

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "H" DELHI  
BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No.1342/Del/2021  
Assessment Year 2016-17

<b>DCIT</b> Central Circle Ghaziabad	Vs.	<b>Subhash Tyagi</b> Prop. M/s. Krishna Construction H.No. 66, Golden Avenue-III Roorkee Road Meerut- Uttar Pradesh-250001
TAN/PAN: AGVPT9394H		
(Appellant)		(Respondent)

ITA No.1044/Del/2021  
Assessment Year 2016-17

<b>Subhash Tyagi</b> Prop. M/s. Krishna Construction H.No. 95, Golden Avenue-III, Roorkee Road, Meerut Uttar Pradesh-250001	Vs.	<b>DCIT</b> Central Circle Ghaziabad
TAN/PAN: AGVPT9394H		
(Appellant)		(Respondent)

CO No.59/Del/2023  
(Arising out of ITA No.1342/Del/2021)  
Assessment Year 2016-17

<b>DCIT</b> Central Circle Ghaziabad	Vs.	<b>Subhash Tyagi</b> Prop. M/s. Krishna Construction H.No. 66, Golden Avenue-III, Roorkee Road, Meerut Uttar Pradesh-250001
TAN/PAN: AGVPT9394H		
(Appellant)		(Respondent)

Applicant by:	Sh.Sandeep Sapra, Adv.		
Respondent by:	Sh.Sanjay Pandey, CIT DR & Ms. Sapna Bhatia, CIT-DR		
Date of hearing:	11.06.2024 & 11.09.2024		
Date of pronouncement:	09	12	2024

**ORDER****PER PRADIP KUMAR KEDIA - AM.:**

The captioned Appeal of the assessee in ITA 1044/D/2021 arises from the first appellate order passed by the Commissioner of Income Tax (Appeals)-4, Kanpur [‘CIT(A)’ in short] under section 250 of the Act dated 30.06.2021 in the penalty order dated 19.06.2019 passed by the AO under Section 271AAB(1) of the Income Tax Act, 1961 (the Act) for A.Y. 2016-17 in question. The Revenue has also simultaneously filed Cross Appeal in ITA no. 1342/D/2021 against the impugned order of the CIT(A) for A.Y. 2016-17 in question. The assessee, in turn, has also filed Cross Objection [CO 59/D/2021] in the Revenue’s Appeal under Section 253(4) of the Act.

2. All the captioned Appeals and Cross Objection being interconnected, were heard together and are being disposed of by this common order.

**ITA No.1044/Del/2021 (Assessee’s Appeal) & Cross objection 59/Del/2023**

3. Briefly stated, the assessee is a proprietor of ‘M/s Krishna Constructions’ and is engaged in the business of construction and related activities. A search and seizure operation under Section 132 of the Act was conducted at the premises of Raj Shyama Group of cases including the assessee on 11.08.2016. In the course of search, certain incriminating documents were found and seized as noted in para 5,6 & 7 of the assessment order dated 21/12/2018 passed under section 143(3) rws s. 153A of the Act. The copy of such incriminating documents found were scanned in the assessment

order. The copy of documents were confronted to the assessee in the course of search while recording statement under s. 132(4) of the Act. The assessee however expressed his inability to provide bifurcation and whereabouts of part of sundry creditors found recorded in the documents found in the course of search. The assessee eventually admitted in statement that amount of Rs. 52 are, in effect, fictitious liability by way of bogus purchases. The assessee did not provide any particulars of parties relatable to such bogus entries. As per the penalty order, the assessee surrendered an amount of Rs. 52 crore vide statement recorded in the course of search under Section 132(4) of the Act. Subsequently, in response to notice under Section 153A dated 20.07.2018, the assessee filed his return of income(ROI) on 06.08.2018 declaring total income at Rs.92,77,43,890/- which, as stated, included the aforesaid amount declared in the statement obtained under Section 132(4) of the Act in the return of income. The income declared in the course of search was thus not rescinded but maintained and acted upon. The assessment order dated 21.12.2018 was passed under Section 143(3) r.w.s 153A of the Act on total income of Rs.92,98,61,030/-. As a sequel to assessment framed, the penalty proceedings were initiated under Section 271(1)(c) towards income declared in the course of search and included in the ROI filed. However, realizing the error committed in resorting to provisions of section 271(1)(c), the AO issued notice under Section 154/155 dated 11.06.2019 seeking to amend the action and rectify mistake so occurred. The AO thus sought to amend the incorrect initiation of penalty proceedings under 271(1)(c) and substitute it by section 271AAB of the Act. The AO eventually passed order under Section 154 r.w. Section 153A r.w. Section 143(3) dated 14.06.2019 for the purposes of initiating and continuing proceedings under Section 271AAB of the Act

