आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 7/JP/2021
निर्धारण वर्ष/Assessment Year : 2017-18

Smt. Rekha Shekhawat 1, Police Line Gopal Vihar Kota	बनाम Vs.	The Pr. CIT Udaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BUVPS 5116 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya, Advocate

राजस्व की ओर से/ Revenue by: Shri Sanajy Dhariwal, CIT

सुनवाई की तारीख/ Date of Hearing : 14/07/2022
उदघोषणा की तारीख/Date of Pronouncement: 16 /08/2022

आदेश/ ORDER

PER: SANDEEP GOSAIN, JM

The assessee has filed an appeal against the order of the ld. Pr. CIT, Udaipur dated 22-02-2021 for the assessment year 2017-18 raising therein following grounds of appeal.

> ''1. The ld. Pr. CIT, seriously erred in law as well as on the facts of the case in invoking the provisions of Sec. 263 of the Act and therefore, the impugned order dated 22.02.2021 u/s 263 of the Act kindly be quashed.

2.1 The ld. Pr. CIT seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the subjected assessment order u/s 143(3) dated 25.02.2019, was passed without considering that the income declared under the head of other sources of Rs. 28,95,300/-, being recovery of cash amount of advances paid for purchase, comes under preview of S. 68 and 69 of the Act and thus, the tax u/s 115BBE was to be paid, as against the tax at normal rates. The assumption of jurisdiction u/s 263 being contrary to the provisions of law and facts on record. Hence, the proceedings initiated u/s 263 of the Act and the impugned order dated 25.02.2019 deserves to be quashed.

2.2 Alternatively and without prejudice to the above

The ld. Pr. CIT erred in law as well on the facts of the case in holding that the income declared Rs. 28,95,300/- during survey, being recovery of cash amount of advance paid for purchase, comes under preview of S. 68 and 69 of the Act and u/s 115BBE, is completely contrary to the provisions of the law and the facts available on the record. Hence, the impugned finding that the assessment order passed u/s 143(3) 25.02.2019 was erroneous set-aside.

3. The ld. Pr. CIT seriously erred in law as well as on the facts of the case in assuming jurisdiction u/s 263 of the Act by wrongly and incorrectly holding that the subjected assessment order u/s 143(3) dated 25.02.2019, was passed without initiating penalty proceedings u/s 271AAC of the Act. The assumption of jurisdiction u/s 263 of the Act with reference to initiation of penalty proceedings u/s 271AAC of the Act being contrary to the provisions of law and facts on record. Hence, the proceedings initiated u/s 263 of the Act and the impugned order dated 25.02.2019 deserves to be quashed.

4. The ld. Pr. CIT erred in law as well as on the facts of the case in wrongly setting aside the assessment order dated 25.02.2019 despite there being complete application of mind by the AO on the subjected issues and it was nothing but a case of change of opinion, based on which, assumption of jurisdiction u/s 263 is not permissible. The impugned order dt. 22.02.2021 therefore, lacks valid jurisdiction u/s 263 of the Act and hence, the same kindly be quashed.''

2.1 Apropos Ground No. 1, 2 & 4, Brief facts of the case are that the assessee filed her return of income on 7-11-2017 declaring total income of Rs.41,09,530/- which was processed u/s 143(1) by the CPC, Bangalore. The case of the assessee was selected for limited scrutiny through CASS. Notice u/s 143(2) of the Act was issued on 10-08-2018 which was transmitted to the assessee through E-Mail address as per returned income filed. Subsequent thereto, Notice u/s 142(1) of the Act alongwith specific questionnaire, calling for necessary details was issued on 01-02-2019 to the assessee's E-Mail address. In response to the notice u/s 143(2) and subsequent thereto notice u/s 142(1) dated 01-02-2019 alongwith specific questionnaire by electronic mail, was issued to the assessee by which necessary details were called for. In response to the notices and questionnaire raised by the AO, the ld. AR of the assessee furnished the requisite details before the AO which were verified by him and placed on record. The AO observed from the record that the assessee derives income from interest as well as the business of construction in the name and style of the Proprietary concern M/s. Jaideep Construction. From the record, the AO observed that the assessee during the year under consideration has shown the net profit of Rs.12,34,275/- over the turnover of Rs.1,52,75,000/- i.e. 08.08% of the turnover. The AO after considering the return of income filed, details furnished by the assesse during the course of hearing and material placed on record, determined the total income at Rs.41,09,530/-.

2.2 Further, it is noted that the ld. Pr. CIT sent the Notice for hearing to the assessee on 14-12-2020 in respect of revision proceedings u/s 263 of the Act and the notice for hearing of the case was fixed on 29-12-2020. The ld. Pr.CIT noted that the assessment u/s 143(3) of the Act for the A.Y. 2017-18 was completed by the AO on 25-02-2019, determining the income of the assessee at Rs.41,09,530/- and the ld. Pr. CIT called for the assessment records which were examined by him and thereafter noticed following points.

> ''On examination of assessment record, it is noticed that in the F.Y. 2016-17 relevant to A.Y. 2017-18, the assessee had declared income of Rs. 28,95,300/ under the head income from other source (income declared at the time of survey) and included the same in the return of income for the A.Y. 2017-18. This income pertains to recovery of cash amount of advances made by the assessee to the other persons for purchase of land / plots and thus comes under the purview of section 68 of the IT. Act (unexplained cash credit) and section 69A of the IT. Act (unexplained money) and tax @ 60% was to be charged as per the provision of section 115BB of the IT. Act. However, in the ITR the assessee has failed to declare the income of Rs. 28,95.300/- u/s 1158BE of the IT Act. Thus, the Income Tax of Rs. 24.31,566/- was to be charged on assessed income under the provisions of section 115BBE whereas Rs. 10,89.595/- has only been charged by the AO. There is under charged of Income Tax of Rs. 13,41.971/- (Rs 24,31,566- Rs. 10,89,595) having total tax effect of Rs. 16.50,608/- including interest of Rs 3.08,637/- u/s 2348 of the IT. Act. It is further seen that the penalty proceedings u/s 271AAC of the I.T. Act was also required to be initiated and imposed by the AO as per section 115BBE of the IT Act which he has failed to do.''

The ld. Pr. CIT, taking into consideration the points observed hereinabove noted that it is clear that the AO did not verify / examine these issues and has completed the assessment without going into these issues. Due to incorrect and incomplete appreciation of facts and law, the AO passed the assessment order without making any enquiries or verification, the assessment order u/s 143(3) of the I.T. Act for AY 2017-18 dated 25.02.2019 has been rendered erroneous in so far as it is prejudicial to the interest of revenue. Therefore, this assessment order u/s 143(3) of the I.T. Act. for A.Y. 2017-18 was proposed to be suitably modified/ enhanced cancelled by invoking the provisions of section 263 of the 1.T. Act. However, before doing so, a notice u/s 263 of the Income Tax Act was issued on 14.12.2020 through ITBA vide DIN, to the assessee for giving opportunity of being heard as well as requiring the assessee to furnish its submissions in this regard on 29.12.2020. However, no details have been furnished by the assessee on 29.12.2020 rather the assessee has sought adjournment vide letter dated 25.12.2020. On request of the assessee another opportunity was provided to the assessee vide notice dated 01.01.2021 fixing hearing for 12.01.2021. However, once again on 12.01.2021 no details have been furnished by the assessee and finally, written submission have been received on e-filing portal on 30.01.2021 which is placed on record. The ld. Pr. CIT observed that the assessee vide above referred written submission has challenged the notice u/s 263 of the I.T. Act by

citing various judicial pronouncements and stating that for action u/s 263 of the I.T. Act the order sought to be revised should be erroneous and prejudicial to the interest of revenue. The ld. PR.CIT considered the submissions of the assessee but the same were not acceptable to him. He further noted that the assessee had cited certain judicial pronouncements challenging the proceedings u/s 263 of the 1.T. Act, but the facts of the case were not identical with the citations made by the assessee. Therefore, the same are not acceptable to him The ld. PR. CIT after examining the assessment record noticed that in the FY 2016-17 relevant to AY 2017-18, the assessee had declared income of Rs 28,95,300/- under the head income from other source (income declared at the time of survey) and included the same in the return of income for the A.Y. 2017-18 which pertains to recovery of cash amount of advances made by the assessee to the other persons for purchase of land / plots and thus comes under the purview of section 68 of the IT. Act (unexplained cash credit) and section 69A of the 1.T. Act (unexplained money) and tax @ 60% was to be charged as per the provision of section 115BBE of the IT. Act. The ld. Pr. CIT thus noted from the ITR that the assessee has failed to declare the income of Rs. 28,95,300/- u/s 115BBE of the IT. Act. Thus, the Income Tax of Rs. 24,31,566/- was to be charged on assessed income under the provisions of section 115BBE whereas Rs. 10,89,595/- has only been charged by the AO. There is undercharge of Income Tax of Rs. 13,41,971/ (Rs. 24,31,566 Rs.

10,89,595) having total tax effect of Rs. 16,50,608/- including interest of Rs. 3,08.637/- u/s 2348 of the I.T. Act. Thus, the ld. CIT(A) from the above scenario felt that that the tax on the income of Rs. 28,95,300/ was to be charged @60% u/s 115BBE, however, the assessee has failed to offer her income for correct rate of tax and the the AO has failed to charge proper rate of tax on the above income of Rs. 28,95,000/- in the order u/s 143(3) of the I.T. Act dated 25.02.2019 for the A.Y. 2017-18, which has resulted in undercharge of Income Tax of Rs. 13,41,971/- (Rs. 24.31.566 Rs. 10,89.595) having total tax effect of Rs. 16.50,608/- including interest of Rs. 3,08,637/- u/s 234B of the I.T. Act. Thus, according to the ld. Pr. CIT, the above AO's order is erroneous in so far as it is prejudicial to the interest of revenue. The ld. Pr. CIT noted that the assessee vide para 3 of submission filed on 30.01.2021 has herself stated that surrendered income wrongly considered u/s 68 and/ or 69A as income from other sources, stating that it is a matter of common knowledge that in the real estate transactions, the involvement of black money is always there and the transacting parties used to settle the deal with the help of cash movement. The unrecorded advance towards the purchase of property and the available cash not recorded in the accounts was nothing but a result of generation of the unrecorded profit from the real estate business over the years and was a part of the overall assets, investments, etc. of the proprietary of the assessee. Hence, the ld. Pr. CIT noted from the above episode that it is clear that the declared

(surrendered) income of Rs. 28,95,300/- during the survey was unrecorded and unexplained income of the assessee and in the ITR the assessee has failed to declare the income of Rs. 28,95,300/- u/s 115BBE of the I.T. Act which was to be charged under u/s 68 and/or 69A of the I.T. Act @60% u/s 115BBE of the I.T. Act. Further, this income was also subject to penalty u/s 271AAC of the I.T. Act. The ld. Further referred to the Explanation-2 below section 263(1) inserted w.e.f. 01.06.2015 by Finance Act, 2015, which provides that:

> "Explanation 2 - For the purpose of this section, it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if, in the opinion of the Principal Commissioner of Commissioner:-
>
> (a) the order is passed without making inquiries or verification which should have been made,
>
> (b)the order is passed allowing any relief without inquiring into the claim,
>
> © the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119, or
>
> (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdiction High Court or Supreme Court in the case of the assessee or any other person."

Thus taking into consideration the above facts and circumstances of the case, the ld. Pr. CIT observed that the order of the AO is erroneous and prejudicial to the interest of the revenue and he, therefore, set aside the order of the AO back to his

file with following directions. The relevant para 7 of ld. Pr. CIT's directions as to the issue of invoking the provision of Section 263 of the Act is reproduced as under:-

> 7. From the above, it is clear that the assessment order u/s 143(3) of the I.T. Act for the A.Y. 2017-18 dated 25.02.2019 was passed by the Assessing Officer in this case, without verification and examination of the issue and incorrect and incomplete appreciation of facts and law as discussed in preceding paras. Hence, assessment order u/s 143(3) of the I.T. Act for the AY. 2017-18 dated 25.02.2019 has thus been rendered erroneous and prejudicial to interest of revenue on this issue. The same is therefore set-aside / canceled and restored back to the file of AO on the issue of charging of tax on the income of Rs. 28,95,300/- declared during survey which was to be charged under u/s 68 and/or 69A of the I.T. Act @60% u/s 115BBE of the I.T. Act and also subject to penalty u/s 271AAC of the I.T. Act., with the direction to pass fresh assessment order after conducting proper verification and examination on the above issue and thereafter appropriate action may be taken as per law. However, an opportunity of being heard should be given to the assessee before passing the order.''

2.3 During the course of hearing, the ld. AR of the assessee prayed that invoking of provisions of Section 263 of the Act by the ld. PR CIT is not justified as the AO has completely examined the details as required by him in the annexure sent to the assessee. The ld. AR further submitted that requisite details as to the case of the assessee was produced /furnished before the AO who verified them and taken the print out of the desired details as demanded during the assessment proceedings. The ld. AR further submitted that the AO has explicitly mentioned that the assesse

derives income from the business of construction in the name and style of the proprietary concern M/s. Jaideep Construction and interest in addition to the above. This fact is also taken into consideration by the AO in his assessment order that during the year consideration, the assessee has shown net profit of Rs.12,34,275/- i.e. @ 8.08% of the total turnover of Rs. 1,52,75,000 and thus determined the income of the assessee at Rs.41,09,530/-. To support the order of the AO, the ld. AR of the assessee has filed the following detailed written submission.

‘’1. Legal Position on S.263-Judicial Guideline: Before proceeding, we may submit as regards the judicial guideline, in the light of which, the facts of this case are to be appreciated.

1.1 The pre-requisites to the exercise of jurisdiction by the Commissioner u/s 263, is that the order of the Assessing Officer is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The Commissioner has to be satisfied of twin conditions, namely (1) The order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e. if the assessment order is not erroneous but it is prejudicial to the Revenue, S.263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous as also prejudicial to revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase prejudicial to the interest of the revenue' has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. Kindly refer Malabar Industrial Co. Ltd. v/s CIT (2000) 243 ITR 83 (SC).

1.2 Also kindly refer CIT v/s Max India Ltd. (2007) 295 ITR 282 (SC) wherein it is held that:

The phrase "prejudicial to the interests of the Revenue" in S. 263 of the Income Tax Act, 1961, has to be read in conjunction with the expression erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law."

