submitted that in the instant case, the assessee has declared income of Rs.3,85,23,770/- (which includes surrendered income of Rs. 2,02,00,000/-) in his return of income filed on 30.09.2013 and further surrendered additional income of Rs. 13,40,344/- through revised return of income filed on 26.02.2015 and thereby assessee surrendered total amount of Rs. 2,15,40,344/-. 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 u/s 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive at 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. It was further submitted that the AO, in this case, has however never given a categorical finding that the income resulted in "undisclosed income" as per definition provided in the Explanation to section 271AAB(1) of the Act.

52. It was further submitted that if a reference is made to the so called admission made by the assessee in the statement recorded u/s 132(4) on dated 19.12.2012 & 02.01.2013, it will be a clear case of obtaining the disclosure from the assessee without finding any incriminating material disclosing any undisclosed income. The alleged seized material is nothing but containing some imaginary figures. Applying the judicial guidelines on the facts of the present case, it can be very well demonstrated that in this case there was no undisclosed income and the AO merely and blindly relied upon the so called admission of a huge surrender which was made / obtained by the

revenue to made the search a success. As a matter of fact, a careful and honest reading of the seized documents / assets etc. viz-a-viz the explanation given by the assessee during the course of the very statement recorded u/s 132(4) itself on 19.12.2012 and again on 02.01.2013, will make it evidently clear that there was no occasion at all to make any admission of income. In fact, despite there being source explained, the figures were stressed to meet with the target of the surrender to be obtained by the search team.

53. It was further submitted that a huge admission of income of Rs. 1.84 Crores was taken on account of alleged flat bookings. The above addition was made based on seized diary marked as Annexure-AS, Exhibit-2, Pg 1 to 9. However, the way, the Revenue authorities obtained the surrender was highly imaginary, merely based on surmises and conjectures and is absolutely lacking the minimum required details to reach any inference (whether for and against the assessee) to honestly held that there existed some income. Even the very existence of some income was not coming from the said diary what to talk of the question of being disclosed or undisclosed. Such contention is supported by the following facts emerging from the diary and the other circumstantial evidences r/w the statement of the assessee, submitted herein below.

Particulars (A.Y. 2013-14)	Income (Rs.)	Remark
Flat Booking	9,07,000/-	As per seized diary marked as Annexure-AS, Ex-2, Pg 1 to 9 (refer statement dated 02.01.2013 Q-7 & Q-8)
Flat Booking	19,37,000/-	
Flat Booking	16,00,000/-	
Flat Booking	17,00,000/-	
Flat Booking	23,00,000/-	

Flat Booking	21,00,000/-	
Flat Booking	41,00,000/-	
Flat Booking	21,00,000/-	
Flat Booking	13,35,000/-	
Flat Booking	3,35,800/-	
Total	1,84,14,800/-	

54. A bare look will suggest that it was a deaf and dumb document in as much as no details at all as to whether the figures, represent is receipt or payment. If the figures really represent the alleged receipt on account of sale/booking of flats, there is no details at all, as to such receipts were towards:

>No Flat No., related to which project as no name or project details have been given.

> No name of the area or place or city has been mentioned.

> Even no name of the buyer/person making payment of the advance, which is completely missing.

55. It was further submitted that there is no date appearing on each and every transaction which is an abnormal feature. It is a matter of common knowledge and human probability that on each and every transaction of receipt and payment, date is put, more particularly when it is a case which is out of books and noted in a diary. Surprisingly, on some entries date has been put and the transaction continue on the next page even. But all these transaction have been assumed to be falling within the F.Y. relating to that day. Surprisingly, in some of the cases, the date has been put at the last entry only, but even then, all

