

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 186/JP/2020  
निर्धारण वर्ष/Assessment Year :2017-18

Shri Hari Narain Gattani 2126, Gattani Bhawan, Mistri Khana Road, Gangori Bazar, Jaipur	बनाम Vs.	DCIT, Circle-04, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACSPG2458C		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से / Assessee by : Sh. S. R. Sharma (CA) &  
Sh. Rajnikant Bhatra (CA)  
राजस्व की ओर से / Revenue by : Ms. Chanchal Meena (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 22/09/2020  
उद्घोषणा की तारीख / Date of Pronouncement: 09/10/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-2, Jaipur dated 16.12.2019 confirming the order passed by the AO u/s 154 read with 143(3) dated 11.01.2019 pertaining to Assessment Year 2017-18.

2. During the course of hearing, the Id. AR submitted that the assessee is an individual deriving salary income from R.A. Gattani & Co, business income as finance broker in the name of Hari Narain Gattani and income from other sources. A survey proceedings u/s 133A of the I.T. Act, was conducted at the business premises of M/s Nikhar Collections, Saraogi Mention M.I.Road, Jaipur on 09.08.2016 by the JCIT, Range-2, Jaipur, a person by the name of Sh. Atul Kumar Gupta was found at aforesaid business premises with a bag containing

cash of Rs. 22,19,590/-. During the course of survey proceedings, statement u/s 131 was recorded of Sh. Atul Kumar Gupta and he explained to the survey team that the cash found in his possession belongs to Sh. Hari Narain Gattani. Thereafter, the statement of Sh. Hari Narain Gattani was also recorded by the survey team u/s 131 of the I.T. Act, 1961 wherein he accepted that the cash found in possession of Sh. Atul Kumar Gupta was his current year's income i.e. F.Y. 2016-17 (A.Y. 2017-18) and thereafter, a search warrant u/s 132 was issued in the name of assessee and the bag in his possession was searched at 421, 4<sup>th</sup> Floor, Saraogi Mansion, M.I.Road, Jaipur. A survey u/s 133A (1) of the I.T. Act was also conducted at business premises of the assessee. No incriminating documents, cash or valuable items were found during the course of survey proceedings. Finally, the cash of Rs. 22,19,590/- which was found from the bag of Shri Atul Kumar Sharma was seized in course of search action.

3. It was further submitted that the assessee thereafter filed his return of income for above assessment year u/s 139(1) on 28-07-2017 disclosing total income of Rs. 41,78,390/- which included the surrendered income of Rs. 22,19,590/- as "current year's business income offered to tax' and paid tax and interest at normal rate of tax for an individual. The said return was revised on 27-08-2018 only to correct an entry of data in e-filed return while declaring exactly same income and details as was declared in original return.

4. It was further submitted that the A.O. thereafter issued notice u/s 143(2) which assessee duly complied with by filing information/details as required and Ld. A.O. completed the assessment u/s 143(3) accepting returned income as declared by assessee. Separately, penalty proceedings u/s 271AAB(1)(a) were initiated by the A.O. stating that "As the assessee has declared the undisclosed income of Rs. 22,19,590/- which he surrendered during the search and seizure

action and substantiated the manner in which the undisclosed income was derived. The assessee has also paid all due tax with interest in respect of above disclosed income. Hence, the penalty proceedings u/s 271AAB (1) (a) are also being initiated separately." The A.O. in assessment completed u/s 143(3) also charged the tax and interest at normal rates of tax for individual and raised NIL demand.

5. It was further submitted that the A.O. thereafter issued notice u/s 154 giving particulars of mistake as under:

*"It is observed that it is a search assessment case and assessee has surrendered of Rs. 22,19,560/- during the search action as an undisclosed income for the year under consideration, on which tax rate was to be charged as per provision of section 115BBE of the I.T.Act. But during the tax calculation the tax rate on surrendered income u/s 115BBE of the I.T.Act, has applied as per 30% but as per second amendment in provision of section 115BBE of the I.T.Act (w.e.f. 01-04-2017), the tax rate should be charged @ 60% on the above income, in addition to this 25% surcharge of such tax and 3% education cess of tax and surcharge".*

6. It was submitted that in response to the show-cause notice, the assessee filed his objections to proposed rectification u/s 154 by A.O. which A.O. did not accept and charged tax @ 60% on said income of Rs. 22,19,560/- and in addition to 25% surcharge on such tax and 3% education cess on tax and plus applicable interest thereon and raised a demand of Rs. 12,85,810/-. Being aggrieved, the assessee went in appeal before the Id CIT(A) who has sustained the order of the AO and against, the said findings, the assessee is now in appeal before us.

