

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "H": NEW DELHI  
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 1080/Del/2022  
(Assessment Year: 2017-18)

Vikas Kumar, C/o. M/s. Mittan Misthan Bhandar, Kishan Pura, Panipat Harayana (Appellant)	Vs. Pr. CIT, Rohtak	(Respondent)
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PAN: **AQUPB4237A**

Assessee by :	Shri Pancham Sethi, CA
Revenue by:	Ms. Richa Khoda, CIT DR

Date of Hearing	17/10/2022
Date of pronouncement	02/11/2022

O R D E R

**PER ANUBHAV SHARMA, J. M.:**

1. The present appeal has been preferred by the Assessee against the order u/s 263 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') dated 23.03.2022 of Ld Pr. Commissioner of Income Tax, Rohtak (hereinafter referred as Ld. Pr. CIT or in short Revisional Authority) against the order dated 24.12.2019 passed 143(3 by the Assessing Officer, Id. ACIT, CIT, Ward No. 1, Panipat (hereinafter referred as the Ld. AO).

2. The facts in brief are that the assessee is an individual and is deriving income from his proprietorship firm i.e. M/s Mitthan Misthan Bhandar. The assessee had filed his original income tax return for A.Y. 2017-18 on 27.03.2018 showing an income of Rs. 67,88,010/-. It appears that a Survey action u/s 133A of the Income Tax Act, 1961 was carried out at the premises of the assessee on 17.08.2016

wherein the assessee had admitted additional income of Rs. 65,00,500/- largely on account of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery. Ld. Revisional Authority to observed that he assessee had also shown surrendered income as normal business income in his original ITR. Ld It was of view that in view of amended provisions of Section-115BBE with Taxation Laws(Second Amendment) Act, 2016, the assessee was required to pay tax u/s 115BBE (Maximum Marginal Rate) on unexplained income in nature of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery surrendered during the course of survey proceedings. It was of view that the surrendered income represented the undisclosed income of the assessee which would have never come to light had there been no survey action upon the assessee u/s 133A of the Act. Since the assessee had not objected for the income surrendered amounting to Rs. 65,00,500/- during survey proceedings and this income comprises of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery. Thus, the same could not be treated as normal business income and whole of the unexplained income has to be considered u/s 68 to 69D of the Act. It was of view that the Ld. AO failed to consider the same and the Ld. AO had failed to invoke the provisions of section-68/69/69A/69B/69C of the Act on the above surrendered income as the same was clearly unexplained in nature, therefore, cannot be treated as normal business income and the A.O has also failed to enquire as to why the assessee had paid taxes at normal tax rate instead of maximum marginal rate as per Section-115BBE of the Act, which was clearly erroneous and prejudicial to the interest of revenue.

3. Accordingly notice u/s263 was issued and reply of assessee was considered and the Ld Revisional authority concluded;

*"I have carefully examined the facts of the case and the submissions filed by the assessee. From the perusal of assessment record, it appears that the assessee had surrendered income amounting to Rs. 65,00,500/- during the course of survey u/s 133A, on account of unexplained cash, unexplained advances to suppliers and unexplained investment in plot and jewellery."*

For clarity the declaration filed by the assessee before the JCIT, Range Panipat dated 17.08.2016 during the survey was pasted and Ld Revisional authority observed:-

*"From the above declaration letter of the assessee it is quite clear that this income has been surrendered on account of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery covered u/s 68/69/69A/69B/69C of the Act. The same is therefore liable to be taxed @60% u/s 115BBE of the Act. However, while filing the return of income the assessee had disclosed this amount as normal business income for the A.Y. 2017-18 and had paid taxes as per normal slab rates. It is relevant to mention here that the surrendered income was in the nature of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery and the same was liable to be added u/s 68/69/69A/69B/69C of the Income Tax Act, 1961 and tax was liable to be paid at the rate of 60% u/s 115BBE of the Act. However, the assessee failed to submit any proper reasons/explanation for showing the surrender income as normal business income. There is no doubt that the surrender income represented the undisclosed income of the assessee which would have never come to light had there been no survey action upon the assessee u/s 133A of the Act. Since the assessee had not objected for the income surrendered*

*amounting to Rs. 65,00,500/- during survey proceedings and this income comprises of unexplained cash, unexplained advances to suppliers & unexplained investment in plot & jewellery . Thus, the same could not be treated as normal business income and all the unexplained income have to considered u/s 68 to 69D. However, the AO failed to do so. From the plain reading of the amended section-115BBE, it is also clear that the same is having effect from 01-04-2017 i.e. commencing date of assessment year 2017-18. As the amendment in Finance Act, 2016 was brought before 01-04-2017, the same is applicable on the A.Y. 2017-18 in full spirit. The government has again cleared its intentions by bringing all the income surrendered during survey under the purview of Section-115BBE vide Finance Act, 2022 only to mitigate litigations. Therefore, the assessee failed to submit any proper reasons/explanations for showing the surrendered income as normal business income and paying taxes at normal slab rates. Thus, the AO should have invoked the provisions of section-68/69/69A/69B/69C of the Act on the above surrendered income as the same was clearly unexplained in nature, therefore, cannot be treated as normal business income and made tax computation at maximum marginal rate as per Section-115BBE of the Act. However, the AO had failed to do so. Therefore, the order of the AO was erroneous and prejudicial to interest of revenue. Consequently, a show-cause notice u/s 263(1) was issued to the assessee. In reply dated 06.03.2022 to the show cause notice, the assessee mainly relied on the ratio of case law of Hon'ble ITAT in the case of Hari Narain Gattani vs DCIT, Circle, Jaipur regarding non-applicability of section -115BBE in his case. However, the fact of the present case is different from the said case law. In the mentioned case law, the Hon'ble ITAT only held that the action*

*of the Assessing officer in rectifying and increasing the rate of taxation from 30% to 60% and surcharge and cess on such undisclosed income doesn't come within the purview of section 154 of the Act. However, in the present case, the order of the AO is clearly erroneous and prejudicial to the interest of revenue for which proceedings u/ 263 of the act has been initiated. Hence, the reply submitted by the assessee is not acceptable being devoid of merits. In reply to show cause notice, the assessee also submitted that the provisions of Section-263 cannot be invoked in a case where the assessing officer had taken a possible view which is not in consonance with the opinion of the CIT. However, in the present case, the AO failed to take action only possible view of applying Section-115BBE @60% on surrendered income after taking cognizance of prevalent provisions. Thus, in view of the case law Malabar Industrial Co. Ltd V/s CIT in 243 ITR 83(SC), the AO erred in terms of provisions of Section-263 of the Act, as the AO's order is erroneous and prejudicial to the interest of revenue. Thus the reply submitted by the assessee is unacceptable being devoid of merits."*

4. Assessee is in appeal raising following grounds;

*"1. That on the facts and circumstances of the case, the Pr. CIT has erred in law in invoking the provisions of section 263 of the Income Tax Act, 1961.*

*2. That on the facts and circumstances of the case, the Pr. CIT has erred, both on facts and in law, in forming the view that the income surrendered by the appellant, during the survey proceedings shall not be considered as normal business income and is required to be taxed as per the special provisions.*

*3. That the PCIT has erred in law & on facts in applying the provisions of Section 115BBE in the instant case, ignoring that*

*the same is not applicable in the given case, as the amended provisions of the Statute, came into operation by Taxation Second Amendment Act, 2016, w.e.f. 15.12.2016 and hence could not be considered as applicable prior to 08.11.2016, in the present case the income was surrendered during the survey proceedings which was conducted in the case of the appellant on 17.08.2016.*

*4. That in the given facts and circumstances of the case, the PCIT has erred in law in invoking the provisions of section 263, also on the amount of Rs. 42 lacs (included in the total surrendered amount), which pertains to the purchase of property in ELDECO made by Smt. Poonam Bansal i.e. wife of the appellant, ignoring that no part of the investment has been made by Appellant.*

*5. That the view taken by the PCIT while invoking the provision of 263 is against the settled jurisprudence that when two views are possible, the one which is beneficial to an assessee shall be taken.*

*6. That the appellant craves leave to add, amend, alter, vary and/ or withdraw any or all the above grounds of appeal before or at the time of hearing of the appeal."*

5. Heard and perused the record.

6. It was submitted on behalf of the assessee that the coordinate bench in ITA No. 570/Del/2022 for Assessment Year 2017-18 in case of **Shri Balwinder Singh Vs. Pr. CIT** vide order dated 24.08.2022 has taken into consideration the similar circumstances where the Id Pr. CIT has invoked powers of section 263 in a case where the assessee had surrendered an income pursuant to a survey operation. It was submitted that the coordinate bench has held that section 115BBE before or after amendment does not provide that where the assessee surrender undisclosed income during the survey action for

the relevant year the tax rate has to be charged as per provision of section 115BBE of the Act and the applicability of amended provision is debatable issue for which jurisdiction u/s 263 could not be invoked. It was submitted that the assessment order was passed by the Ld. AO after taking into circumstances that the surrendered income was business income and there was no error requiring invocation of powers of section 263.

7. On the other hand the Id DR submitted that the Id Pr. CIT has merely directed the AO to take into consideration the amended provision. Section 115BBE and considered the surrender income to be falling under the provision of section 68/69/69A/69B/69C the Id AO had failed to take those provision into consideration.

8. Now by appreciating the assessment order it can be observed that during the course of survey proceedings certain loose documents were found and impounded on the basis of which the assessee declared an additional income of Rs. 65,00,500/- during the year under consideration. It is not disputed that the assessee has duly shown an additional income declared in his income tax return for the year under assessment and has paid due tax on this amount. It is also not disputed during the course of assessment proceedings the assessee has filed a reply submitting that in the aggregate amount of surrender of Rs. 65,00,500/- includes an amount of Rs. 42 lakhs offered on account of investment in the purchase of immovable property.

9. In this context on page Nos. 1 to 8, the copy of the statement of the assessee recorded during the course of survey proceedings is available in paper book submitted by the assessee. At page No. 5 of the statement of the assessee was question with regard to excessive cash of inventory of Rs. 9,75,500/- and which the assessee having failed to explain and he offered over and above regular income. Further the assessee was asked to explain the difference of Rs. 3,75,000/- being in the stock inventory. The same was also offered

as additional income over and above regular business income. The assessee was then questioned to explain the entry of Rs. 3,46,500/- available in the diary about purchase of jewellery which was also offered by him over and above regular income. The assessee was question with regard to buying a plot of Rs. 38 lakhs at Eldico, Panipat for which he explained that he had bought the plot for Rs. 42 lakhs which includes stamp duty and as he was not able to explain the source of Rs. 42 lakhs then he offered an additional income of Rs. 42 lakhs over and above the regular income. Then during the survey a diary was found where entry was shown of an advance to supplier of Rs. 6,03,500/-. Again not having any explanation about the source he offered it as additional income over and above regular income.

10. The assessment order show that the Ld. AO was satisfied that the assessee has filed his income tax return declaring alleged amount of surrender of Rs. 65,00,500/- and has paid due taxes on the entire amount of surrender. However, has not accepted the claim of the assessee that the purchase of plot by wife of assessee was from her own resources.

11. However, the addition was made on ground that the Id AO was doubtful of the total sales for which he observed in para 5 of his order as under:-

*"5. Perusal of the impounded diaries reveals that the assessee has recorded the total sales approximately Rs. 50 lakh upto the date of survey i.e. 17.08.2016 which comes to Rs. 10,00,000/- per month approximately whereas the assessee has shown total sales at Rs.37.50 lakh in his Income Tax Return for the period from 01.04.2016 to 31.03.2017. The assessee has declared net profit of Rs.3,00,000/- @8% u/s 44AD of the Act. Accordingly, show cause notice was issued to the assessee on 22.12.2019 vide which he was asked as to why the total sales for the F.Y. 2016-17 may not be estimated at Rs. one crore. Further, the assessee was show caused as to why net profit @8% may not be applied which comes to Rs.8,00,000/- and addition of Rs.5,00,000/- (800000-300000) was proposed to be made to his taxable income."*

12. The assessee had replied to the same submitting that:-

*"Kindly refer to your notice dated 20/12/2019 proposing to estimate sales of business at Rs. One crore as against 3475000/-declared by me it is respectfully replied that up to the date of survey I have declared sale of Rs. 1400000/- approximately because the profit earned out of sales less shown at Rs. 36 lacs sales approximately has been offered in additional business income offered in form of excess cash rs.975500/-, excess stock Rs.375000/- resulted from profit earned on sales not included in total sales and advances to suppliers surrendered at Rs. 603500/- were also advances out of income earned on sales up to the date of survey less shown/ not included in total sales offered in return of income. I had to pay huge amount of income tax after survey therefore due to depression I could not pay full attention to my business and my sales declined in post survey period. I have declared sales of Rs. 2345000/- for 7 months after the post survey period.*

*By any estimate my total sales for the year under consideration including the sales not shown up to survey period is not more than 74 to 75 lakhs. On the excess sales up to survey period I have already offered additional business income of Rs. 1954000/- in form of advances to suppliers, diff in stock and excess cash thus net profit on the sales less shown up to the date of survey may not be twice added to my income as alleged.*

*The total surrender was made in view of various documents gathered during survey and these were before the survey party and on the basis of discrepancies in documents impounded. The income surrendered is profit generated out of excess turnover documents impounded hence the said discrepancy may not be treated to make additions over and above the amount already surrendered."*

13. The AO thus concluded as under:-

*"5.1 The reply filed by the assessee has duly been considered but not found tenable. The assessee has submitted that he has declared sales at Rs.14,00,000/- approximately upto the date of survey because the profit earned out of sales of Rs.36 Lakh has been offered as additional income in the form of cash, excess stock and advances to suppliers. Further, the assessee has submitted that he has shown total sales of Rs.23.50 (37.50 Lakh -14 Lakh) Lakh which is over and above the sales shown at the time of survey. Thus, the assessee has himself admitted that there was total sale of Rs.50 lakh approximately upto the*