transactions preceding such date, have been assumed to have taken place on that very date. The internal page 4 of diary starts from 01.4.2011, After recording some entries on 2 pages i.e. 4 & 5, the Pg 6, the next date starts from 01.04.2012. What emerges is that on a single sitting transaction of one complete year was noted on 2 pages only. Similarly from 01.04.2012, Pg 6 to 9, in single sitting all the transaction have been noted totaling to Rs. 1.84 cr. A carefully examination of the entries will show that in all the pages though dated differently, the notings appear to be made on single sitting only. The pressure exerted while writing, the pattern, the manner, the ink used and the colour thereof, all unmistakably points out that all the noting have been done on a single day and that too on a single sitting only. It was highly surprising as to how a person could have remembered huge amount having been received, without showing a name and the purpose/nature e.g. at internal page 4 of diary marked as Annexure-AS, Exhibit-2, Pg 1 to 9. There are three entries of receipts Rs. 6.21 Lakh, 3.15 lakh and Rs. 2.10 lakh which totals to Rs 11.46 lakh. This goes to show either these receipts were from three different person but their "names" are missing. Moreover the date as to "when received" is also missing and barely in the name of the date the month and year is mentioned. If a person has recorded for memorandum as if these were the undisclosed transactions (as inferred and alleged by the Revenue) it is completely against the human probabilities and the surrounding circumstances that the person will not provide the other related details. Kindly refer Sumati Dayal vs. CIT [1995] 214 ITR 801 (SC). Throughout the month, the same pen, the same ink, the same manner and pressure appears to be there, which is another abnormal feature. The entries continue even on

the next page 5 without mentioning the month. Assuming for the same month "vizsy 2011", the total comes to Rs.17.24 lakh. These submissions and observations hold good even for the next pages 6-9 which starts from 01.04.2012 and the total comes to a huge amount of Rs. 1.84 crore. Hence, no addition was legally permissible. Kindly refer Jayanti Lal Patel v/s ACIT & Others (1997) 20 TW 546 (Raj), Ashwani Kumar Bharadwaj v/s DCIT (1998) 21 TW 358 (JP) and Ashwani Kumar v/s ITO (1992) 39 ITD 183 (Del).

56. It was further submitted that no iota of evidence were either found or has been referred to/relied upon by the search team or the AO, neither in the statements or the assessment or penalty order even, so as to justify the adverse inference drawn that it is income from flat booking. No corresponding asset is reported or alleged to have been found which was not accounted for/ not disclosed. On the contrary, in the statement recorded u/s 132(4) on 19.12.2012 and again on 02.01.2013, the assessee repeatedly answered that:

(i) All the bookings have been duly accounted for in the accounts of the company engaged in the construction business viz Nainani Builders (P) Ltd.

(ii) All the bookings are normally taken through account payee cheque only.

(iii) It was only in 1-2 stray cases where it was received in cash but there also official receipts of cash received were issued by the company.

57. It was further submitted that this real estate project was being undertaken and carried out by a Limited company Nainani Builders (P)

Ltd. though belonging to the Nainani Group and not by assessee in his individual capacity. Another feature worth noting is that search was commenced on 10.15 AM at the residence of the assessee on 19.12.2012, then continued whole day and was concluded at the request of the assessee at 10.05 PM in the night, when the assessee complained of some medical problem. The seized diary marked as Annexure-AS, Exhibit-2, Pg 1 to 9 were seized on 19.12.2020 as per Revenue authorities. Surprisingly, when these papers were available on 19.12.2012 itself, why no question was raised relating thereto on 19.12.2012 itself in statement recorded u/s 132(4) and why questions were raised relating thereto for the first time on 02.01.2013 in statement recorded u/s 132(4) of the Act. A clear inference from these facts is that factually no such dairy existed on 19.12.2012 and since the Department wanted to reach the targeted figures hence it appears to have entered into a bargain with the assessee, exerting all the pressures in the intervening period and then when the assessee agreed to admit some income, the department also built up a story to justify and support the admission of income and this gave birth to the said dairy, which clearly appears to have been prepared in a single sitting. Notably, a specific request was made to the Pr. CIT (Central) vide letter dated 16.10.2017 in response to his notice u/s 279 dated 06.07.2017, requesting to obtain expert report u/s 151 of CPC r/w Sec. 45 of Evidence Act 1872, unfortunately however no attention was made to such prayer.

58. It was further submitted that another important aspect is that during the course of search, one more diary namely Mansa Special-Notebook was found and was seized on 19.12.2012 as Annexure AS

Exhibit 08 containing pages 1 to 3 which contains several transactions, being expenditure and also receipts. But a bare perusal of the said diary reveals that probably it was prepared as a memorandum diary to record various expenses and receipts on day to day basis on different dates. The different manner of writing, pressure exerted, using of pen and different colour of ink, strikingly shows the difference between the diaries found and used for addition i.e the diary marked as Annexure AS Exhibit 08 containing pages 1 to 3, and another diary marked as Annexure-AS, Exhibit-2, Pg 1 to 9, on the basis of which surrender was obtained. Whereas in the diary named as Mansa Special- Notebook seized on 19.12.12 as Annexure-AS Exhibit-08 containing pages 1 to 3 on the first internal page there is a mention of "जयश्रीदादाजी" surprisingly however, on dairy pages 1 to 9 marked as Annexure-AS, Exhibit-2, on first internal page it is stated "श्रीश्री१००८ धूनीवालेदादाजी" followed by some more entries like "भजलोदादानामहरीहरनाम". It is clearly against the human probabilities that if the same person has to write the paper/dairy etc, normally before starting the writing, he will remember his Guru / God and will address/ Name in the same manner but not differently. If a person is habitual to start with writing श्रीगणेशायनामः, he will start writing in this manner alone. Further entries like TDS, income tax etc. shows that these transactions were recorded for memorandum purpose and later on must have been taken into account and recorded in the regular books of accounts. Whatever might have been the reason but what clearly emerges is that whereas AS-8 appears to be memorandum diary prepared and maintained in a normal and regular course whereas, diary AS-2 is nothing but a later creation of evidence being an attempt made to justify the huge amount of

surrender obtained by the search team. Though one may say that it is a job of an expert but such difference are visible and such inference can be drawn even by a layman. Unfortunately however, the Id. CIT(A) did not at all pay any attention and summarily confirmed the levy of penalty by merely and conveniently relying upon the so called admission in the recorded statements. He neither paid any attention to the facts nor appreciated the evidences judiciously nor, he applied his mind on the legal position and the case laws dealing with the aspect of undisclosed income so as to attract S. 271AAB.

59. The Id. DR is heard who has relied on the finding of the lower authorities. The Id. DR submitted that there is no basis to hold that the surrender was made by the assessee under any pressure and had that being the same, the assessee could have retracted from such surrender or filed any compliant to the higher authorities, which is not the case of the assessee. It was further submitted that the assessee has surrendered the undisclosed income in his statement recorded u/s 132(4) and has offered the same to tax in his return of income, there cannot be any question of said surrender of income not falling in the definition of undisclosed income. It was submitted that unlike section 271AAA, the penalty U/s 271AAB is mandatory in nature and is imposed at the varying rate of 10%, 20% or 30% depending on the fulfillment of certain conditions therein. It was submitted that all the conditions specified in Section 271AAB have been fulfilled in the instant case, therefore, the penalty U/s 271AAB being in the nature of mandatory penalty and there being no discretion with the Income tax authorities, the penalty so imposed by the AO was rightly confirmed by the Id

CIT(A) and the order of the Id CIT(A) should be upheld. The Id DR accordingly supported the findings of the lower authorities.

60. We have heard the rival contentions and perused the material available on record. The first question that arises for consideration is the nature of charge(s) specified under section 271AAB of the Act. Whether it provides for a singular charge of undisclosed income for the specified previous year found during the course of search initiated under section 132 on or after the 1st day of July, 2012 or it provides for multiples charges, as so contended by the Id AR, in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB of the Act. On close reading of provisions of Section 271AAB, we find that the primary condition or charge for levy of penalty is the existence of undisclosed income for the specified previous year found during the course of search in the case of assessee. Once the said primary condition or charge is satisfied, for the purposes of quantifying the penalty, the Assessing officer has to examine the satisfaction of ancillary conditions as specified under clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB. Therefore, merely for the reason that the quantum of penalty varies from 10% to 30% subject to compliances with the ancillary conditions, it cannot be said that where the AO has initiated the penalty under section 271AAB, there is any ambiguity in the charge or there is any lack of application of mind on part of the Assessing officer. Further, the levy of penalty under Section 271AAB is not based on addition made and investigation/enquiry conducted during the course of assessment proceedings, rather it is based on search conducted on the assessee on or after the 1st day of

July, 2012, in such a situation, where the penalty show-cause notice is issued u/s 271AAB, the Assessing officer is making the assessee aware of the charge against him in terms of undisclosed income found during the course of search and thus, the assessee is granted an opportunity to refute such charge and file his explanations/submissions. Unlike provisions of section 271(1)(c) which provides for separate charge of "concealment of particulars of income" or "furnishing of inaccurate particulars of income", as invoked by the AO in the other years, there is a singular charge under section 271AAB i.e, of the existence of undisclosed income for the specified previous year which is found during the course of search in the case of the assessee. Therefore, in the instant case, where the notice dated 10.03.2015 is issued to the assessee to show-cause why penalty should not be levied u/s 271AAB of the Act in respect of undisclosed income of the specified previous year, the assessee is made aware of the specific charge against him and an opportunity has thus been granted to him to rebut such charge and therefore, we do not see any infirmity in the initiation of the penalty proceedings and consequent penalty order so passed by the AO. A similar view has been taken by the Co-ordinate Bench in case of Mahesh Kumar Jain & others (*ITA No. 630/JP/17 & others dated 27.11.2017*) wherein it was held as under:

"10. The first and foremost question that arises for consideration is the nature of penalty provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c). In other words, whether these provisions provide for levy of penalty on account of separate and independent charges or these provision provide for levy of penalty for the same charge under section 271AAB, however, subject to satisfaction of the prescribed conditions,

the quantum of penalty may vary as specified in the respective sub-clauses of 271AAB of the Act.

11. In this regard, we refer to the provisions of section 271AAB which are reproduced 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, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

- (a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—*
 - (i) in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and specifies the manner in which such income has been derived;*
 - (ii) substantiates the manner in which the undisclosed income was derived; and*
 - (iii) on or before the specified date—*
 - (A) pays the tax, together with interest, if any, in respect of the undisclosed income; and*
 - (B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;*
- (b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—*
 - (i) in the course of the search, in a statement under sub-section (4) of*

- section 132, does not admit the undisclosed income; and*
- (ii) on or before the specified date—*
- (A) declares such income in the return of income furnished for the*
- specified previous year; and*
- (B) pays the tax, together with interest, if any, in respect of the*
- undisclosed income;*
- (c) a sum which shall not be less than thirty percent but which shall not*
- exceed ninety percent 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) or sub-section (1A).

(3) The provisions of sections 274 and 275 shall, as far as may be,

apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

- (a) "specified date" means the due date of furnishing of return of income*
- under sub-section (1) of section 139 or the date on which the period*
- specified in the notice issued under section 153A for furnishing of*
- return of income expires, as the case may be;*
- (b) "specified previous year" means the previous year—*
- (i) which has ended before the date of search, but the date of furnishing*
- the return of income under sub-section (1) of section 139 for such*

year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

(ii) in which search was conducted;

(c) "undisclosed income"

means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under [section 132](#), which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or] Commissioner before the date of search; or

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

12. On reading of the above provisions, it provides that 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 sum

computed at the rate of 10% of the undisclosed income of the specified previous year, if such assessee, in the course of the search, in a statement under sub-section (4) of [section 132](#), admits the undisclosed income and satisfies other conditions as provided in 271AAB(1)(a). It further provides that where the declaration of undisclosed income is not made by the searched person in the course of search but is declared in the return of income furnished for the specified previous year and subject to satisfaction of other conditions, penalty @ 20% is payable by him. It further provides that where the declaration of undisclosed income is neither made by the searched person in the course of search nor declared in the return of income furnished for the specified previous year and additions are made during the course of assessment proceedings, penalty which can vary from 30% to 90% is payable by him.

13. Both the provisions as contained in section 271AAB(1)(a) and 271AAB(1)(c) thus provides for levy of penalty in cases where search has been initiated under [section 132](#) on or after the 1st day of July, 2012 and quantum of penalty has been kept at 10% where there is declaration in the statement recorded during the course of search, and where there is neither a declaration in the statement u/s 132(4) recorded during the course of search nor a declaration in the return of income, the penalty has been kept at a higher pedestal which can vary from 30% to 90%. Further, it is noted that the provisions of section 271AAB overrides section 271(1)(c) which infact contain provisions for levy of penalty under two separate limbs- concealment of particulars of income or furnishing inaccurate particulars of income. Further, the decision of the Hon'ble Supreme Court in case of SAS Emerald Meadows

(supra) rendered in the context of two separate limbs/charges under section 271(1)(c) therefore doesn't support the case of the assessee company. In our considered view, both the provisions of section 271AAB(1)(a) and 271AAB(1)(c) provides for levy of penalty for an identical charge i.e, undisclosed income for the specified previous year which is found during the course of search initiated under section 132 on or after the 1st day of July, 2012. Therefore, we are unable to accede to the contention of the Id AR that the Id CIT(A) has erred in confirming the levy of penalty u/s 271AAB(1)(a) which provides for a separate and independent charge and comes under different section than the provisions of section 271AAB(1)(c) which has been specifically invoked by the AO."

61. Further, even for sake of argument, if it is assumed that primary charge of undisclosed income has to be read along with ancillary conditions and thus multiples charges have been prescribed in terms of clause (a), clause (b) or clause (c) to sub-section (1) to Section 271AAB and where the Assessing officer has not stated the specified charge at the time of initiation of penalty proceedings, in our considered view, such uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order and so long as there is a clear finding in the penalty order, no infirmity can be said to arise in terms of initiating of such proceedings and subsequent penalty order. In this regard, reference can be made to the Third Member decision in case of HPCL Mittal Energy vs Add. CIT reported in 97 Taxmann.com 03. Though the said decision has been rendered in context of section 271(1)(C), it has

laid down certain legal propositions revolving around initiation of penalty proceeding and charges towards levy of penalty and we found the same to be equally relevant in context of section 271AAB for the limited purposes of examining matters around charges towards levy of penalty and therefore, deem it relevant to consider the same for the purposes of present appeal. The Coordinate Bench in the aforesaid decision, after analyzing catena of judicial pronouncements, including the decision of Hon'ble Karnataka High Court in case of Manjunatha Cotton and Ginning Factory (supra), has held as under:-

"15. *The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it*

so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(l)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.

16. *The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that*

the conditions stipulated in section 271(l)(c) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law..... Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid'.

17. *In Manu Engg. Works (supra) penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'*

18. *In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(l)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have*

concealed the particulars of income or to have furnished inaccurate particulars of such income.'

19. *Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.*

20. *Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.*

21. *Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances,*

he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order.

22. *In Manu Engineering Works (supra), the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : —*

'We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.'

23. It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order."

62. In the instant case, the notice initiating the penalty proceedings talks about initiation of penalty proceedings U/s 271AAB of the Act in respect of undisclosed income of the specified previous year. Thereafter, while passing the penalty order, the Assessing officer has given a clear finding as reflected in para 7 to 9 of the penalty order that the assessee is liable for penalty U/s 271AAB(1)(a) which provides for levy of penalty @ 10% of the undisclosed income. As held by the Coordinate Bench (supra), an uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order. In such a case, we donot

see any legal infirmity in the initiation of penalty proceedings and consequent penalty order so passed by the Assessing officer and the contentions so raised by the Id AR in this regard cannot be accepted.

63. Now, coming to another contention raised by the Id AR wherein he has challenged the findings of the lower authorities that penalty U/s 271AAB is mandatory in nature and there is no discretion with the Income tax authorities. In this regard, we again refer to the provisions of Section 271AAB which begins with the stipulation that the Assessing officer may direct the assessee and the assessee shall pay the penalty as per clause (a) to (c) so satisfied in sub-section (1) to Section 271AAB. Further, as per sub-section (3) of Section 271AAB, the provisions of section 274 and section 275 as far as may be applied in relation to penalty under this section which means that before levying the penalty, the Assessing officer has to issue a show-cause granting an opportunity to the assessee. Thus, we find that the levy of penalty is not automatic but the Assessing officer has to decide based on facts and circumstances of the each case. It is a consistent view which has been taken by the various Co-ordinate Benches of the Tribunal and a useful reference can be drawn to the decision of the Co-ordinate Bench in case of ACIT vs Marvel Associates reported in 92 taxmann.com 109 wherein it was held as under:

"5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the appeal hearing, the Ld. A.R. vehemently argued that the A.O. has levied the penalty under the impression that the levy of penalty in the case of admission of

income u/s 132(4) is mandatory. The Ld. A.R. further stated that penalty u/s 271AAB of the Act is not mandatory but discretionary. The provisions of section 271AAB of the Act is parimateria with that of section 158BFA of the Act relating to block assessment and accordingly argued that the levy of penalty under section 271AAB is not mandatory but discretionary. When there is reasonable cause, the penalty is not exigible. The Ld. A.R. taken us to the section 271AAB of the Act and also section 158BFA(2) of the Act and argued that the words used in section 271AAB of the Act and the words used in section 158BFA(2) of the Act are identical. Hence, argued that the penalty section 271AAB of the Act penalty is not automatic and it is on the merits of each case. For ready reference, we reproduce hereunder section 158BFA (2) of the Act and section 271AAB of the Act which reads as under:

271AAB [Penalty where search has been initiated]:

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

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

(i) in the course of search, in a statement under 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 further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the

Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.

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

Sub section (3) of section 271AAB:

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

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

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

Therefore, we agree with the contentions of the Id AR that the levy of penalty under section 271AAB is not mandatory and it depends upon specific facts and circumstances of each case as to whether the same warrant the levy of penalty.

64. In the instant case, it therefore needs to be examined the basis and findings of the Assessing officer for levy of penalty. For the purposes of levy of penalty u/s 271AAB, what has to be examined is whether the charge of "undisclosed income for the specified previous year found during the course of search in the case of the assessee" is

satisfied or not. The term "undisclosed income" has been specifically defined in terms of clause (c) of explanation to section 271AAB which reads as under:

"(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.”

65. On perusal of the aforesaid provisions, what therefore has to be determined is whether there is 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 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 and whether a finding to this effect has been recorded by the Assessing officer. On perusal of the penalty order, we however find that the only finding which has been recorded by the Assessing officer is that the assessee has made a surrender of undisclosed income of Rs 2,15,40,344 under various heads and all essential requirements/conditions prescribed under section 271AAB are satisfied and it is a fit case for levy of penalty and the AO accordingly levied penalty @ 10% of income so surrendered during the course of search. The question is whether the penalty is to be levied solely basis the surrender during the course of search, what was the necessity of bringing a specific definition of “undisclosed income” by the legislature while enacting the provisions of section 271AAB of the Act. In our view, once a specific definition of undisclosed income has been provided in section 271AAB, being a penal provision, the same must be strictly construed and the Assessing officer has to record a clear and specific finding to this effect and cannot be solely guided by the surrender made

by the assessee during the course of search. Admittedly and undisputedly, in the instant case, there is no finding in the penalty order to this effect that undisclosed income so found and surrendered during the course of search falls under the definition of "undisclosed income" as so defined in section 271AAB and in absence thereof, on this ground itself, the impugned penalty proceedings deserve to be set-aside.

66. Having said that, let's look at the statement of the assessee recorded u/s 132(4) dated 2.01.2013 and the seized material in context of admission by assessee of Rs. 1.84 Crores on account of alleged flat bookings which forms the main reason for levy of penalty in the instant case. In response to question no. 5, he has stated that he, along with his wife are directors in M/s Nainani Builders Private Limited which is executing a real-estate project by name of Kanchanjunga Multistorey project wherein 160 flats are being built and out of the same, 112 flats have been sold. Then, in response to question no. 6, he has elaborated further on the said project and has stated that out of total 160 flats, 100 flats are of 2BHK and 60 flats are 3BHK and a total of 112 flats have been booked. However, no registry has been done in respect of these flats as the construction is not completed. Initially, he had booked flats @ Rs 1100/- and currently, he is booking flats @ Rs 1600/. Except for one or two parties, payments from all parties have been received through cheque while booking and receipt has been issued by the company and which has been duly recorded in the books of accounts of the company. He has further stated that out of 112 flats in respect of which booking has been accepted, agreement has been done in respect of 68/69 flats at the same rate at which booking has been

done and the same has been recorded in the books of accounts. The remaining agreements will be done as soon as the customers finalized their loan agreements and in respect of which, only booking receipts have been issued. And finally, he has stated that the flats in respect of which booking has been done, the same are duly recorded in the books of accounts. However, if we look at his responses in subsequent questions in respect of seized material i.e, Annexure AS – Exhibit 2, we find contradiction as against what he has stated earlier regarding receipt of payment against flat bookings. In question no. 7, he was asked to explain the figures in certain loose papers found during the course of search marked as Annexure AS – Exhibit 2. In response, he has submitted that at pages 6-9, he has received an amount of Rs 1,84,14,800 which represents cash amount received on booking of flats on various dates during financial year 2012-13 which he surrenders and will pay taxes thereon as the same is not recorded in regular books of accounts. Therefore, unlike the responses to earlier questions, where he has stated that all payments on account of flat booking have been received through cheque except few payments and all such payments have been accounted for in the books of accounts of the company, in the latter part of the statement, he has submitted that cash has been received on account of booking of flats and which has not been accounted for in the books of accounts of the company. The question is given such contradiction, whether any further enquiry or investigation was carried on by the Assessing officer during the course of penalty proceedings to determine what sum of money has been received and in what mode and manner and to what extent, the same has been recorded in the books of accounts of the company and to what extent,

it remains undisclosed and not recorded in the books of accounts regular maintained. However, we find that there is no such enquiry or investigation and consequentially, no such finding recorded by the Assessing officer in the penalty order.

67. Further, if we look at the figures in the loose papers found during the course of search marked as Annexure AS – Exhibit 2, which have been stated to be reflecting amount received in cash towards booking of flats, all we found that there are certain entries stating the amount received in cash towards booking, however, there is no mention of name of the real estate project, name of the assessee, name of flat buyers who have booked the flats, the date when the amount was received (except against few entries), the flat numbers and area specification of any flats. Therefore, from the said notings in these loose papers, it is not discernable and difficult to say that these are entries representing real and actual transactions. In addition, given the contradiction as we have noted above, where the assessee has stated initially that except one or two buyers, payments have been received from all buyers through cheque duly recorded in the books of accounts and in the latter part of the statement, he talked about booking amount received in cash not recorded in the books of accounts, neither during the course of search and seizure proceedings nor even in the course of statement recorded under section 132(4) any efforts were made by the search party to find out the actual existence of such transactions and dealings towards which the alleged entries are recorded in the seized documents. Though the admission on part of the assessee is a relevant evidence, however, when the entries/notings on the loose papers are

apparently not representing the real transactions, then it was incumbent on part of the Department to enquire further in the matter and especially in the context of penalty proceedings, in absence of such efforts and even no question being put to the assessee, these entries alone would not ipso facto constitute undisclosed income of the assessee.

68. Another aspect of the matter is that admittedly and undisputedly, the construction business was undertaken by the Company, M/s Nainani Builders Private Limited and not by the assessee in his individual capacity. The booking has been done by such company, the agreements have been entered into by such company with the buyers and the booking amount has been recorded in its books of accounts atleast to the extent of cheque payment which has not been disputed by the Revenue. Admittedly, the assessee is a Director in M/s Nainani Builders Private Limited and such transactions will remain the transactions of the company even though the same have been executed/undertaken by the Director in his fiduciary capacity on behalf of the company. A director represents the interest of the company he is representing and not his individual interest. Only in a scenario, where it is found that he is using such fiduciary capacity for his personal and individual interest and gain, corporate veil can be lifted. In the instant case, this is not even the case of the Revenue. In response to question no. 9 in his statement recorded u/s 132(4), he has stated that he has surrendered a total sum of Rs 2,50,00,017/- which includes Rs 1,92,03,797/- for financial year 2012-13 and the said amount is surrendered as undisclosed income on his behalf, his family members

and his company on account of receipt of cash income. Therefore, basis the statement of the assessee, where he has also stated clearly that the surrender on account of flats booking amount has been made on account of the company, we find that it is the company to which such entries in the loose papers relates and belongs and not to the assessee. Further, the occasion to record such transactions will arise in the hands of the company which is maintaining books of accounts in the normal course relating to such construction business and not in the hands of the assessee. Therefore, the charge u/s 271AAB that such transactions are 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 can only be fastened in the hands of the company and not that of the assessee. The fact that the assessee has declared the amount so surrendered in his individual return of income and have paid taxes thereon and the fact that the Revenue has also accepted the same, the same might be true as far as the quantum proceedings are concerned and which has now attained finality, however, when it comes to penalty proceedings, it is a settled legal proposition that the quantum and penalty proceedings are independent proceedings and while levying penalty, the provisions have to be read strictly and only where the charge against the assessee is clearly established and the conditions specified therein are satisfied, the penalty can be levied. In the instant case, we therefore find that the charge that the assessee is found to be owner of income based on entries in certain loose papers not disclosed before the date of search not been satisfied, the levy of penalty cannot be held justified and deserve to be set-aside.

69. Similarly, regarding levy of penalty on remaining amount of Rs 31,25,544 surrendered during the course of search, the said surrender may be the basis for assessment but can't form the basis for levy of penalty which are separate and distinct proceedings in absence of a specific finding as to how the same qualify as an undisclosed income as so defined u/s 271AAB of the Act. Hence, penalty levied thereon is also liable to be set-aside.

In the result, the appeals of the assessee for the respective assessment years are allowed in light of aforesaid directions.

Order pronounced in the open Court on 15/04/2020.

Sd/-

(Sandeep Gosain)
Judicial Member

Sd/-

(Vikram Singh Yadav)
Accountant Member

Jaipur

Dated:- 15/04/2020.

*Santosh

Copy of the order forwarded to:

1. The Appellant- Shri Laxman Nainani, Kota.
2. The Respondent- DCIT, Central Circle-3, Jaipur.
3. CIT
4. CIT(A)
5. DR, ITAT, Jaipur.
6. Guard File { ITA No. 1029 to 1034/JP/2019 }

By order,

Asst. Registrar