7. In the aforesaid factual background, it was submitted by the Id AR that for invoking section 154(1) of the Act, the mistake must be apparent from record and in the present case, the mistake pointed out by A.O in his notice u/s 154 was not apparent from record or obvious and patent mistake. The AO states that assessee has surrendered Rs. 22,19,560/- during the search action as an undisclosed income for the year on which tax rate is to be charged as per provisions of section 115BBE as amended by Taxation Laws (Second Amendment Act), 2016. It was submitted that in this case, the assessee in his return of income furnished u/s 139 declared the said income of Rs. 22,19,560/- as "current year's business income offered to tax" and in return, it was shown as business income which is not an income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D as is evident from copy of return, Profit and loss account and balance-sheet of the assessee. It was accordingly submitted that the assessee did not apply provisions of section 115BBE while computing tax payable as per return of income. The AO also in assessment completed u/s 143(3) did not determine the said income assessable u/s 68, section 69, section 69A, section 69B, section 69C, section 69D and so rightly not invoked provisions of section 115BBE while determining tax payable by assessee on assessment but determined tax payable by assessee at normal tax rates as is evident from assessment order. The AO in the notice u/s 154 issued to assessee has wrongly stated that during the tax calculation, the tax rate on surrendered income u/s 115BBE has been applied @ 30%. Thus notice u/s 154 pointing out mistake was on wrong facts. Thus when provisions of section 115BBE was not at all invoked while passing the assessment order, then it cannot be held in notice u/s 154 that the same was a mistake apparent from record. It was further submitted that the applicability or non-applicability of provisions of section 115BBE on such facts is debatable issue which should have been taken in completing regular assessment u/s 143(3) and not in proceedings u/s 154 of the Act. It was submitted that this is not an obvious or

patent mistake which is apparent from the record. In support, the reliance was placed on the Co-ordinate Bench decision in case of ACIT vs. Sudesh Kumar Gupta reported in 117 Taxmann.com 178.

8. It was further submitted that the amendment provisions of section 115BBE of the Act as amended by the Taxation (Second Amendment) Act, 2016 are applicable from 15.12.2016 and are not retrospective in operation and therefore not applicable to the search operation conducted in case of the assessee on 9<sup>th</sup> and 10<sup>th</sup> of August, 2016. It was submitted that the tax laws as the Taxation (Second amendment) Act, 2016 was amended on 15.12.2016 and received the assent of President of India on the said date. It was submitted that though the amendment was applicable for assessment year 2017-18 but only on income referred to in said section pertaining to the date after 15.12.2016. As in case of the assessee, the unexplained cash was found and seized on 9<sup>th</sup> and 10<sup>th</sup> of August, 2016 and accordingly at the material time, old provisions of section 115BBE are applicable. It was accordingly submitted that the amendment provisions are not retrospective in operation and are not applicable in the present case and has been wrongly invoked by the Assessing Officer under proceedings initiated u/s 154 of the Act. In support, the reliance was placed on Hon'ble Supreme Court decision in case of Karimtharuvi Tea Estate Ltd. vs. State of Kerala [1966] 60 ITR 262 (SC).

9. Per contra, the Id DR submitted that the assessee filed the return of income declaring income of Rs. 41,78,390 which includes as income of Rs. 22,19,590 surrendered in respect of cash found from Shri Atul Kumar Gupta and which has been owned up by the assessee. In order passed under section 143(3), the AO specifically mentioned that the income declared by the assessee included income of Rs. 22,19,590 surrendered on account of cash. Once, this

fact is mentioned in the assessment order, the correct rate of tax is as per section 115BBE, though, the section is not mentioned by the AO. Therefore, it is clearly a mistake apparent from record as the wrong rate has been charged and which is sought to be rectified by the AO. It was further submitted that from perusal of ground no. 2 of the assessee's appeal, it is clear that the assessee has not challenged the applicability of section 115BBE of the Act and has only challenged the amendment brought in by the Taxation (Second Amendment) Act, 2016. In this regard, it was submitted that claim of assessee that this amendment cannot be applied retrospectively cannot be accepted as the amendment has been brought in with effect from 1.4.2017 i.e, relevant to assessment year 2017-18 and the amended rate of tax @ 60% is for the complete financial year 2016-17 and the assessee's case clearly falls under the financial year 2016-17 relevant to assessment year 2017-18. The Id DR accordingly supported the findings of the lower authorities.

10. We have heard the rival contentions and perused the material available on record. We refer to the order passed by the Assessing officer u/s 154 and the findings of the Assessing officer therein read as under:

*"In this case the assessment under section 143(3) r.w.s 153A of the I.T. Act, 1961, for the assessment year 2017-18, was completed on 06.12.2018, at assessed income of Rs. 41,78,390/-. As this is a search assessment case and assessee surrendered of Rs. 22,19,590/- during the search action as an undisclosed income for the year under consideration, on which tax rate was to be charged as per provision of section 115BBE of the I.T. Act. However during the assessment proceedings the tax rate on surrendered income u/s 115BBE of the I. T. Act, charged @ 30% whereas as per second amendment in provision of section 115BBE of the I.T. Act (w.e.f 01.04.2017), the tax rate should have been charged @*

*60% on the above surrendered amount, in addition to this 25% surcharge on such tax and 3% education cess of tax and surcharge. There is a mistake apparent from records and the same is required to be rectified u/s 154 of the I.T. Act.*

*Further, in the above matter an opportunity to being heard has been provided to assessee on 27.12.2018. In response to the same assessee has submitted his written reply on dated 10.01.2019. The reply of the assessee has been considered on merits however, the same was not found tenable. In view of discussion held in above Para(s) the revised tax calculation is being issued with this order which shall be part of this order accordingly. The assessed income of Rs. 41,78,390/- will remain unchanged."*

11. We find that the reasoning adopted by the AO for invoking provisions of section 154 is as follows. Firstly, he stated that this is a search assessment case and assessee surrendered a sum of Rs. 22,19,590/- during the search action as an undisclosed income for the year under consideration, on which tax rate was to be charged as per provision of section 115BBE of the I.T. Act. Secondly, he has stated that during the assessment proceedings, the tax rate on surrendered income u/s 115BBE of the Act has been charged @ 30%. And thirdly, as per amended provisions of section 115BBE of the Act as applicable in the instant case, the tax rate should have been charged @ 60% on the above surrendered amount.

12. If we look at the provisions of section 115BBE, it provides that where the total income of the assessee includes any income referred to in section 68 , section 69, section 69A , section 69B , section 69C or section 69D, the income tax payable shall be at the rate of 30% on income so referred in said sections. Further, in terms of amended provisions of section 115BBE by the Taxation

Laws (Second Amendment Act), 2016, it provides that where the total income of the assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139 or the total income of the assessee determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not reflected in the return of income furnished under section 139 of the Act, the income tax payable shall be at the rate of 60% on income so referred in said sections. Thus, both the pre-amended and post-amended provisions of section 115BBE talks about the income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D. The change which has been brought about in the provisions relates to income so referred in aforesaid provisions so defined which is either reflected in the return of income or determined by the Assessing officer and in both cases, it will be covered by the provisions of section 115BBE of the Act and rate of taxation has been increased from 30% to 60% on such specified income. There is therefore nothing stated in either the pre-amended or post-amended provisions of section 115BBE that where the assessee surrenders undisclosed income during the search action for the relevant year, the tax rate has to be charged as per provision of section 115BBE of the Act. Therefore, without dwelling further on the applicability of the amended provisions of section 115BBE for the impugned assessment year, the reasoning so adopted by the Assessing officer in terms of applicability of section 115BBE by default in search cases cannot be accepted and in any case, the same is clearly not a mistake which is apparent from the plain reading of the provisions of section 115BBE of the Act.

13. Coming to the other contention raised by the Assessing officer wherein he has stated that during the assessment proceedings, the tax rate has been charged @ 30% on surrendered income u/s 115BBE of the Act and which is

now sought to be rectified in terms of impugned order. In this regard, we have gone through the return of income as well as the assessment order so passed by the Assessing officer u/s 143(3) and find that in the return of income, tax liability on the undisclosed income has been determined as per slab rate of taxation applicable to an individual and not at the rate of 30% as per 115BBE of the Act. Similarly, in the assessment order passed u/s 143(3), we find that firstly, there is no finding by the Assessing officer that the income so surrendered has been determined as income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and secondly, in the computation of tax liability, the tax liability on the undisclosed income has been determined as per slab rate of taxation applicable to an individual and not at the rate of 30% as specified in section 115BBE. Thus, both the income so offered by the assessee as well as rate of taxation has been accepted by the Assessing officer and in fact, we find that there is a specific finding by the Assessing officer in the assessment order that the assessee has also paid all due tax with interest in respect of the undisclosed income. There is thus, no finding that any of the aforesaid provisions so referred in section 115BBE have been invoked by AO during the assessment proceedings and therefore, we find that the contention of the Assessing officer that during the assessment proceedings, the tax rate has been charged @ 30% on surrendered income u/s 115BBE of the Act is not factual correct as not borne out of assessment records and thus, the action of the Assessing officer in rectifying and increasing the rate of taxation from 30% to 60% and surcharge and cess on such undisclosed income doesn't come within the purview of section 154 of the Act.

14. In light of aforesaid discussions and in the facts and circumstances of the present case, we are of the considered view that the action of the Assessing officer in invoking his jurisdiction u/s 154 is not legally tenable as beyond the

scope and powers u/s 154 of the Act and the order so passed as confirmed by the Id CIT(A) is hereby set-aside.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 09/10/2020.

Sd/-  
(विजय पाल राव)  
(Vijay Pal Rao)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(विक्रम सिंह यादव)  
(Vikram Singh Yadav)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 09/10/2020

\*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Shri Hari Narain Gattani, Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Circle-04, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 186/JP/2020}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar