

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

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

श्री वी. दुर्गा राव, न्यायिक सदस्य 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 अपील सं./I.T.A.No.139/Viz/2020
(निर्धारण वर्ष/Assessment Year:2017-18)**

M/s Deccan Tobacco Company
D.No.5-7-6-1/5, Brodipet
Guntur

Vs. Pr.Commissioner of Income Tax
(Central)
Visakhapatnam

[PAN : AAHFD1174H]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri M.V.Prasad, AR
: Shri D.K.Sonowal. CIT, DR

सुनवाई की तारीख / Date of Hearing
घोषणा की तारीख/Date of
Pronouncement

: 22.09.2020
: 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(Central) (Pr.CIT), Visakhapatnam in F.No.Pr.CIT(C)/263/10/2019-20 dated 20.03.2020 for the Assessment Year (A.Y.) 2017-18.

2. All the grounds of appeal are related to the order passed by the Pr.CIT,(Central) Visakhapatnam u/s 263 of the Income Tax Act, 1961 (in short 'Act'). In this case, search u/s 132 was conducted on 20.09.2016 and the assessee has declared the amount of Rs.7,60,53,000/- as additional income in tobacco stock for the A.Y.2017-18. Subsequently, the assessee filed return of income in response to notice issued u/s 142(1) declaring total income of Rs.34,47,92,320/- inclusive of additional income declared during the search. The Assessing Officer (AO) completed the assessment accepting the income returned and taxed the entire income @30% by an order dated 28.12.2018. Subsequently, Ld.Pr.CIT (Central), Visakhapatnam has called for the records and examined the same. On perusal of the records, the Pr.CIT noticed that the AO taxed the undisclosed income representing unexplained stock @30% instead of 60% as required u/s 115BBE of the Act. 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 of the Act. The assessee filed explanation objecting for treating the excess stock as unexplained investment u/s 69 of the Act. The assessee also objected before the Pr.CIT

to take 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) ChaksiHiralalMagan Lal Vs. DCIT 45 SOT 349
- x) DaulatramRawatmull 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

2.1. 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) RamanlalKacharulalTejmal 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

2.2. Accordingly, the Ld.Pr.CIT revised the assessment order, directing the AO to tax the income @60% on excess stock of Rs.7,60,53,000/- u/s 115BBE of the Act.

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. Further, the assessee submitted that the assessee has admitted total income of Rs.15 crores in the group concerns voluntarily. He further argued that the amount of Rs.7,60,53,000/- was admitted as additional income in Schedule-I under the sub group of other operating 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 a 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 had filed explanation. Referring to page No.13 to 17 of the paper book, the Ld.AR drawn our attention to the questionnaire issued by the AO specifically to the item No.4 in page No.16, wherein, it is observed that the AO has called for explanation of the assessee as to why the said sum of Rs.7,60,53,000/- 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 19.11.2018, the assessee filed its explanation vide letter dated 28.12.2018 which was placed at page No.18 to 22 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 it has admitted the other operating income under the head 'profits and gains' of business. He invited our attention to its explanation in page No.19 to 22, 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% on 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 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 admitting total income of Rs.34,47,92,320/-. The AO accepted the return of income and taxed the same as normal income @30%. In the return of income the assessee has admitted the income under the head 'other operating income' in the P&L account and 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 also 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, claiming that the additional income admitted by the assessee constitute business income and the same cannot be assessed u/s section 69 and 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 19 to 22 of the paper book and the same reads as under :

"Accordingly, our firm has brought excess stock value to the books of account by passing the necessary entries in the P&L Account as well. An amount of Rs.7,60,53,000/- was accordingly admitted as 'other income' in Schedule L - 'other operating income' and the same was also shown in the return filed in the relevant columns under the head "Profits and Gains of the Business" in Part A of the Return filed for the impugned year. The same can also be verified from the P & L Account as well as from the Return filed. Copies, of the above were already filed with your goodself on 17/12/2018. Thus, it is submitted that there is no need to bring the excess stock once again to tax as that would result in double addition.

It is further submitted that the our company is involved in the export of unmanufactured tobacco and has no other income generating activity, The excess stock found is nothing but our business stock, and accordingly, the same was offered as income from business only.

The Hon'ble ITAT, Jaipur Bench in the case of Bajargan Traders, Jaipur vs ACIT Alwar in ITA No 137/JP/17 dated 17032017 has held that "unrecorded investment which has gone in purchase of such unrecorded stock of rice has been recorded in the books of accounts and offered to tax by crediting the said amount in the profit and loss account Had this investment been mode out of known sources, there was no necessity for assessee to credit the profit and loss account and offer the same to tax. Accordingly, we do not see any infirmity in Assessee's bringing such transaction in its books of accounts.

Having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head business income or "income from other sources In the present case, the assessee is dealing in sale of food grains, rice and oil seeds, and the excess stock which has been found during the course of survey is stock of rice. Therefore the investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee"

The Hon'ble ITAT' Bench has relied on the decision in the case of Shri Ram Narayan Birla dated 30.09.2016. In that case, the question before the coordinate bench was whether the CIT(A)-2, Udaipur has erred in directing to assess the unexplained income surrendered by the assessee under the head " Income from Business". The Bench has held that the excess stock was part of the

stock, and therefore, the same was correctly held by the CIT (A) as income from business.

Similar view is also held in the following cases:

1. *CIT vs S K Srigiri and Brothers (298 ITR 13), Kar.*
2. *DCIT vs V Ram Narayan Birla (482/JP/2015) dated 30.09.2016*

In the case of S P Equipment and Services vs ACIT (33 DTR 265), the provision of Section 40(b) was also made applicable on the profits earned by the firm.

In the case of M/s Choksi Hiralal Maganlal vs DCIT (45 SOT 349), the ITAT has held that "in the in the instant case, excess stock found during the survey was not separately and clearly identifiable but it is part of mixed lots of stock found at the premises which included declared stock as per the books and also excess stock as computed by the survey officer, the provision of Section 69(B) could not be made applicable as primary condition for invoking the provisions of Section 69A, 69.8 is that the asset should be separately identifiable and it should have independent physical existence of its own.-Since, the excess stock was a result of accumulation of profit from business over the years and had not been kept identifiable separately but was part of overall physical stock found, the investment in the excess stock had to be treated as business income".

In the case of ITO vs Micro Marbles Private Limited (66 SOT 76), it was held that the incomes surrendered by the Assessee at the time of survey accounts to excess stock would definitely be related to business of Assessee. In that case, the Assessing Officer has assessed GP which was upheld by the ITAT. This indicates the excess stock to be considered as business income only. There are other decisions also in which deduction under 80HHC was also allowed. CIT vs Haswani Arts 352 ITR 574 (Rajasthan), CIT vs Margaret's Hope Tea Co Ltd-01 ITR 747 Kolkata) wherein excess stock was treated as 'profit from the business', so as to allow the deduction.

In the case of Daulatram Rawatmull vs CIT (64 ITR 593), Kolkata, It was held that where a credit entry is found in the business accounts of an assessee and the explanation as to how the amount came to be received is rejected by the income-tax authorities and the amount is taken to be income from an undisclosed source, such income can be treated as business income, if the assessee has no other source of income.

Relying on the facts of this case and the principles as laid down in the above cases which equally apply to the facts, Assessee has correctly treated the above income as 'income from business' and accordingly provisions of

Section 115BBE are not applicable, as proposed by the Assessing Officer.

Without prejudice to the above, it is submitted that provisions of Section 115BBE are not applicable as the rate of 60 per cent was brought on statue by the Taxation Laws(-Second Amendment) Act 2016 (by way of ordinance in December, 2016), whereas the search has occurred in September, 2016 in winch excess stock was found It is a settled proposition of law that any amendment which increases the tax burden of the assessee, has to be considered prospective and not retrospective The cause of action arose in September, 2016 and the law at the point of time was to tax such incomes only at 30 per cent tax rate under Section 1 153BE. In the case of CIT vs Vatika Township Private Limited (367 FIR 466), the Hon'ble Supreme Court at para No.32 & 33 held that legislation which modify accrued rights or which impose obligations or impose new duties or attach a new disability has to be treated as prospective, unless the legislative intent is clearly to give the enactment a retrospective effect. It is further held in pan 39(c) that "if the concerned provision of the taxing statue is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue, has to be preferred". Therefore, the amendment brought in December, 2016 is not applicable to the facts of the case, as the excess stock was found in the course of search which was correctly offered under, the head Income from Business"

Having regard to the above, we request you not to treat the Additional Income offered of Rs 7,60,53,000/- under Profits and Gains from Business or Profession once again as Investment u/s 69 B of the Income Tax Act, 1961 and not to tax as per the provisions of section 115 BBE."

5.1. From the explanation offered by the assessee, we observe that there are two possible views with regard to excess stock found during the course of search/survey 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 of the Act. There are two possible views on assessment of business stock as business income as well as unexplained investment as per the views of 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. When there are two possible views and one of the possible view is taken by the AO, the Ld.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 of the Act. 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 decisions 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)
न्यायिक सदस्य/JUDICIAL MEMBER
दिनांक /Dated : 23.11.2020
L.Rama, SPS

Sd/-
(डि.एस. सुन्दर सिंह)
(D.S. SUNDER SINGH)
लेखा सदस्य/ACCOUNTANT MEMBER

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

1. निर्धारिती/ The Assessee–M/s Deccan Tobacco Company, D.No.5-7-6-1/5, Brodipet, Guntur
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

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam