

आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM
(through web-based video conferencing platform)

श्री वी. दुर्गा राव, न्यायिकसदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपीलसं./I.T.A.No.140/Viz/2020
(निर्धारण वर्ष/Assessment Year:2017-2018)

M/s Deccan Jewellers Private Limited Vs. Pr.Commissioner of
K.B.N.Complex Income Tax (Central)
D.No.27-16-65 Visakhapatnam
Governorpet
Vijayawada
[PAN : AACCD1524H]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri M.V. Prasad. AR
प्रत्यर्थी की ओर से / Respondent by : Shri D.K. Sonowal, DR

सुनवाई की तारीख / Date of Hearing : 22.09.2020
घोषणा की तारीख/Date of Pronouncement : 23.11.2020

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

This appeal is filed by the assessee against the order of the Principal Commissioner of Income Tax (Pr.CIT) (Central), Visakhapatnam in F.No.Pr.CIT(C)/263/10/2019-20 dated 20.03.2020 for the Assessment Year (A.Y.)2017-18 passed u/s 263 of the Act.

2. In this case search u/s 132 was conducted in the group concerns on 20.09.2016. Consequent to the search, the assessee admitted additional income of Rs.15 crores in the group in aggregate. In this case, the assessee filed the return of income originally u/s 139(1) declaring loss of Rs.9,43,92,456/-, subsequently, in response to the notice issued u/s 142(1), the assessee filed the revised return of income, declaring the same loss which was declared in the original return. Subsequently, the Assessing Officer (AO) has taken up the case for scrutiny and notices were issued u/s 143(2) and 142(1) and assessment was completed on total income of Rs.7,95,21,933/-. The AO estimated the income @2.15% on total turnover of Rs.85,19,30,587/- and arrived at the net profit of Rs.1,82,75,649/-. Further the AO made the addition of Rs.6,12,46,284/- as excess stock declared during the course of search. Thus, the AO computed the total income as under :

Income computed and accepted by the assessee's net profit @2.15% on G.T. of Rs.85,19,30,587/-	: Rs.1,82,75,649
Add : undisclosed income declared during the course of search (on account of excess stock)	: Rs.6,12,46,284
Assessed Income	: Rs.7,95,21,933

The entire income was taxed at normal rates i.e @30% by the AO. Subsequently, the Pr.CIT(Central), Visakhapatnam has taken up the case for revision u/s 263 and found that the AO has taxed the stock of Rs.6,12,46.284/- @30% instead of 60% in contravention of provisions of section 115BBE of the Act. Subsequently, Pr.CIT (Central), Visakhapatnam has called for the records and examined the same. The Pr.CIT called for explanation from the assessee as to why the unexplained investment declared by the assessee should not be taxed @60% as per section 115BBE. The assessee filed explanation objecting for treating the stock as unexplained investment u/s 69 of the Act and also objected for taking up the case for revision u/s 263 of the Act and relied on the following decisions.

- i) Malabar Industries Co.Ltd Vs. CIT 243 ITR 83 (SC)
- ii) CIT Vs. Max India Ltd., 295 ITR 282 (SC)
- iii) Spectra Shares and Scrips P.Ltd. Vs.CIT 36 Taxmann.com 348 (HC AP)
- iv) CIT Vs. Srinivasa Hatcheries Pvt. Ltd., 60 Taxmann.com 207 (HC AP)
- v) CIT Vs. P.D.Abraham 48 taxmann.com 352 (Kerala HC)
- vi) Bajargan Traders Vs. ACIT ITA No.137/JP/17, dated 17.03.2017
- vii) CIT Vs. S.K.Srigiri and Brothers 298 ITR 13
- viii) DCIT Vs. V.Ram Narayan Birla ITA No.482/JP/2015 dated 30.09.2016
- ix) Chaksi Hiralal Magan Lal Vs. DCIT 45 SOT 349
- x) Daulatram Rawatmull Vs. CIT 64 ITR 593
- xi) M/s A Star Exports ITA No.4411 Mumbai ITAT

xii) M/s Silver Palace, Pune Vs. DCIT ITA No.893/Pun/2016

The Ld.Pr.CIT considered the explanation offered by the assessee and viewed that the objections raised by the assessee are not acceptable and accordingly viewed that the excess stock found during the course of search declared as additional income required to be taxed as undisclosed investment u/s 69 and thus, the same required to be taxed @60% as provided u/s 115BBE of the Act. The Ld.Pr.CIT relied on the following decisions to hold that undisclosed stock required to be taxed as unexplained investment u/s 69 of the Act.