1.3 In CIT v/s Ganpat Ram Bishnoi (2005) 198 CTR (Raj) 546 held that from the record of the proceedings, in the present case, no presumption can be drawn that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of existing necessary condition for invoking jurisdiction u/s 263. Jurisdiction u/s 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.

1.4 In CIT v/s Rajasthan Financial Corporation (1996) 134 CTR 145 (Raj) held

that: "Once Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the Assessing Offer allowed the claim being satisfied with the explanation of assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order not make an elaborate discussion in that regard

1.5 Abdul Hamid vs. ITO (2020) 117 taxmann.com 986 (Gauhati Trib.) it was held that only probability and likelihood to find error in assessment order is not permitted u/s 263.

Ratio of these cases fully apply on the facts of the present case in principle.

2. Due application of mind:

2.1 In the present case jurisdiction u/s 263 of the Act is on the ground that the while completing assessment proceedings the AO did not verify / examine the income pertains to recovery of cash amount of advances made by the assessee to the sellers. for purchase of land / plots which comes under purview of S. 68 or u/s 69A hence the AO failed (1) to tax the additional income under the provisions of S.115BBE and (2) to initiate penalty proceeding u/s 271AAC consequent thereto.

At the outset it is wrong to say that the AO completed the assessment without verification and examination of the issue and incorrect and incomplete appreciation of facts and law in as much as the AO after making a detailed enquiry and examination of books of account, other records viz impounded diary etc., statement recorded during survey and the relevant judicial guideline and precedents available before him, took a possible view (i.e. in the facts of the case not to impose tax u/s 115BBE) and completed the subjected assessment under scrutiny.

2.2 The relevant para of the assessment order showing that the AO has examined) each any every documents submitted by assessee during scrutiny proceedings, is reproduced below:

"The case was selected for Limited Scrutiny through CASS, Notice u/s 142(1)of the Act alongwith the specific questionnaire, by which necessary details were called for was issued.....

In response ……Shri R.S. Mittal, CA, furnished the requisite details time to time ……. The details furnished by the assessee/ the authorized representative of the assessee were verified, printout of the same were taken and were placed on record"

2.3 Further, a perusal of questionnaire it is revealed that the AO raised specific query w.r.t. cash deposit in Bank as under (PB 1-7):

"1. Abnormal increase in Cash Deposits in Bank Account(s) during the demonization period/Large Cash Deposits in Bank Account(s) during the year:

Accordingly, the assessee filed detailed submission dated 15.02.2019 (PB 8-12) before the AO and a categorical submission was made in Pr-3(iii) as under

"Sources of Cash Deposit: The income Tax Survey was conducted on the premises of the assessee on dated 04.07.2016 at the time of survey assessee surrendered the income of Rs.1,75,04,250/- as advances made to persons during the financial year 2014-15 & upto 30.06.2016. The assessee recovered the advanced amount and after recovery of advances assessee depostted the cash amount in bank account."

Further, assessee vide Pr-3(iv) assessee submitted copy of extracts of cash book before the AO stating as under:

" The copy of extracts of Cash Book for the relevant period is attached."

Further, the assessee vide Pr-15 submitted as under:

"Income disclosed during the survey:

That at the time of survey assessee surrendered the income of Rs.28,95,300/ as advances for purchase of Land/Plots and same amount is added in total income for filing the Income Tax Return and paid the due tax as per return filed."

Thus, the AO was fully aware of and conscious of the aspect of imposition of tax u/s 1154BBE.

2.4 Selection of the case under CASS: Moreover, the very fact of selection of the case under CASS on the ground of heavy cash deposits based on the AIR information followed by the issuance of the notices u/s 142(1) along with questionnaire to the assessee. The AO raised very specific and relevant queries/called for explanation and evidences asking various details w.r.t. the source of cash deposits, Loans and advances, to produce Cash Book, Bank Book etc., goes to fully establish that the AO was fully alive to the issue in hand from all angles, whether it is factual or legal aspect involved. (viz not only the source but also the taxability of the additional income stated during survey was regular business income or undisclosed income so as to be taxed at normal rate or higher rates u/s 115BBE.

In the response of the notices, the assessee filed complete documents w.r.t. queries raised along with production of Cash Book, Bank and Account books etc. which was required by the AO time to time through the A/R, and the same were duly verified and examined by the AO.

3. Additional income- Business income only:

3.1 It is submitted that the only source of income in the case, is the Real Estate business through proprietary M/s Jaipdeep Construction. There is no other known or unknown source of business hence there is no possibility of their being any undisclosed cash or any assets being found not relating to the said business Moreover, the subjected undisclosed income of Rs. 28,95,300 /- consisted of the property advances of Rs. 19,15,000/- and cash resulting from the same business of Rs. 9,80,300/- it is submitted that advances were given during the course of the property business and hence it directly related to the said business only. Moreover, (cash of Rs. 9,80.300/-, was a necessary consequence / generation of undisclosed profit form the Real Estate Business. It is a matter of common knowledge that in the real estate transactions, the involvement of black money is always there and the transacting parties used to settle the deal with the help of cash movement. The unrecorded advance towards the purchase of property and the available cash not recorded in the accounts was nothing but a result of generation of the unrecorded profit form the real estate business.

In fact, a bare reading of the related questions & answers clearly shows that the husband of the assesse has even admitted such income as a result of the real estate business activities. There is no mention or whisper in these statements that such surrendered income was something beyond or in addition to the real estate business or that there

was some other source of income giving rise to such undisclosed Income. In these circumstances, the only inescapable conclusion is that the surrendered income was nothing but a business income from the real estate business of the said proprietary.

3.2 Notably, statement of husband of the assessee Shri Shankar Singh Shekhawat recorded on dated 04.07.2016 u/s 133A during the survey are worth noting. The relevant extracts of the same are as under

15 उपर्युक्त प्रश्न संख्या 12 एवं 13 जिसमें मैसर्स जयदीप कंस्टकशन के संबंध में Rs. 17149950 की Property Adv. and Construction की अलेखांकित एवं अघोषित पाई गई राशियों के संबंध में आप क्या कहना चाहते हैं ?

उत्तर मेरी पत्नी (रेखा शेखावत) स्वामिलव वाले उपर्युक्त फर्म कि वित वर्ष 2015–16 के लिए मेरे द्वारा Rs. 17149950 की स्पष्ट की गई एवं स्वीकार की गई आय/ विनियोग की राशि को गत वर्ष 2015-2016 की अलेखांकित एवं अघोषित आय स्वेच्छा से स्वीकार करता हूँ एवं मेरी कर निर्धारण वर्ष 2016-2017 की दाखिल की जाने वाली विवरण में दिखाए जाने वाली मेरी उक्त गत वर्ष 2015- 2016 को नियमित आय में अतिरिक्त रूप से आप के रूप में जोड़ कर उस पर लगने वाले कर की राशि स्वेच्छा से जमा कराने के लिए स्वैच्छिक,स्वतन्त्र सहमति देता हूं। इस प्रकार मेरे कर निर्धारण वर्ष 2016-2017 की विवरणीत कुल आय मेरी नियमित आय में Rs. 17149950 को जोड़कर उस पर लगने वाले कर चुकाकर स्वयं कर निर्धारण में मेरी आयकर विवरणी भर दूंगा।

प्रश्न17 मैं आपको रेडियंट 2015 डायरी जिसके कवर पर रामलेटन मित्रा लिखा हुआ है, जिसमें 1 जनवरी 2015 से 24.06.2016 की अवधि के लिए आपके द्वारा निर्माण कार्य की सामग्री की खरीद का दैनिक आधार पर ब्यौरा लिखा हुआ है इसी डायरी 26 दिसंबर के पृष्ठ पर 2016.17 प्रो० जयदीप कंसट्रक्शन के नीचे Property Advance Rs.19,15,000/- लिखा हुआ है। कृप्या स्पष्ट करें यह विवरण किस संबंध में है?

उत्तर उपर्युक्त डायरी में 26 दिसंबर के पृष्ठ पर जो विवरण लिखे हुए है ये विवरण मेरी पत्नि श्रीमति रेखा शैखावत के एकल स्वामित्व की व्यवसायिक संस्था मै. जयदीप कंसट्रक्शन के संबंध में लिखे हुए है जो कि मेरी पत्नि द्वारा चालू वित वर्ष 2016.17 की प्रथम तिमाही के दौरान Rs. 19,15,000 रुपये की उसके व्यापार में निर्माण व्यापार के कार्यों हेतु प्लॉट आदि संपत्तियों उसके द्वारा खरीदने के उद्देश्य से कई व्यक्तियों से चालू वित्त वर्ष की प्रथम तिमाही की अवधि के दौरान अग्रिम साई पेटे तथा उसके द्वारा संपत्ति खरीद के प्रतिफल के भुगतान की राशियों के संबंध में है जोकि कई कच्ची परचीयों, नोटबुक्स, स्लिप्स, डायरी आदि में लिखी हुई थी, को जोड़कर यहाँ लिखी गई है।

प्रश्न 19 उपरोक्त प्रश्न संख्या 17 में, मै० जयदीप कंसट्रक्शन की एकल स्वामिनी मेरी पत्नि है की चालू वित्त वर्ष 2016 -17 के लिए मेरी पत्नि 19,15,000 रु की स्पष्ट की गई एवं स्वीकार की गई है. उक्त राशि आय विनियोग की अघोषित राशि है को चालू वित्त वर्ष 2016-17 की प्रथम तिमाही की अलेखांकित एवं अघोषित आय है, को इच्छा से स्वीकार करते हुए चालू वित्त वर्ष की इस प्रथम तिमाही की इस स्वीकृत आय पर अग्रिम कर राशि जमा कराने के लिए मेरी स्वैच्छिक,स्वतन्त्र सहमति प्रदान करते हुए इस पर लागू कर की राशि के चैक स्वैच्छा से जारी करके आपको सुपुर्द कर रहा हूँ।

कृप्या 15 सितंबर से पहले मेरी चालू वित्त वर्ष की अवधि कीआय के उपर कर जमा कराना समझा जाये।

3.3 Accounting: It is submitted that income so surrendered in shape of the unrecorded trade advances and cash-in-hand were entered in the regular books of accounts and the unrecorded cash together with the recoveries made from the unrecorded debtors, both, taking together constituted sufficient cash balance including the declared cash balance in the day-to-day maintained cash book. Thus, the bank deposits from 09.11.2016 onward were made out of the same. The recoveries made from the debtors and the unrecorded cash-were entered in the cash book (PB 16-17) and other accounts during the relevant assessment year. These accounting entries were certainly before the AO who duly examined, which furnished a strong ground to him to take a decision that it was a business income only and S. 115BBE was not applicable.

3.4 The very fact that the subjected diary which included the details of the business transactions also included the relevant page/s relied upon by the revenue, sufficiently proved that such noting related to unrecorded advances towards the purchase of plot etc. and the stated cash was part of the real estate business. The unrecorded advances and cash remained mixed up with the other recorded advances and cash of the property business. The AO duly verified and examined the documents and details filed before him these facts certainly influenced his decision making process. The AO after due application of mind accepted and assessed the income.

4. Legal Position w.r.t S.115BBE:

4.1 At the outset it is submitted that S.115BBE specifically refers to the income which are of the nature as referred in S. 68,69,69A of the Act being the income from other sources. Therefore, subjected income has essentially to be classified u/s 14 of the Act as income from other sources and that is possible only when the income is not capable of being classified under any other head being income from salary, house property, capital gain, business or profession.

4.2 A combined reading of S. 14 with S. 56 of the Act makes is evidently clear that for the assessment of an income it must have to be classified under four heads of income as enumerated u/s 14 and if it doesn't fall under any specific head of income as per item A to E of S. 14, such income has to be assessed under the residuary head of income i.e. item F of S. 14. Therefore, income added u/s 68 or 69 etc. has to be given a specific head in terms of S. 14,

4.3 The Hon'ble Supreme Court in case of Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC) held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under

another head. Further, the Hon'ble Supreme Court in case of Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4.4 It is submitted that whatever, was disclosed was nothing but additional income only and it cannot be termed as excess/undisclosed/unaccounted Income for the simple reason that survey was carried out on 04.07.2016 i.e. before close of the relevant previous year ending on 31.03.2017 or in other words, during the currency of the previous year only. The assessee did not yet close the previous year's books of accounts therefore, unless completely prepared all transaction done, are accounted for and the accounts are completely prepared, it can't be termed as excess-shortage /undisclosed/unaccounted money, quantity etc. Even the return of income was not filed by the assessee committing itself to a particular state of affairs. At the best it was only additional income stated during survey. Moreover, the assessee admittedly accounted for such income also in regularly maintained books of account and also declared the resultant income in its ROI. Therefore, once a comparison i made between the income shown in the accounts and those in ROI, there will be no difference. Consequently, it cannot be said that there was some excess shortage/undisclosed/unaccounted income, etc.

5. Binding judicial guideline: The Hon'ble Rajasthan High Court as also Tribunals whose decision are binding upon the assessing officer as a juridical precedence have also been consistently holding so.

5.1 The Hon'ble Rajasthan High Court in case of CIT va Bajargan Traders in ITA No. 258/2017 dated 12.09.2017 (DPB 1-5) has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources. It was held as under:

> ‘’2.10. We have heard the rival contentions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814/- towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transaction by debiting the purchase account and crediting the income from undisclosed sources. In the annual accounts, the purchases of Rs. 70,04,814/2 were finally reflected as part of total purchases amounting to Rs. 33,47,19,658/in the profit and loss account and the same also found included as part of the closing stock amount to Rs. 1,94,42,569/- in the profit/loss account since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of RS. 70,04,814/- also found credited in the profit and loss account as income from undisclosed sources. The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss therefrom would be subject to tax as any other normal business transaction. Secondly, the 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 made out of known source, there was no necessity for assessee to credit the profit/loss account and offer the same to tax. Accordingly, we do not see any infirmity in assessee's firinging such transaction in its books of accounts and the accounting treatment thereof so as to regularize its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future
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> 2.11. 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 foodgrains, 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 decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore, the investment in the excess stock has to be brought to tax under the head "business income and not under the head income from other sources In the result, ground No. 1 of the assessee is allowed.’’

5.2 The Hon'ble ITAT Jaipur, Jaipur in its decision in the case of Shri Ram Narayan Birla in ITA No. 482/JP/2015 dated 30.09.2016 (DPB 6-13) has held that unrecorded/excess investment or expenditure surrendered during the course of the survey has to be assessed as business income only and not under the head income from other sources. The Hon'ble ITAT Jaipur followed the case of Choksi Hiralal Mangal vs. DCIT 131 TTJ 1 (Ahd).

5.3 The Hon'ble Ahmedabad Tribunal in case of Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 05.08.2011) held that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable investment or asset or expenditure (i.e. in our understanding not connected with business so as to make convenient to invoke aforesaid sections). In case source of investment or asset or expenditure

is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be. separated from business then first what is to be taxed is the undisclosed business receipt. Only on failure of such exercise, it would be regarded as taxable u/s 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

5.4 In case of Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25.05.2018) (DPB 14-32), the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the Bajargan Traders (supra), held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income u/s 115BBE of the Act.

5.5 There apart, there are many decisions available taking such a view in favor of the assesse on dated 21.02.2019 when the subjected assessment was framed by the AO.The above very relevant and crucial facts and the legal position was well available before the AO and there is nothing on record to show that he did not consider the same.

5.6 Since the AO acted in accordance with the law prevailed on the date of the passing assessment order hence, no fault can be found in his action and in particular, proceeding u/s 263 cannot be invoked in such a case. Kindly refer CIT vs. G.M. Mittal Stainless Steel (P.) Ltd. [2003] 130 Taxman 67/263 ITR 255 (SC) (DPB 33 35), CIT, LTU, Bangalore vs. Canara Bank [2021] 123 taxmann.com 207 (Karnataka).

In view of the facts & circumstances, judicial guidelines and the statutory provisions,the additional income declared during survey of Rs. 28,95,300/- could not be subjected to S. 115BBE of the Act, hence there was no error in the assessment order.

6. Substitution of opinion, not Permissible-Possible view taken by the AO: Thus, the AO certainly did form an opinion by taking a conscious possible decision in view of the facts available on record, investigated by him and the available juridical guideline particularly those binding upon him. It is only after considering all the relevant aspects, the AO decided not to charge tax u/s 115BBE and to impose penalty u/s 271AAC of the Act. However, the impugned order shows that it is a case of substitution of opinion. From the factual and legal submission made hereinabove, it is evident that the AO has taken a possible view but it appears nothing but a case of substitution of opinion. However, the law is well settled that CIT cannot substitute his own opinion and if a legally possible view has been taken by the AO, the CIT cannot invoke revisionary powers.

7. Merely because the order is brief and cryptic, that does not render it to be erroneous and prejudicial to the interests of revenue. The Id. Pr. CIT has no jurisdiction u/s 263 to revise the order of the AO simply because he has not made elaborate discussion in the order with regard to the reason mentioned in the CASS. Kindly refer Ved Prakash Contractors vs. CIT (2016) 175 TTJ UO 19 (Chd.) held as under:

> "Revision-Erroneous and prejudicial order-Lack of proper enquiry-Order of the AO may be brief and cryptic but that by itself is not sufficient to brand the assessment order as erroneous and prejudicial to the interests of the Revenue AO having considered all the issues, the exercise of power under s. 263 was bad in law-If an enquiry is made by the AO, the CIT would have no jurisdiction under s. 263 to revise the order of the AO on the ground that such enquiry is not adequate-Therefore, the order of the AO cannot be held to be erroneous and prejudicial to the interests of the Revenue simply because he has not made elaborate discussion in that regard in his order."

8.1 It is not the case of CIT that there was a complete/total lack of inquiry: There is no such whisper in the impugned order. He himself stated that there was incomplete appreciation of facts and law, which implies that some enquiry was made but no proper enquiry was made as per CIT. However, law is well settled that the Assessment order cannot be held to be erroneous simply on the allegation of inadequate enquiry unless there is an established case of total lack of enquiry. Kindly refer CIT vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del) wherein Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held that one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under S. 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. Also kindly refer CIT vs. Chemsworth Pvt. Ltd. (2020) 275 Taxman 408 (Kar).

8.2 Invoking of Explanation 2 to S. 263 is without jurisdiction: It is further submitted that in the entire Show Cause Notice, there is no whisper of the invoking of Expl. 2 to S. 263, based on which now in the Impugned Order S. 263 at Pg 4 Pr 6. the Ld CIT has taken support of. In other words, without specifically confronting the assesse/ noticee, of the proposed action even though mandatorily required, the Ld. CIT has acted against the interest of the assesse while invoking S. 263 by taking help of Expl. 2 of S. 263. The law is well settled that any proposed action which do not find place in the SCN u/s 263 or without specifically confronting the assesse of such proposed action before invoking S. 263, shall vitiate the entire proceeding and therefore, the resultant order u/s 263 has to be quashed. This aspect is directly covered by recent decision of Hon'ble Supreme Court in the case of Principal Commissioner of Income-tax, Surat-2 Vs. Shreeji Prints (P.) Ltd. [2021] 130 taxmann.com 294 (DPB 43-48) wherein vide the Hon'ble Supreme Court held as under.

> "Section 69, read with section 263, of the Income-tax Act, 1961 Unexplained investments (Unsecured loans)- Assessment year 2013-14 Assessee-company had. received unsecured loans from two different companies Commissioner noting that said loans were shown as investment in assessee's name in balance sheet of respective companies exercised his revisionary powers and passed an order without giving an opportunity to assessee of being heard, invoking Explanation 2 to section 263 High court by impugned order held that since Assessing Officer has made inquiries in details and accepted genuineness of loans received by assessee, such view of Assessing Officer was a plausible view and same cannot to be considered erroneous or prejudicial to interest of revenue Whether SLP against said impugned order was to be dismissed-Held, yes (Para 21 [in favour of assessee)"

Since the facts are admitted and undisputed hence the impugned order deserved to be quashed in toto.

8.3.1 Even the amendment (Expl. 2(a)) does not confer blind powers: It is held that despite there being an amendment, enlarging the scope of the revisionary power of the ld. PCIT u/s 263 to some extent, it cannot justify the invoking of the Expl. 2(a) in the facts of the present case. Before referring to that Explanation, one has to understand what was the true meaning of the Explanation in the context of application of mind by a quasi-judicial authority.

8.3.2 In the case of Narayan Tatu Rane Vs. ITO Itat, (2013) 7 NYPTTJ 1493 (Mum) it was held that newly inserted Explanation 2(a) to S. 263 does not authorize or give unfettered powers to Commissioner to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made. As submitted above here also the AO having already applied its mind (directly or indirectly), the assessment order was not erroneous.

9. Adverse Observations and Objections raised by the Ld. CIT: 9.1 No estoppel against law: Further, showing surrendered income under the head Income from Other Sources is not a valid ground to invoke S. 263. One of the

reasons adopted is that after making a surrender of the subjected income of Rs. 28,95,300/ the same has been shown by the assessse under the head Income from "Other Sources" in its ROI which required application of S. 115BBE of the Act.

It is submitted that the law is well settled that there can't be any estoppels against the statute. Merely because the assesse has taken a mistaken view of the legal position by showing the income surrendered during the course of survey in a particular head of income numerated u/s 14 of the Act, is a highly technical task. Even a tax consultant/CA may not correctly decide what to talk of a poor ignorant & layman assesse. Acquiescence cannot take away right a party to which he is otherwise entitled to. No tax can be collected without the authority of law as guaranteed by Article 265 of the Constitution of India. Therefore, even if the assessee has made some commitment, it cannot work as an estoppel and the assessee, if still feels aggrieved in any manner, can pursue legal remedy. Hence, showing income under a wrong head in the return of income cannot be taken as an admission.