instead of s. 271(1)(c) of the Act.

4. A show cause notice dated 14.06.2019 was issued to set the penalty proceedings under s. 271AAB(1) of the Act in motion. As a sequel to the show cause notice and response of the assessee thereon, the AO passed penalty order dated 19.06.2019 under clause (c) of erstwhile Section 271AAB(1) of the Act. The penalty was thus quantified at Rs. 15.60 cr. on undisclosed income being admitted amount of Rs. 52 Crore on account of unexplained credit liabilities towards fictitious purchase entries found and detected in the course of search.

5. The AO also similarly imposed penalty @ 30% amounting to Rs. 63,790/- on an addition of Rs. 2,12,640/- towards unexplained expenditure under s. 271AAB(1)(c) of the Act. Likewise, penalty of Rs. 2,71,350/- being 30% of the addition of Rs. 9,04,500/- towards unexplained money received, was imposed under s. 271AAB(1)(c) of the Act.

6. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) vide order dated 30.06.2021 endorsed the action of the AO to levy penalty under s. 271AAB of the Act but however modified the quantum of penalty. The CIT(A) reduced the penalty by taking shelter of clause (a) to s. 271AAB(1) of the Act in place of clause (c) invoked by the AO. The penalty imposed by AO @ 30% of the admitted amount was thus scaled down and modified to 10% of the admitted amount. The relevant operative paragraph of the order of the CIT(A) dealing with issue read as under:

*“6.15 However in case of addition of Rs. 52 crores, the disclosure was made during the search in the statement recorded on oath u/s 132(4) of IT Act of Shri Subhash Tyagi i.e. the assessee. In the disclosure statement, the assessee duly told that this income has generated out of cessation of liability of some creditors. The assessee also substantiated*

*the manner in which the undisclosed income was derived by giving the list of creditors and their credit balances. Before the specified date the tax alongwith interest in respect of this undisclosed income was paid by the assessee. And the assessee furnished return of income for this previous year declaring this amount of Rs. 52 crores. Therefore the provisions of section 271AAB(1)(a) are applicable and the penalty @10% is upheld. Therefore penalty of Rs.5,20,00,000/- is upheld and the relief to the extent of Rs.10,40,00,000/- is allowed to the assessee.”*

7. Further aggrieved by the partial confirmation of penalty to the extent of Rs. 5,23,35,140/- levied on three counts in aggregate, the assessee has knocked the door of the Tribunal. The Revenue has also simultaneously challenged the partial relief granted by the CIT(A) by way of revision of quantum penalty at lower rate of 10% as against the penalty imposed by AO @ 30% under Section 271AAB(1)(c) of the Act.

8. As per the main grounds of appeal, the assessee has challenged the legality and correctness of imposing penalty under s. 271AAB of the Act.

9. Apart from the main Grounds as per appeal memo noted above, the assessee has also filed petition for admission of additional ground under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 which is reproduced for ready reference.

*“That the penalty aggregating to Rs.15,63,35,410/- u/s. 271AAB(1) of IT Act levied by the AO and Rs.5,23,35,140/- as sustained by the Ld. CIT(A) deserves to be deleted as the AO vide notice u/s.271AAB(1) dated 14/06/2019 did not specify as to under which limb of section 271AAB(1), the penalty was proposed to be levied.”*

10. To support the Additional Ground, the ld. counsel for the assessee contended that the above additional ground is purely a legal issue which strikes to the root of the matter. Hence, the legal ground, for which necessary facts are available on record, deserves

to be entertained and adjudicated upon in the light of judgment rendered in the case of *NTPC Ltd. vs. CIT, 29 ITR 383 (SC)*.

11. The assessee has also filed Cross Objection Memo [CO no. 59/Del/2023] wherein grounds akin to additional ground has been raked up.

12. The Grounds of Cross Objection of the assessee are also reproduced hereunder:

*“1. That the penalty of Rs.10,40,000 u/s.271AAB(1) of the IT Act as sustained by the Ld. CIT(A) out of Rs.15,63,35,140/- as imposed by the AO deserves to be deleted as the AO vide notice u/s.271AAB(1) dated 14.06.2019 did not specify as to under which limb of section 271AAB(1), the penalty was proposed to be levied.”*

13. The prayer for admission of additional Ground noted above which was not set forth in memorandum of appeal is being admitted for adjudication in terms of Rule 11 of the Income Tax [Appellate Tribunal] Rules, 1963 owing to the fact that the objection raised in the additional ground is legal in nature for which relevant facts are stated to be emanating from existed record.

14. When the matter was called for hearing, the Id. Counsel for the assessee pointed out that the penalty imposed by the AO and partially retained by the CIT(A) flouts the provisions of s. 271AAB of the Act. The Ld. Counsel pointed out the application of provisions of section 271AAB is not automatic. The Assessee has not resiled from the admission made and offered the same for taxation in the ROI and also paid taxes thereon. The statutory discretion thus required to be exercised in favour of the assessee. Besides, the show cause notice is vague and does not specify the

particular limb of s. 271AAB of the Act which is proposed to be applied in the instant case. Also, there is no allegation towards presence of any undisclosed income by the AO. The Id counsel thus contended that the jurisdiction to impose penalty under the shelter of s. 271AAB is not available in the instant case and consequently, the penalty order itself is unsustainable in law and liable to be quashed. Without prejudice to plea of lack of jurisdiction and in the alternative, the Id. Counsel pointed out that the action of CIT(A) to refer to clause(a) to sub-section (1) of S. 271AAB cannot *per se* be faulted in law as all the attendant obligations of clause (a) was duly discharged by the Assessee.

15. The Id. CIT DR for the Revenue, on the other hand, relied upon the action taken by the AO for imposition of penalty. The CIT-DR simultaneously supported the revenue appeal by taking a stance the CIT(A) misdirected himself in law in modifying the quantum of penalty by penalty rate of 10% rather than 30% applied by the AO. The Ld. DR submitted that on fulfillment of conditions of s. 271AAB, the applicability thereof is automatic as held in the case of *Pr. CIT vs. Sandeep Chandak (2018) 93 taxmann.com 405 (Allahabad)*. It was submitted that the language of s. 271AAB is couched in mandatory language by using the express 'shall'. No discretion is available to the AO in this regard and the provision is not subjected to s. 273B either. On facts, the Ld CIT(DR) pointed out that it is a gross case of detection of bogus liabilities created in the books in the course of search. The Assessee could not give any iota of information on the details of creditor and thus prevented the revenue from making incisive investigations and connect the trail. A mere admission of unaccounted income in the course of search would by itself not exonerate the assessee from penal action. The penalty, if not imposed in such gross cases, would provide premium

to such tax evader assessee who would get away by merely paying taxes which in any case, is bound to be paid. The penal consequence of such potential escape from lawful taxation is incumbent in such cases. The Id. CIT(DR) also pointed out that the notice issued to invoke s. 271AAB after completion of assessment is no impediment in law in the absence of requirement of holding satisfaction in the course of assessment unlike s. 271(1) (c) of the Act. Thus rectification of mistake to apply correct provision is not prohibited as long as the action of the AO is within permissible time limit. Rectification of basis of imposition of penalty with reference to s. 271AAB of the Act does not violate any provision of the Act. Furthermore, there is no requirement of specifying any limb to clause (1) of the s. 271AAB of the Act, in exclusion to other limb(s) or sub-clause(s) in the show cause notice. The AO is entitled to invoke s. 271AAB in its entirety to cover all possibilities and eventualities. The case of assessee may fall in more than one limb for different kinds of undisclosed income. The provisions of s. 271AAB was rightly put in motion as a result of undisclosed income found and admitted in the course of search *qua* the specified previous year. The Ld. CIT-DR thus contended that the defenses raised on behalf of the assessee are quite shallow and without any substance. In the light of unassailable detection of false entries in the name of sundry creditors and corresponding expenses debited by way of bogus purchases, the modification of penalty amount by the CIT(A) is wholly unjustified. The CIT(DR) thus urged for restoration of the penalty quantified by the AO and cancellation of the modifications carried out by the CIT(A).

16. We have carefully considered the rival submissions and perused the material referred to and relied upon in the course of hearing. The legality of imposition of penalty under 271AAB and



quantification thereof, in the facts of the present case, is in controversy.

16.1 The provision of Section 271AAB(1), as applicable at the relevant time, lays down that in a case where search has been initiated on or after 1-7-2012 (but before 15-12-2016), the assessee shall be liable to penalty [ in addition to tax, if any, payable by him] of varied sum computed at the rates prescribed in different limbs of sub section (1) to section 271AAB, as may be applicable to the assessee, depending on the situation the assessee is placed in. The penalty is essentially attracted *qua* the undisclosed income of specified previous year detected in the course of search.

16.2 As the facts emerges from record, in the search and seizure operations conducted in the premises of the assessee on 11/08/2016, the revenue found several incriminating documents [marked as various annexures] from the premises of the assessee as copied and scanned in the assessment order. It was *inter alia* found by the search team that the list of computerized sundry creditors recorded in the books [aggregating Rs. 1,05,55,24,297] also include an account head titled 'creditors for material' showing outstanding payable amount of Rs. 1,02,56,32,400/-. The assessee was confronted on such vague and innocuous outstanding payable entry in the books in the course of recording statement under s. 132(4) of the Act. In response, the assessee readily admitted under s. 132(4) that such amount has been entered in the books for the purposes of determination of profits as per profit & loss account and such amount denotes material purchase which goes to reduce the profits. On further enquiry seeking bifurcation and break up of such outstanding amount party wise and expense wise, the deponent of the statement categorically expressed his inability to provide any

particulars of such amount to the extent of Rs. 52 crs. A query was further raised by the search team to caution that in the absence of any particulars on such amount made available, why such amount should not be taken as bogus purchase or bogus liability of the assessee wrongly entered in the books. As per the statement recorded, the assessee admitted the non existence of any liability and also volunteered to say that he is not liable to pay to the unidentified creditors against such liabilities found recorded in the books. The assessee readily agreed to offer a sum of Rs. 52 crore booked for the purposes of suppression of income as cessation of liabilities and further expressed his willingness to pay taxes on such sum. As a necessary corollary, in the wake of total absence of any particulars available on such unexplained entries entered in books towards creditors and corresponding inflated purchases, the assessee agreed to admit such entries as undisclosed income and offered to pay taxes thereon. The existence of undisclosed income found in the course of search is thus both explicit and implicit. A nuanced reading of statement recorded under s. 132(4) would reveal that the manner of creating such bogus creditors towards material purchases during the year was apparently quizzed and the assessee was found blank and wanting. The name of beneficiary creditors were not revealed despite pointed enquiry. The 'manner' giving rise to such credits thus did not surface in the course of enquiry. The next step of 'substantiation' of such entries was never achieved by the assessee nor could be, in the absence of availability of basic particulars being name and address of creditors providing bills towards material purchase. There is however no dispute on the fact that the admission made in the statement made under s. 132(4) was honoured and maintained and was offered for taxation while filing ROI. The taxes due on such admission were duly paid. The AO

initiated penalty proceedings in the course of search assessment proceedings by invoking s. 271(1)(c), which on realization of mistake, was later amended to S. 271AAB. The AO ultimately imposed penalty under s. 271AAB(1)(c) @ 30% on three counts (i) Rs. 63,790 on addition of Rs. 2,12,640/- on unrecorded hotel expenses in cash (ii) Rs. 2,71,350/- on unexplained money additions of Rs. 9,04,500/- & (iii) Rs. 15,60,00,000 on amount admitted towards non-existent liabilities Rs. 52 Crs. named in the statement under s. 132(4) as cessation of liabilities. In the first appeal, the CIT(A) upheld the action of the AO to levy penalty @30% under sub-clause (c) to s. 271AAB(1) towards undisclosed income of Rs. 2,12,640/- and Rs. 9,04,500/- in the absence of any disclosure in the course of search proceedings. The CIT(A) however scaled down and modified the levy of penalty from 30% imposed by the AO to 10% in terms of sub-clause (a) to s. 271AAB(1) instead of 30% rate applicable as per sub-clause (c) applied by AO *qua* the undisclosed income detected of Rs. 52 cr. towards anonymous liability booked on account of material purchases. The CIT(A) thus granted partial relief.

16.3 Several pertinent questions have been raised by the assessee to assail the imposition of impugned penalty namely (a) whether penalty can be imposed under the shelter of s. 271AAB(1) in the backdrop of factual matrix narrated in the preceding paragraph (ii) whether the AO is under statutory obligation to identify the specific limb of sub-section 1 to s. 271AAB at the threshold by way of show cause notice for the purposes of initiation of penalty under erstwhile section 271AAB?

16.4 On appraisal of facts noted above, it is ostensible that incriminating documents were admittedly found in the course of

search which revealed that the assessee has indulged in recording unsupportable entries by way of material purchase and corresponding unidentifiable creditors to suppress true profits of the assessee concern. Likewise, entries for expenses incurred were not found recorded on or before the date of search in the books. Confronted with such tell-tale facts, the assessee admitted non existence of sundry creditors liability. The income arising from the incrementing documents found and admitted were included in the Return of Income filed after search and taxes etc. thereon were also paid. The assessee however seeks to allege that the pre-requisites of 271AAB (1) is not fulfilled in the instant case as there is no allegation of existence of any undisclosed income by the revenue. Besides, the assessee has duly specified the manner and also substantiated the manner *qua* the so called undisclosed income. The CIT(A) modified and scaled down the rate of levy of penalty from 30% to 10% on the ground that the assessee has provided the list of creditors and thus provided the manner of deriving undisclosed income and also substantiated such manner.

16.5 The plea of assessee towards non applicability of s. 271AAB, in our view, is devoid of any rationale. On the face of cogent evidences detected and admitted to be un-explainable liability, one may wonder as to what is the nature of such admitted suppression of income etc. The entries found recorded in the books as a result of creative accounting towards un-explained liabilities is noting but undisclosed income as defined in s. 271AAB of the Act. Likewise, the entries found not recorded in the books towards expenditure incurred also squarely meets the requirement of definition of 'undisclosed income' appended in s. 271AAB of the Act. The Assessee has, by his express conduct, has rather accepted the existence of undisclosed income. The plea of assessee towards non

existence of any 'undisclosed income' *per se* seeks to obfuscate reality and thus cannot be accepted. The existence of undisclosed income discovered in the course of search qua the specified previous year provides sound basis for applying s. 271AAB of the Act in the present case. The substantive and main ground of the assessee towards legality of imposition of penalty under s. 271AAB of the Act is thus liable to be dismissed.

16.6 We now advert to second question raised on legal requirement to specify the limb in the show cause notice which is claimed to be attracted in the instant case. As pleaded, all the three limbs of Section 271AAB(1) have different ramifications. The AO was thus called upon in law to inform the assessee as to which limb of subsection (1) of Section 271AAB are attracted at the first instance and how the case of the assessee falls under an appropriate clause.

16.6.1 A nuanced reading of different limbs/clauses of subsection (1) of s. 271AAB would show that penalty is leviable in all circumstances with varied rate depending on gravity of conduct of the assessee. Different limbs/clauses of sub-section 271AAB provides for quantification of penalty having regard to the factual matrix. The incidence of penalty is lower where the assessee provides due cooperation in the matter of admission of undisclosed income and payment of taxes coupled with revealing manner of earning such income with substantiation thereof etc. This un-hindered co-operation from the searched assessee helps the deptt. to understand *modus operandi* of the assessee in earning impugned undisclosed income coming to surface owing to search as also indulgence of other parties in tax evasions. Where however, the assessee takes an ambivalent position to stonewall the incisive understanding on the matter, the quantum of penalty goes higher.

The quantum of imposable penalty thus depends on appreciation of facts in perspective after taking the response of the assessee in account. It is, at times, difficult to pre-conceive and show cause the assessee qua the exact quantification of penalty at the initial stage of issue of show cause notice. Noticiably, for the purposes of s. 271AAB, there is no requirement in law to form any ‘satisfaction’ [as contemplated under s. 271(1B) for the purposes of s. 271(1)(c)] before initiating penalty proceedings. The provisions of s. 271AAB thus can not be read *pari materia* with that of s. 271(1)(c) of the Act. The scheme of Act merely provides for reasonable opportunity to the assessee while imposing penalty which opportunity was duly provided and availed. It is not the case of the assessee that no opportunity was provided in the course of penalty proceedings. The assessee has not raised any objections on such aspect before the AO. The assessee was also privy to all relevant facts.

16.6.2 There being no substance in the plea, the additional ground raised by the assessee on this score is liable to be dismissed. The cross objection raising the grievance similar to additional ground is also a *damp squib*.

17. As per the delineations made, the appeal of the assessee in ITA No. 1044/D/ 2021 as well as CO 59/Del/2023 are dismissed.

**ITA No.1342/Del/2021 (Revenue’s Appeal) – A.Y. 2016-17**

18. We now advert to appeal of the revenue in ITA no. 1342/Del/2021 concerning AY 2016-17 in question.

18.1 As noted above, while the AO imposed penalty @30% on the amount surrendered under clause (c) to Section 271AAB(1) of the Act, the CIT(A) applied clause (a) to Section 271AAB(1) of the Act

and reduced the penalty @ 10% of the admitted amount towards non-existent sundry creditors liabilities of Rs. 52 crores. The Revenue has challenged the correctness of applicability of clause (a) approved by the CIT(A) rather than clause (c) applied by the AO in the facts of the case.

18.2 The revenue contends that it is an admitted position that the assessee failed to provide any whereabouts of so called 'creditors for material' to the extent of Rs. 52 cr. out of Rs. 102.56 cr. found entered in books. The Assessee rather admitted that such liability towards material purchase is without any substantiation and corroboration in the statement under s. 132(4) of the Act. The assessee also admitted that the liability created on account of material purchase is not liable to be paid. The creditors were clearly admitted to be non-existent giving rise to impugned undisclosed income. In such facts, mere providing a list of the so called creditors without any particulars, PAN, address and invoices, bank payments if any etc. do not lend support to identity and veracity of the names provided in the list. The burden cast under clause (a) towards manner and substantiation is apparently not discharged. A muted list showing names of creditors cannot be regarded as compliance of providing 'manner' of generating undisclosed income as contemplated under clause (a). Be that as it may, it is a matter of record that the assessee has not provided any explanation towards 'substantiation' of the manner of deriving impugned undisclosed income. The AO, thus guided by the mandate of the Act, rightly invoked clause (c) of sub-section 1 to s. 271AAB of the Act. The CIT(A), on the other hand, acted contrary to statutory mandate and mere furnishing of a non-descript list of creditors was regarded as sufficient compliance of clause (a) to justify imposition of penalty at concessional rate of 10% under that clause rather than 30% under

clause(c). The revenue thus contends that the action of the CIT(A) seeking to reduce the incidence of penalty is devoid of legal and factual basis and hence calls for restoration of action of the AO.

18.3 Per contra, the assessee contends that imposition of penalty under s. 271AAB itself is bad in law owing to non compliance of pre-requisites. Notwithstanding & without prejudice, the CIT(A) has adopted pragmatic approach and modified the penalty order in keeping with the factual matrix of the case.

19. A perusal of the first appellate order, as extracted earlier, shows that the CIT(A) by a cryptic and non-descript reasoning, modified the quantification of penalty qua non existent liability on account of material purchase on the ground that the list of creditor vouches for manner of deriving undisclosed income and also substantiation thereof as required under clause (a) of s. 271AAB of the Act. Needless to say, the powers exercised by the CIT(A) is quasi-judicial. The CIT(A) is expected to state reasons for coming to his conclusion. The CIT(A) has summarily brushed aside the action of AO and granted relief in the matter of quantification of penalty without any logical or sound reasoning. The issue towards existence of manner of deriving undisclosed income and substantiation thereof is fact oriented. There is no reference found towards presence of any list of creditors in the course of search or in the course of assessment proceedings or in the penalty proceedings before the AO. Be that as it may, a presentation of bare list of creditors cannot *ipso facto* be regarded as sufficient compliance of twin burden cast upon the assessee, namely 'manner' of deriving undisclosed income and 'substantiation' thereof. While the assessee is not expected to discharge burden to the hilt in such cases, the assessee is expected to come out with clean hands and with all information, he is privy



to. At no stage of the proceedings, any worthwhile information has come to the fore. The benefit of lesser penalty under clause (a) is contingent upon the compliance of conditions laid therein. The conditions have clearly not been complied with. The assessee has failed to demonstrate even before the Tribunal as to how the compliances of such conditions have been achieved. The action of the CIT(A) clearly lacks comprehension as well as circumspection. The lackadaisical way of modifying the penalty order by the CIT(A), in the facts of the case, cannot be countenanced in law. The action of the AO applying clause(c), in the absence of necessary compliance of cumulative pre-requisites of clause (a) by the Assessee, requires to be restored.

20. Before parting, we however feel compelled to observe that penalty liable to be imposed under clause(a) to sub-section (1) of S. 271AAB of the Act is @10% of the undisclosed income provided, among others, the assessee admits presence of undisclosed income and specifies the manner in which such income is derived and substantiates the manner. Under clause (b) however, the assessee is made liable to pay penalty @20% of undisclosed income, where he does not admit the liability but ultimately declares such income in the ROI and pays taxes thereon. Significant here to observe, as per the phraseology of clause (b), there is no obligation fastened on the assessee to specify the manner and substantiation thereof unlike clause (a). There is third category in erstwhile clause (c) of sub-section 1 to s. 271AAB which specifies penalty @30% of undisclosed income where situation is not covered by either clause (a) or clause (b). As a corollary, a person, who for any reason, fails to specify the manner of deriving undisclosed income, despite admission at the time of search itself gets trapped by higher penalty @ 30% under clause (c) owing to admission at the time of search,

which is the case in the instant appeal. To put it differently, a person who does not admit undisclosed income at the threshold in the course of search is better off under clause (b) compared to a person who extends co-operation and volunteers to admit existence of undisclosed income but subjected to harshness of clause (c) due to inability to spell out manner / substantiation etc. Hence, in the wake of attendant obligations fastened under clause(a), a searched person ends up incurring relatively far more incidence of penalty on admission of undisclosed income in the event of failure to provide manner and substantiation. A searched assessee making admission is in worse position compared to another searched person who adopts silence on admission at the time of search and consequently gets covered under clause (b) in the absence of obligation annexed in clause (b) towards manner etc. Other things being constant, a person making admission cannot be made to pay higher quantum of penalty vis a vis a searched person who declares the undisclosed income directly in the ROI without making any admission in the course of search. This militates against both common sense and spellbound logic. Hence there appears to an *ex-facie* legislative aberration which remained unaddressed. It is trite that legislative *casus omissus* cannot be supplied by the judicial interpretive process. Consequently, we are constrained to approve the action of the AO under clause (c) owing to non-fulfillment of attendant pre-requisites of clause (a) despite admission in the course of search, as noted above.

21. In the result, the appeal of the revenue in ITA 1342/Del/21 is allowed.

22. In the combined result, the appeal of the assessee and cross objection stands dismissed whereas appeal of the revenue is allowed.

**Order pronounced in the open Court on 09<sup>th</sup> December, 2024.**

**Sd/-**

**[SUDHIR KUMAR]  
JUDICIAL MEMBER**

**Sd/-**

**[PRADIP KUMAR KEDIA]  
ACCOUNTANT MEMBER**

DATED: 09.12.2024

*Prabhat/Amit*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar,  
ITAT, Delhi