- i) Sanjayson of Dwarakadas Jajoo Vs. CIT (2006) 154 Taxmann 101 (MP)
- ii) Ramanlal Kacharulal Tejmal Vs. CIT (1994) 146 ITR 368 (Bom)
- iii) B.T.Steel Ltd., Vs. CIT (2010) 328 ITR 471
- iv) Fakir Mohmed Haji Hasan Vs. CIT (2001) 247 ITR 290 (Guj)
- v) Dhanush General Stores Vs. CIT (2011) 339 ITR 651 – value of unexplained investment (stock) assessable to Income Tax u/s 69

Accordingly, the Ld.Pr.CIT revised the assessment order, directing the AO to tax the income @60% on excess stock required to be brought to tax @60% and quantified the excess stock at Rs.4,91,13,985/- as under :

“8.6. Having held that the unexplained stock would have to be taxed @ 60% as per sec 115BBE, it will have to be examined as to how much amount is to be taxed under the said section. Though as per the notice it was intended to bring entire amount of undisclosed income i.e. Rs.6,12,46,184/- to be brought to tax @ 60%; on perusal of facts it is observed that an amount of Rs.86,66,619/- being excess claim of purification loss is in the nature of business income and hence the same was correctly taxed at 30% by the

assessing officer.

8.7. As regards to the excess stock the facts are perused. There is overall deficit in stock of gold and silver when the total of all branches is taken into consideration. It is presumed that there can be inter-branch transfers /adjustments which are reasonably to be considered. Therefore, it is held that in the assessee's case there is no excess stock in gold and silver. Therefore, the excess stock of diamonds amounting to Rs.4,93,39,000/- only is considered as unexplained investments in the stock of diamonds, which is liable for taxation u/s.115BBE. Giving further benefit of doubt it is judicially assumed that an amount of Rs.3,13,972/- (4,02,724 being deficit stock at two branches minus 87,752 being excess stock at one branch) in gold and Rs. 13,31,116/- being deficit stock in silver is sold unaccounted and the relevant amount is available for the assessee to be invested in diamonds during the year. Therefore, this amount is also reduced from Rs.4,93,39,000/- and the unaccounted investment in the stock of diamonds is arrived at Rs.4,76,93,912/- (Rs.4,93,39,000 - Rs.16,45,088). In view of the foregoing, such excess stock of diamonds amounting to Rs, 4,76,93,912/- clearly partakes the character of "unexplained investment" and falls well within the scope and ambit of section 69 of the IT Act and, thus, attracting the provisions of section 115BBE of the I.T. Act. The assessing officer by not applying the provisions of sec 115BBE not only erred but also caused prejudice to the revenue.

8.8. That leaves us with the another issue of excess stock of precious stones / gem stones and unaccounted gold jewellery received from goldsmiths amounting to Rs.13,51,113/- and Rs.68,960/- respectively. These two items have been declared by the assessee himself as unaccounted in the statement of computation attached with the return u/s.153A. There is also no specific explanation offered with regard to these two items during the present proceedings. Therefore, these two items declared unaccounted by the assessee himself are also treated as unaccounted investments which are liable for taxation u/s. 115BBE. The total amount thus works out to Rs.14,20,073/-.

8.9. In view of the foregoing, under the specific facts and circumstances of the case, the assessing officer erred in accepting the explanation of the assessee that it is not the unexplained investment in stock but is business income without any enquiry and therefore caused prejudice to the interest of revenue by not invoking the provisions of Sec, 115BBE and consequently taxed income of Rs.4,91,13,985/- (Rs.4,76,93,912 + Rs.14,20,073) at 30% instead of 60%; though such excess stock clearly partakes the character of "unexplained investment" and falls well within the scope and ambit of section 69 of the IT Act thus attracting the provisions of section 115BBE of the I.T Act. Therefore, the order of the Assessing Officer, thus, is not only erroneous for not applying such provisions, but also prejudicial to the interest of the revenue in as much as the tax is charged at lesser rate than prescribed for such type of income. Since the twin conditions are satisfied, by virtue of powers vested u/s 263, I hereby direct the assessing officer to tax the Income of Rs.4,91,13,985/- @ 60% in accordance with the provisions of sec 115 BBE."

Accordingly, the Pr.CIT held that the order passed by the AO is erroneous and prejudicial to the interest of the revenue, hence directed the

AO to tax the excess stock of Rs.4,91,13,985/- @60% instead of 30% by the AO.

3. Against which the assessee is in appeal before this Tribunal. During the appeal hearing, the Ld.AR argued that excess stock found during the course of search is business income as held by various High Courts. He further argued that the amount of Rs.4,91,13,985/- was admitted as additional income under the head profits and gains of the business in Part A of the return filed in the relevant assessment year. The assessee has relied on various decisions of Tribunal to hold that excess stock is part of business income because it is an accumulation of stock over the period of time. He relied on the decisions cited supra and argued that the excess stock admitted by the assessee required to be assessed as business income, hence, there is no case for application of section 115BBE of the Act or unexplained investment u/s 69 of the Act. The Ld.AR further argued that the issue with regard to excess stock to be assessed as business income or not was examined by the AO in notice issued u/s 142(1) for which the assessee has filed explanation. Referring to page No.59 to 63 of the paper book, the Ld.AR drawn our attention to the questionnaire issued by the AO specifically to the question No.4, 6 and 7, wherein, it is observed that the AO has called for explanation of the assessee as to why the sum of

Rs.6,12,46,284/- should not be added to the total income u/s 69 and apply the provisions of section 115BBE of the Act. The Ld.AR further submitted that in response to the notice issued u/s 142(1) on 23.10.2018, the assessee filed its explanation vide letter dated 12.11.2018 which was placed at page No.61 to 63 of the paper book. In the reply submitted, the assessee stated that the excess stock in question required to be taxed as business income and accordingly he has admitted the income under the head 'profits and gains' of business. He invited our attention to its explanation in page No.61 to 63, wherein, he relied on various decisions of various High Courts, where, it was held that the stock in question required to be taxed as business income. Thus argued that the excess stock found during the course of search should be taxed as business income and this view was upheld by the judicial decisions mentioned in its explanation and the same was duly considered by the AO and taxed the income @30% at normal rates. The Ld.AR also submitted that the order of the AO was passed with the approval of Jt.CIT (Central Range) u/s 153D of the Act which fortifies that the view of the assessee was approved by the Jt.CIT also u/s 153D. Therefore, argued that once, the AO has considered the issue and taken a conscious decision on a particular view, the same cannot be disturbed by substituting with the opinion of Pr.CIT which tantamount to

difference of opinion. The Ld.AR submitted that on difference of opinion, revision u/s 263 is not permissible, hence requested to set aside the order of the Ld.Pr.CIT and allow the appeal of the assessee.

4. Per contra, the Ld.DR argued that during the course of search u/s 132, excess stock was found and the same required to be assessed as unexplained investment u/s 69 of the Act. Once the excess stock required to be assessed as unexplained investment u/s 69 of the Act, it is mandatory on the part of the AO to apply section 115BBE of the Act. Since the AO has applied the normal rates the assessment made by the AO u/s 143(3) dated 28.12.2018 is erroneous and prejudicial to the interest of revenue, hence, argued that the Ld.Pr.CIT has rightly taken up the case for revision u/s 263 and therefore, requested to uphold the order of the Ld.Pr.CIT and dismiss the appeal of the assessee.

5. We have heard both the parties and perused the material placed on record. Search u/s 132 was conducted in the assessee's case and subsequently notice u/s 142(1) was issued by the AO and in response to the notice issued u/s 142(1), the assessee filed the return of income declaring loss of Rs.9,43,92,456/-. The AO estimated the income @2.15% on total turnover of Rs.85,19,30,587/- and arrived at the net profit of

Rs.1,82,75,649/-. Further the AO made the addition of Rs.6,12,46,284/- as excess stock declared during the course of search. In the return of income the assessee has admitted the income under the head 'profits and gains of the business or profession'. The AO did not make any addition or did not bring any income or part of income u/s 69 of the Act. During the course of assessment proceedings, the AO has called for explanation of the assessee as to why the additional income admitted by the assessee should not be treated as undisclosed investment u/s 69 of the Act, applying the provisions of section 115BBE of the Act. The assessee filed explanation, in response to the notice issued u/s 142(1) claiming that the additional income admitted by the assessee constitute business income, the same cannot be assessed u/s section 69 and there is no case for application of the provisions of section 115BBE of the Act. For the sake of clarity and convenience, we extract relevant part of the explanation offered by the assessee before the AO which is placed at page 61 to 63 of the paper book and the same reads as under :

"4. During the course of search operations it is pointed out that huge quantity of gold purchased from and claimed purification loss at 20-21 percentage which is on a higher side. Therefore in the deposition given by one of our director Sri Fazalul Rahaman Khan has accepted and voluntarily offered Rs. 86,66,619 as business income towards excess loss claimed on purification of gold. In the return of income filed we have admitted said income as our business income and claimed set off of loss against such income. However, it is stated in the notice under section 142(1) that such unaccounted income is assessable under section 69 and liable for tax under section 115B.BE and asked our objections in this regard.

In this connection we submit that the excess claim of purification loss has a direct connection to our business and any income offered in this connection is also to be treated as business income, whereas section 69 speaks about unexplained investment but not excess claim of losses.

5. *It is further stated that during the course of search operations on physical verification of stocks, excess stock of jewellery found Rs. 5,11,59,592 found as compared stock as per stock book maintained by us. In the deposition given by one our director Sri Fazalul Rahaman Khan has explained that the excess stock accumulated is due to excess claim of purification loss over years and unaccounted purchases over years. However, as he could not explain details for such variation in stocks accepted Rs. 5,11,59,592 as undisclosed business income. However, it is stated in the notice under section 142(1) that such unaccounted income is assessable under section 69 and liable for tax under section 115BBE and no set off of losses permitted and asked our objections if any in this regard. In this regard we submit that that the excess stock found during the search operation is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the Authorized Officers during the search operation at the premise. Since excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the provisions of section 69 cannot be made applicable as primary condition for invoking the provisions of the section is that the asset should be separately identifiable and it should have independent physical existence of its own., Since excess stock is result of suppression of profit from business over the years and has not been kept identifiable separately but i.e. the part of overall physical stock found and therefore the investment in the excess stock has to be treated as business income. it is an undisputed fact from the record that at the time of survey excess stock was found, it is also not disputed that we are engaged in the business of jewellery. In view of our submissions acceptance of excess stocks as undeclared income is to be treated at only business income and provisions of section 69 and 115BBE are not applicable in our case.*

6. *It is further stated that during the course of search operations on physical verification of stocks at our Visakhapatnam branch; Rajahmundry branch, excess stock of precious stones/gems of the value Rs. 6,02,881 and Rs. 7,48,232 and excess jewellery Rs. 68,960 were found respectively as compared stock as per stock book maintained by us. In the deposition given by one our director Sri Fazalul Rahaman Khan has explained that the excess stock accumulated is due to unaccounted purchases over years. However, as he could not explain details for such variation in the said stocks accepted Rs. 14,20,073 [Rs.6,02,881+Rs.7,48,232+Rs.68,960] as undisclosed business income. However, it is stated in the notice under section 142(1) that such unaccounted income is assessable under section 69 and liable for tax under section 115BBE and no set off of losses permitted and asked our objections if any in this regard. in this regard*

we submit that that the excess stock found during the search operation is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the Authorized Officers during the search operation at the premise. Since excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the provisions of section 69 cannot be made applicable as primary condition for invoking the provisions of the section is that the asset should be separately identifiable and it; should have independent physical existence of its own. Since excess stock is a result of suppression of profit from business other the years and has not been kept identifiable separately but i.e. the part of overall physical stock found and therefore the investment in the excess stock has to be treated as business income. It is an undisputed fact from the record that at the time of survey excess stock was found. It is also not disputed that we are engaged in the business of jewellery. In view of our submissions acceptance of excess stocks as undeclared income is to be treated as only business income and provisions of section 69 and 115BBE are not applicable in our case. In this regard we bring the following judicial pronouncements supporting our above claim a) Chokshi Hiralal Maganlal Vs DCIT, ITA No.3281/Ahd/2009; b) CIT V Ms Sanjay Bairathi Gems Ltd, ITA No.157/JP/17; c) Cy. CIT v. Ram Narayan Birla, 2017 TaxPub(DT) 4439 (Jp-Trib) d) M/s Kim Pharma (P) Ltd. Vs CIT, ITA No. 106 of 2011 (P&H); CIT another v. S.K. Srigiri and Bros. [2008] 298 ITR 13 (Karn).

5.1. From the explanation offered by the assessee, we observe that two views are possible with regard to excess stock found during the course of search in the premises of the assessee. According to the decisions relied upon by the assessee, the same forms part of business income and the same cannot be assessed u/s 69 or 69A of the Act. Since two views are possible on assessment of excess stock as business income as well as unexplained investment as per the views of Ld.Pr.CIT and the assessee, the AO after examining the explanation taken a view that the excess stock required to be

assessed as business income, accordingly completed the assessment. Therefore, when two views are possible on the same issue and the AO has taken one of such views, the Pr.CIT is not permitted to substitute his view to tax the assessee at higher rate by applying the provisions of section 115BBE of the Act in the proceedings u/s 263. This view is supported by the decision of Hon'ble jurisdictional High Court in the case of Spectra Shares and Scrips (P) Limited Vs. Commissioner of Income Tax – III, Hyderabad (supra), the Hon'ble jurisdictional High Court in the case laws cited supra held that merely because of difference of opinion, Pr.CIT cannot invoke his powers u/s 263 of the Act. For the sake of clarity and convenience, we extract relevant part of the order of the Hon'ble Andhra Pradesh High Court in para No.59 which reads as under :

“59.....

The contention of the Revenue that the Assessing Officer had not applied his mind to the material on record cannot be accepted because the respondent in his order dated 31.03.2011 specifically records a finding at Para 5.1 that there is application of mind by the Assessing Officer. The Revenue cannot raise a plea which is not contained in the order of the respondent and is contrary to it and to the record. The contention of the Revenue that there are no reasons given by the Assessing Officer about the nature of activity of the assessee cannot be accepted because a query was raised by him in the course of the assessment proceedings and was replied by the assessee. Obviously, he was satisfied with the explanation of the assessee and therefore did not think that the issue needs to be specifically mentioned. It is settled law that the Assessing Officer in the assessment order is not required to give detailed reasons and once it is clear that there was application of mind by an enquiry, the respondent, merely because he entertains a different opinion in the matter, cannot invoke his powers u/s. 263 of the Act. It is therefore not correct to say that there was no proper enquiry by the Assessing Officer.”

5.2. Similarly, this Tribunal in *G.V.R. Associates. v. Income-tax Officer, Ward-1(3), Vijayawada*, [2017] 88 taxmann.com 716 (Visakhapatnam - Trib.) held that the estimation of the net profit is one of the permissible methods of assessment of income from business. The Assessing Officer had taken a conscious decision of estimating the net profit from business after considering the nature and complexity of the books of account maintained by the assessee. Once the Assessing Officer had taken a conscious decision and acted in accordance with law and made the assessment, the same could not be branded as erroneous by the Commissioner, simply because according to him, the Assessing Officer should have made further enquiries. The Ld.DR did not bring any other decision to controvert the case laws relied upon by the assessee. Therefore, respectfully following the view taken by the Hon'ble High Court of Andhra Pradesh and the coordinate bench of this tribunal in the case law cited supra, we hold that there is no case for revision u/s 263, hence, we set aside the order of the Pr.CIT passed u/s 263 and allow the appeal of the assessee.

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

Order pronounced in the open court on 23rd November, 2020.

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिकसदस्य/JUDICIAL MEMBER लेखासदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 23.11.2020

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER लेखासदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 23.11.2020

L.Rama, SPS

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

1. निर्धारिती/ The Assessee-M/s M/s Deccan Jewellers Private Limited
K.B.N.Complex, D.No.27-16-65, Governorpet, Vijayawada
2. राजस्व/The Revenue -Pr.Commissioner of Income Tax (Central),
Visakhapatnam
3. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 4.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, Visakhapatnam