*date of survey, therefore, it is justified to estimate the total sale of the assessee to Rs. One crore for the financial year under consideration. However, to meet the end of natural justice, the total sales declared upto the date of survey is considered upto Rs.50 lakh and reduced out of total sales determined for the whole financial year. Thus, the undisclosed sales is treated at Rs.26.50 lakh (One Crore - 73.50 Lakh) and net profit @8% i.e. Rs.2,12,000/- is determined and added to the taxable income of the assessee. I am satisfied that the assessee has miss reported his income to the extent of Rs.2,12,000/-, penalty proceedings under section 270A of the Income Tax Act, 1961 are initiated separately.*

*[Addition of Rs.2,12,000/-*

*With the above observations, total income of the assessee is computed as under:*

Total Returned Income	67,88,010/-
Addition made as discussed in Para no. 5.1	2,12,000/-
Total Assessed Income	70,00,010/-

14. The Bench is of considered opinion that for invoking the deeming provisions u/s 69, 69A, 69B and 69C there should be clearly identifiable asset or expenditure. In this context, reference can be made a judgment of Ahmadabad Bench ITA No. 3281/Ahd./2009 **M/s. Chokshi Hiralal vs. DCIT** where the Co-ordinate Bench observed in para 13 as follows :-

*"13. Thus in a case 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 the assessee to establish nexus and. if it is satisfactorily established then first such investment, should be considered, as undeclared receipt under that particular head. It is only where no nexus is established with any head 'then it should' be considered as deemed income under section 69, 69A, 69B & 69C as the case may be.** It is because when assessee fails to explain satisfactorily the source of such investment then it should be taxed under section 69, 69A, 69B & 69C as the case may be. It should not 'be done at the first instance without giving opportunity' to the assessee to establish nexus. Therefore, there is no conflict with the decision of Hon. Gujarat High Court in the case of Fakir Mohmed Haji Hasan (supra) where investment, in an' asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. Therefore, we hold that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral, and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment."

15. However, what has occurred in the present case is that the Ld. AO has not attempted to enquire as to if the surrendered amount was actually income from business only. The Ld. AO accepted the surrendered amount as assessee had filed return and paid tax upon the amount of surrender. Ld. AO on the basis of surrendered amount

merely proceeded to revalue the reported quantum of sales and in that attempt escaped considering applicability of provisions of Section 115 BBE.

16. It is apparent that during survey the information collected had nothing to do with the business turn over alone and the investments were in jewellery and properties were also disclosed. The onus was on the assessee to establish that income from the business alone was used to acquire these and to the contrary that the Ld. AO had assumed the turn over exceeded the declared turn over to justify the surrendered income in the form of property and jewelry. Thus, there was failure on the part of the Ld. AO to accept the return of the assessee without enquiring as to if the income disclosed was actually business income only. In that way the assessment order was erroneous and prejudicial to the interest of revenue and rightly interfered by the Ld. PCIT.

17. The judgment relied by the Ld. Counsel for the assessee/ appellant in **Shri Balvinder Singh vs. PCIT** of the Co-ordinate Bench is not applicable to the present facts and circumstances as in that case there was no dispute about investments in immovable property or jewellery. The surrendered income of 1.50 crores was cash 9.50 lakhs , stock 22.50 lakhs renovation of building Rs. 20 lakhs and undisclosed shares Rs. 98 lakhs. However, in the case in hand the difference in stock inventory was merely Rs. 3,75,000/-, difference in cash inventory was 9,75,000/-, advances to suppliers were 6,35,000/- which may be considered to be having nexus with the business but the investments of Rs. 38 lakhs in the plot and Rs. 3,46,500/- in jewellery have not been examined by the Ld. AO as to if they were also proceed of undisclosed sales so as to be accepted in the return of income and on the rate of tax paid or to otherwise invoke provisions of 115BBE of the Act.

18. Thus Ld. ACIT has fairly directed the AO to inquire about applicability of Section 115BBE along with explanation 2 inserted by Finance Act, 2015. In the light of aforesaid discussion, the Bench is of considered opinion that impugned order does not require interference. There is no substance in the grounds. **The appeal is dismissed.**

Order pronounced in the open court on 2/11/2022.

Sd/-

(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Sd/-

(ANUBHAV SHARMA)  
JUDICIAL MEMBER

Dated:2/11/2022  
A K Keot / Binita

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
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ASSISTANT REGISTRAR  
ITAT, New Delhi