9.1.1 Kindly refer CIT vs. M. Pyngrope (1993) 200 ITR 106 (Gau.), wherein it was held that:

> "Appeal (AAC)-Maintainability of appeal-Scope-Denial of liability by assessee within the meaning of S.246(1)(c)-Has wide import and such denial may be by way of appeal-It is not necessary that assessee should have denied liability in return itself 9.1.2 CIT vs. Apar Limited (2002) 175 CTR 312 (Bombay), wherein it was held that:
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> > "Appeal [CWT(A) Maintainability of appeal-Intimation under s. 16(1)(a)(i) Return filed under protest-Thereby assessee disputed his very liability to wealth-tax-AO could not have foreclosed assessee's right to appeal by issue of intimation under s.16(1)(a)(i)-Appeal maintainable under s. 23(1A)(a)"

9.1.3 Mayank Poddar (HUF) vs. WTO (2003) 181 CTR 362 (Calcutta) (DPB 36-39),wherein it was held that:

> "Estoppel-Applicability of principle-Interpretation of statutes-Scope-There is no estoppels against statute Property, though not taxable under the WT Act, included by assessee in taxable net wealth by misconception of law-Property does not become taxable.
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> x x x

A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or urong understanding of law by the assessee or because of his admission or on his misopprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable." (Para 11)

9.2 The Ld CIT in para 5.2 of the order without properly appreciating the context behind using the word Black Money, has misinterpreted the same to suit his purpose. The relevant para 3 of WS is self-explanatory. .3 Surrendered income wrongly considered u/s 68 and/or 69A as income of other sources: If the totality of the facts and circumstances and the judicial guideline is considered, the additional income could not be considered of the nature described the above provisions. Otherwise also on merits once such additional income has already been accounted for before/ at the close of the year nothing remained undisclosed/ unexplained.

10. Contradictory approach of revenue: It is pertinent to note that the assessee lady had also declared Rs 1.71 Crore in A.Y. 16-17 on similar facts and circumstances The assessment was also framed for A.Y.16-17 vide order u/s

143/3) dated 31.10.2018. However, no revisionary action u/s 263 is reported of similar nature where the CIT alleged and attempted to apply S. 115BBE. Similar surrender was made by the husband also in A.Y 16-17 and AY 17-18 and there also assessment was completed by order u/s 143(3) dated 21.07.2017 for AY 2016-17 but no action u/s 263 is reported there also.

11. As regard initiation of Penalty u/s 271AAC: No doubt, the CIT concerned can examine the record of any proceedings and order passed consequent thereto can be set aside, if found erroneous and prejudicial to the interest of the Revenue. However, a bare perusal of the provision shows that penalty proceedings can be initiated by the concerned authority, L.e. the AO/CIT(A), only during the course of assessment for appellate) proceedings (or appellate) and before the conclusion of such proceedings. Whereas the revisional jurisdiction of the CIT starts only after the conclusion of such proceedings, which result into assessment or appellate order. Therefore, as a sequel thereto, is not open to CIT to exercise the revisional powers to create non existent proceedings under S. 263 by holding the assessment proceeding as erroneous in so far as prejudicial to the interest of revenue. Since S. 263 regulates the revisional powers of the CIT hence, the strict requirements of a jurisdictional provision cannot be compromised. In this case, the proceeding and consequent order is assessment order and not the penalty proceedings because the same were not existing hence no proceedings u/s 263 could be invoked.

11.1 The issue is covered by the binding decision in case of CIT vs Keshrimal Parasmal [1986] 27 Taxmann 447 (Raj) (DPB 40-42), holding that:

> "In J.K. D'Costa's case (supra), it was held that the Commissioner was not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings. The Supreme Court has dismissed the special leave petition in the said case in Special Leave Petition (Cit) Nos. 11391 and 11392 of 1981, dated 2-3-1984 [1984] 147 ITR (S) 1. As the position was concluded and settled by the Supreme Court, the question which was sought to be referred could not be said to be a substantial question of law arising out of the Tribunal's order. It was only a question of academic nature''.

11.2 Very recent case laws are Shri Nandkumar Bhalchandra Bhondve in ITA No.943/PN/2014 dated 17.08.2016 and in Easy Transcription & Software (P) Ltd. vs. CIT (2017) 185 TTJ 504 (Ahd.) held as under:

> "Revision Jurisdiction of CIT-Jurisdiction to direct AO to initiate penalty proceedings under s. 271(1c)-It is not open to CIT to exercise the provisional powers to create a non-existent proceeding under s. 263 by holding the assessment as erroneous in so far as prejudicial to the interest of Revenue-Sec. 263 is a substantive provision and howsoever clear the legislative intent may be, the requirements of a substantive provision cannot be bypassed as the legislative casus omissius cannot be supplied by interpretational fiat-Arriving at 'satisfaction' is thefoundation of initiation of proceedings under s. 271(1)(c) which was to be recorded by AO in the course of assessment proceedings-Consequently, once the assessment is concluded, the CIT becomes functus officio as regards initiation of penalty under s. 271(1)(c)-Non-initiation of penalty proceedings under s 271(1)(c) while framing assessment is not a good ground for invoking provisional powers under s. 263-Sec. 271(1)(c) read in conjunction with s. 263, gives an unmistakable impression that while in the wake of amendment under s 271(1c) w.ef 1st June, 2002, it may be lawful for the Administrative CIT to impose penalty, that by itself would not be sufficient to hold that the CIT is entitled to exercise revisional powers by treating the assessment order as erroneous and prejudicial to the interest of Revenue-CIT is not competent to direct the AO to redo the assessment with a view to initiate and levy penalty under s. 271(1)(c) in respect of erroneous claim of deduction under s. 10B.

Detailed submissions on this aspect (in Para 3) were made before the Ld. CIT wherein, the decision in Keshrimal Parasmal (Supra) was cited but there appears no reference and no consideration at all of these submissions and the Ld. CIT still directed the AO to initiate penalty proceeding u/s 271AAC of the Act which is in utter disregard of the decision of the Hon'ble High Court.

12. Lastly, the issue of charging interest u/s 234B consequential to application of S.115BBE could not be raised in the proceedings u/s 263.

In view of the above legal and factual position, the proposed action u/s 263 is completely beyond the S. 263 and therefore, the impugned order deserves to be quashed.''

2.4 During the course of hearing, the ld. DR strongly relied upon the order of the ld. Pr. CIT and submitted that he has rightly invoked the provisions of Section 263 of the Act.

2.5 We have carefully considered the finding recorded in the impugned order passed under S. 263, the rival contentions raised by both the parties as the material placed on record as well as gone through the judicial pronouncements. The bench notes that the prerequisite exercise of jurisdiction by the learned Principal CIT under s. 263 of the Act is that the order of the AO is established to be erroneous insofar as it is prejudicial to the interest of the Revenue. The Principal CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e., if the assessment order is not erroneous but it is prejudicial to the Revenue, s. 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, that the provision will

be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the Revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. It is pertinent to mention that if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order and it is prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. In this regard, we draw strength from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1: (2000) 243 ITR 83 (SC). We also draw strength from the decision of the Hon'ble Supreme Court in the case of CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266: (2007) 295 ITR 282 (SC) wherein it was held that:

> *"The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be*

treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."

It is also noteworthy to mention that one of the pre-requisite before invoking S. 263 and the allegation of the Ld. Pr. CIT is that there has been incorrect assumption of fact and law by the Assessing Officer. However, despite our deep and careful consideration of the material on record including the finding recorded in the subjected Assessment order dated 25.02.2019 and in the findings recorded in the order under challenge, we do not find any incorrectness and incompleteness in the appreciation of facts made by the AO. Hence we do not agree on this aspect to this extent with Ld. Pr. CIT. However, we now proceed to consider whether the AO has also incorrectly appreciated and assumed the law while making the subjected assessment to be termed, as erroneous and prejudicial to the interest of the revenue. The facts are not disputed that the assessee engaged was in the Real Estate Business through her proprietary M/s Jaipdeep Construction, purchasing & selling of plots, lands, construction of properties and the like. A survey u/s 133A was carried out on dated 04.07.2016, during the course of which, statement of the husband of the assessee lady Shri Sankar Singh Sekhawat were recorded u/s 133A/131. Shri Sankar Singh Sekhawatis also engaged in the similar types of real estate business in its property namely M/s Rajshree Properties at Kota. Shri Sankar Singh Sekhawat admitted unrecorded income in the case of his wife/assessee of Rs.

28,95,300/- for F.Y. 2016-17 (A.Y. 2017-18) which, consisted of the property advances of Rs. 19,15,000/- and cash of Rs. 9,80,300/- and there was no other known or unknown source of business. We further note that subsequent cash recoveries were made from such trade advances and the cash of Rs 9,80,300/- so admitted were incorporated in the regularly maintained books of accounts. Perusal of the cash book placed on record at Pg.- 17 of the paper book filled by the assessee it is noticed that the assesse has credited on dated 04.07.2016 the cash declared in survey of Rs 9,80,300/- and credited to her capital account and constituted a part of the closing balance of cash in hand on that day of which was there after carried forward to 05.07.2016 as opening balance. Similarly, property advance of RS 19,15,000/- was also credited to the capital account and debited to *Advance for Property Declared (In 16-17)* (PB 15). Later on cash recovery is made therefrom on 3.11.2016 which was debited in the cash book and credited to the said advance account. (PB 15-16). We also note that the available cash thereafter was used by the assessee in its day to day transactions related to real estate business including the bank deposits made from 09.11.2016 and onward. On the other hand, the capital account of assessee has been credited with the same amount of additional income of Rs. 28,95,300. Thus, the net effect of such accounting entries passed, the treatment is that the unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and

thereafter used in its day to day business Activities. We have also meticulously gone through the questions and answers raised during the survey in which the authorised officer asked regarding the property advanced made by the assessee through its proprietary M/S Jaideep Constructions of Rs 171,49,950/- in Financial Year 2015-16 relating to A.Y. 2016-17 in question no. 15 with reference to earlier questions 12 & 13 and in reply thereto Shri Shekhawat, while admitting the additional income to that extent in its regular income for A.Y. 2016-17. He was also confronted with the impounded material Radiant 2015 Diary, starting from 1st January 2015 and the contents thereof were referred to, which shows the purchase of the building material on day to day basis. The details of the purchase of construction material on day to day basis and on page 26th December, the entry of property advanced of Rs. 19,150,000/- was mentioned under the heading Prop. Jaideep Constructions. In reply to which Shri Shekhawat stated that such details related to said propriety of his wife (the assessee) given on account of the construction activities and purchase of plot as advanced (Sai). Thus, the impounded material has also the very questions which were raised and the answers given shows that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only. It is imperative to mention that as claimed above, in AY 2016-17 also, the assessee lady has admitted the additional income of Rs. 1.71 crore and the assessment of

that year was completed under the scrutiny in the order dated 31.10.2018 passed under S. 143(3). In the similar case of Shri Shekhawatalso admitted additional income in A.Y 2016-17 & 2017-18, where also assessment were completed under scrutiny u/s 143(3) on 21.07.2017. However, such contentions were not controverted by the ld. DR. Moreover, it is clear from a bare reading of the order under challenge that the Ld. Pr. CIT has not disputed rather admitted these facts in para 5 that *this income pertains to recovery of cash amounts of advances made by the assessee to the other persons for purchase of land/plots.* Hence, the undisputed facts indicate that the additional income so admitted was in the normal course of real estate business. Thus, undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown course of income and the source of additional income so admitted is also clearly identifiable and related to the regular business of real estate. These facts are evidently clear to bring home the point that such additional income clearly falls under S. 14 r/w S. 28 of the Act. The residuary provision under S. 56 which is titled as income from other sources, comes into the picture only and only when any items of income doesn't clearly fall under any specific head of income as per item A to E of S. 14. But where such income find place under a particular head being business or profession, then there is no scope of invoking S. 56 in the context of S. 14. On the other hand, a clear reading of S. 115BBE provides that it is only such income which is of the nature of

S. 68/69A and so on with reference to which only S. 115BBE could be invoked. When the additional income is clearly identifiable and related to the real estate business is certainly assessable as business income and cannot be considered as income falling under S. 68/69A of the Act as held by the Ld. CIT. The Ld. CIT also failed to appreciate that the survey was carried out in the mid of the previous year where accounts were yet to be closed on 31st July 2017. Unless the previous year comes to an end and the accounts are finalized and produced before the assessing officer, the assessee placing reliance there upon for the purpose of computation of income, it cannot be said conclusively that some item of receipt is in the nature of unexplained cash credit u/s. 68 or unexplained money under S. 69A of the Act. In view of the above deliberation, we are fortified in our view by certain decisions on the point of invoking S. 115BBE in similar situation. The Hon'ble Rajasthan HC in the case of CIT vs Bajargan Traders in ITA No. 258/2017 dated 12.09.2017 (copy of which was supplied by the Ld. AR) has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under

the head income from other sources. The finding of ITAT Jaipur Bench in the case of CIT vs Bajargan Traders (supra) is as under:

> *"We have heard the rival contentions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814/- towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transAction by debiting the purchase account and crediting the income from undisclosed sources. In the annual accounts, the purchases of Rs. 70,04,814/- were finally reflected as part of total purchases amounting to Rs. 33,47,19,658/- in the profit and loss account and the same also found included as part of the closing stock amount to Rs. 1,94,42,569/- in the profit/loss account since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of RS. 70,04,814/- also found credited in the profit and loss account as income from undisclosed sources. The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss therefrom would be subject to tax as any other normal business transaction. Secondly, the 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 made out of known source, there was no necessity for assessee to credit the profit/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 and the accounting treatment thereof so as to regularize its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future. 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 foodgrains,*

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 decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore, the investment in the excess stock has to be brought to tax under the head "business income" and not under the head income from other sources". In the result, ground No. 1 of the assessee is allowed.

Further the coordinate bench in the case of Shri Ram Narayan Birla in ITA No. 482/JP/2015 dated 30.09.2016 has held that unrecorded/excess investment or expenditure surrendered during the course of the survey has to be assessed as business income only and not under the head income from other sources, following the case of**ChoksiHiralalMangal vs. DCIT 131 TTJ 1 (Ahd)** , which has held that

"in a cases where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premises that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/expenditure with the known head, give opportunity to theassessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head."

Similar view has been expressed by the ITAT Jodhpur in case of Shri LovishSinghal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25.05.2018) applying the ratio propounded in case of Bajargan Traders (supra) holding that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found u/s 69 of the Act and accordingly held that there is no justification for taxing such income u/s 115BBE of the Act. Although there are several decisions but we do not wish to multiply the same. It is further noted that the decision of the Hon'ble jurisdictional HC in the Bajargan Traders (supra) was rendered on dated 12.09.2017. Similarly the decision of the honorable ITAT Jaipur in Shri Ramnarayan Birla (supra) was rendered on 30.09.2016 (and there may be some more decisions which were passed) and were available much earlier to 04.07.2016, when the assessment order was passed. Since the AO acted in accordance with the law prevailed on the date of the passing assessment order hence, no fault can be found in his action and in particular, proceeding u/s 263 cannot be invoked in such a case as was held in CIT vs. G.M. Mittal Stainless Steel (P.) Ltd. [2003] 130 Taxman 67/263 ITR 255 (SC) (copy placed at DPB 33-35). Also refer CIT,Bangalore vs. Canara Bank[2021] 123 taxmann.com 207 (Karnataka). Further we find that in the case of Narayan TatuRane Vs. ITO, ITAT Bench [2013) 7 NYPTTJ 1493 (Mum] held that newly inserted Explanation 2(a) to S. 263 does not authorize or give unfettered powers to

Commissioner to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made. As noticed above in this case also the AO having already applied its mind (directly or indirectly) and the ld. CIT(A) without appreciating the existing binding judicial pronouncements and also ignoring the directly relevant facts, was not justified in expecting the AO to apply S.115BBE as also S.271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind the said Expl. hence, there was no error in the assessment order. One more aspect taken note and made a basis by the Ld. Pr. CIT is that the assesse, while showing the additional income so admitted in its return of income in the computation of its total income shown under the head income from other sources. Although he has not very clearly made this fact as a basis of finding error in the assessment order yet however, the law, on this aspect is very well settled that there can't be any *estoppels against statute*. It cannot be denied that showing income, in a particular head of income enumerated under Sec. 14 read with various other heads, is a highly technical task and even the Tax Consultants and Charted Accountants may not correctly decide the proper classification under which head such income to be declared and/or assessed. Therefore, merely because the assesse had taken the mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources, of the surrounding

circumstances and the binding decisions of Hon'ble Rajasthan High Court and ITAT, Jaipur. Such an acquaintance cannot take away the right of a party to which he is otherwise entitled to, or in other words, to be assessed as business income. Law is also, well settled that, no tax can be collected without the authority of law as guaranteed by Article 265 of the Constitution of India. Therefore, even if the assessee has made some commitment but later on found wrong in law, it cannot work as an estoppel and the assessee, if still feels aggrieved in any manner, can pursue legal remedy. Hence, showing income under a wrong head in the return of income cannot be taken as an admission. We are fortified in our view by various decisions of different Hon'ble High Courts in the cases of-

CIT vs. M. Pyngrope (1993) 200 ITR 106 (Gau.), wherein it was held that:"*Appeal (AAC)—Maintainability of appeal—Scope—Denial of liability by assessee within the meaning of S.246(1)(c)—Has wide import and such denial may be by way of appeal—It is not necessary that assessee should have denied liability in return itself."*

CIT vs. Apar Limited (2002) 175 CTR 312 (Bombay), wherein it was held that: *"Appeal [CWT(A)]—Maintainability of appeal—Intimation under s. 16(1)(a)(i)—Return filed under protest—Thereby assessee disputed his very liability to wealth-tax—AO could not have foreclosed assessee's right to appeal by issue of intimation under s. 16(1)(a)(i)—Appeal maintainable under s. 23(1A) (a)"*

Mayank Poddar (HUF) vs. WTO (2003) 181 CTR 362 (Calcutta)(DPB 36-39),wherein it was held that: *"Estoppel—Applicability of principle—Interpretation of statutes—Scope—There is no estoppels against statute—Property, though not taxable under the WT Act, included by assessee in taxable net wealth by misconception of law—Property does not become taxable.*

x x x x

A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable."(Para 11)"

It is thus, held that the additional income was in the nature of business income and don't fall under Sec. 68 and/or Sec. 69 of the Act and consequently therefore, Sec.115BBE could not have been invoked. In view of the above discussion, therefore, we are of the considered view that the Ld. Pr. CIT was not at all justified by invoking the provisions of Sec. 263 by wrongly/incorrectly holding that the subjected assessment order u/s 143(3) dated 25.02.2019, was passed without considering that the income declared under the head of other sources of Rs 28,95,300/-, being recovery of cash amount of advances paid for purchase, comes under preview of S. 68 and 69 of the Act and thus, the tax u/s 115BBE was to be paid, as against the tax at normal rates. The assumption of jurisdiction u/s 263 was contrary to the law and facts on record. Hence, the proceedings initiated u/s 263 of the Act and the impugned order dated 25.02.2019 are hereby quashed. Thus, ground of appeal nos. 1,2 & 4 are decided in favour of assess and against the revenue.

3.1 In Ground No.-3, the assessee has challenged the assumption of jurisdiction u/s 263 for not initiating penalty proceedings u/s 271AAC of the Act. The Ld. CIT held that the additional income was also subjected to penalty u/s 271AAC of the Act and accordingly set aside the subjected assessment order.

3.2 After hearing both the parties and perusing the materials available on record as well as judicial pronouncements cited by both the parties, we at the outset have no hesitation to hold that the issue involved is no more res integra in as much as the Hon'ble Rajasthan HC in the case of **CIT vs KeshrimalParasmal [1986] 27 Taxmann 447 (Raj),** held as under:

> *"In J.K. D'Costa's case (supra), it was held that* ***the Commissioner was not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings.*** *The Supreme Court has dismissed the special leave petition in the said case in Special Leave Petition (Civil) Nos. 11391 and 11392 of 1981, dated 2-3-1984 [1984] 147 ITR (St.) 1. As* ***the position was concluded and settled by the Supreme Court,*** *the question which was sought to be referred could not be said to be a substantial question of law arising out of the Tribunal's order. It was only a question of academic nature."*

There are several other decisions cited by the ld. AR of the assessee for which no contrary decision was brought to our notice. Hence we are of the considered view that the ld. Pr. CIT acted beyond jurisdiction in holding that the additional income

was subjected to penalty u/s 271AAC of the IT Act. Thus Ground No. 3 of the assessee is allowed

4.0 In the result, the appeal of the assessee is allowed

Order pronounced in the open court on 16/08/2022

Sd/-	Sd/-
(राठोड कमलेश **जयन्तभाई**)	(संदीप गोसाई)
(Rathod Kamlesh Jayantbhai)	(Sandeep Gosain)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 16 /08/2022
*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. The Appellant- Smt. Rekha Shekhawat, Kota Beawar
2. प्रत्यर्थी / The Respondent- The Pr. CIT, Udaipur
3. आयकर आयुक्त / The ld CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 7/JP/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar