

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SMT. DIVA SINGH, JM & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA NO. 454/CHD/2022

निर्धारण वर्ष / Assessment Year : 2017-18

M/s Agya Ram Manohar Lal Karnail Singh Road, Khanna-141401	बनाम	The Pr. CIT (Central), Ludhiana
स्थायी लेखा सं./PAN NO: AACFA4974B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate

राजस्व की ओर से/ Revenue by : Shri Vivek Nangia, CIT -DR

सुनवाई की तारीख/Date of Hearing : 08/09/2022

उद्घोषणा की तारीख/Date of Pronouncement : 10/11/2022

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of Learned Principal Commissioner of Income Tax (Central), Ludhiana [in short the 'Ld. PCIT(C)'] passed u/s 263 of the Income Tax Act, 1961 (in short 'the Act') dated 24/03/2022 pertaining to assessment year 2017-18, wherein the Assessee has taken the following grounds of appeal:

1. "That the Ld. PCIT(C) has erred in assuming the jurisdiction u/s 263(1) of the Income Tax Act, 1961 by issuing notice u/s 263 and setting aside the issue to the file of Ld. Assessing Officer for applying the rate of tax u/s 115BBE on the quantum of addition sustained by the Ld. CIT(A).

2. That the Ld. PCIT (Central) has also erred in not considering the fact that earlier the assessment was framed after due application of mind and whereas, the Assessing Officer had taken a conscious decision to apply the normal rate of tax and, as such, the observation of PCIT is against the factual facts and circumstances of the case.

3. That the Ld. PCIT has failed to appreciate that the order of AO having merged with the order of the CIT(A), the assumption of jurisdiction by the Ld. PCIT is bad in law.

4. *That the submissions filed before the PCIT (Central), vide order, dated 11.02.2022 have not been considered properly.*
5. *That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed-off."*

2. Briefly the facts of the case are that search and seizure operations were carried out in case of M/s Roop Square Group at its various business and residential premises including that of the assessee on 01.11.2017 and thereafter, in pursuance to notice u/s 153A on 14.02.2019, the assessee firm filed its return of income on 12/06/2019 declaring total income of Rs. 7,80,640/- thereafter the assessment was completed under section 153A on 28/12/2019 at an assessed income of Rs. 1,98,50,680/- by making an addition of Rs. 1,36,18,520/- as normal business income and Rs. 42,04,640/- under section 69C of the Act and Rs. 12,46,878/- under section 69 of the Act.

2.1 Subsequently, the assessment records were called for and examined by the Ld. PCIT(C) and it was observed that the tax was calculated at normal rate on whole of the assessed income whereas on the additions made under section 69C as well as under section 69, the tax has to be calculated under section 115BBE of the Act and the same has resulted in short levy of tax and interest amounting to Rs. 31,60,394/- and accordingly, a show cause u/s 263 dt. 27/03/2021 was issued to the assessee as to why the assessment order so passed be not set-aside as being erroneous in so far as prejudicial to the interest of the Revenue.

2.2 In response, the assessee submitted before the Id PCIT that being aggrieved with the assessment order, the assessee has moved in appeal before the Ld. CIT(A) who has since passed an order wherein the addition of Rs. 42,04,640/- has been reduced to Rs. 28,37,506/- and addition of Rs. 12,46,878 has been reduced to NIL. It was also submitted that since the assessment order dt. 28/12/2019 has been subjected to appeal, the AO's order would get merged

with the order of the Ld. CIT and the same cannot be subject matter of revision u/s 263 of the Act.

2.3 It was further submitted that the AO was consciously clear that since addition were made under section 69 and 69C, the tax will be charged under section 115BBE and applying his mind and knowing the fact that tax has to be calculated by applying provisions of Section 115BBE of the Act, the AO applied tax rate @ 30% as was requirement of the Act for the assessment year under consideration.

2.4 The submissions so filed by the assessee were considered but not found acceptable to the Ld. PCIT(C). As per the Ld. PCIT(C), as far as the quantum of addition is concerned, the same is subject matter of appeal before the Ld. CIT, however, as far as the rate of tax be applied to such income is concerned, the said issue was neither agitated nor adjudicated by the Ld. CIT and therefore as far as the rate of tax to be applied, the same can be subject matter of revision under section 263 read with explanation 1(c) of the Act. Therefore, in view of the same, the submission of the assessee cannot be accepted that since the assessment order dt. 28/12/2019 has been subjected to appeal, the AO's order would get merged with the order of the Ld. CIT.

2.5 It was further held by the Ld. PCIT(C) that while framing the assessment, the AO has made addition under section 69C of the Act amounting to Rs. 42,04,640/- and referred to the findings of the AO in para 3.11 of the assessment order, and under section 69 of the Act amounting to Rs. 12,46,878/- and referred to AO's findings at para 5 of the assessment order, however, the AO has failed to apply the rate of tax as per section 115BBE of the Act. The Ld. PCIT accordingly directed the AO to apply rate of tax as per section 115BBE on the quantum of addition sustained by the Ld. CIT(A) and to that extent, the

assessment order passed by the AO was set aside. Against the said findings and direction of the Ld. PCIT, the assessee is in appeal before us.

3. During the course of hearing, the Ld. AR submitted that against the order of the Ld. CIT(A), both the assessee as well as the Department went in appeal before the Tribunal and Tribunal vide order dt. 19/05/2022 has reduced the quantum of additions of Rs. 28,37,506/- to Rs. 10,71,106/- and as far as the addition of Rs. 12,46,878/- which was deleted by the Ld. CIT(A), the same is confirmed by the Tribunal. It was accordingly submitted that the effective addition which now stand is the amount of Rs. 10,71,106/- under section 69C as so confirmed by the Tribunal vide its order dt. 19/05/2022.

3.1 As regards the applicability of provision of section 115BBE is concerned, it was submitted that the AO passed a detailed order after due application of mind and the said order was further approved by the Add.CIT under section 153D of the Income Tax Act and therefore where the Sr. Officer has also applied his mind to all the issues, it can be said the AO has taken a conscious decision and it can be said that he has taken the possible view and it cannot be subject matter of revision under section 263 of the Act. In support, reliance was placed on the decision of Hon'ble Andhra Pradesh High Court in case of PCIT Vs. Deccan Jewellers Pvt. Ltd. reported in (2021) 438 ITR 131 as well as decision of the Coordinate Chandigarh Benches in case of M/s Sham Jewellers and M/s Shyam Fashion Mall (*ITA No. 275/Chd/2022 and 315/Chd/2022 vide order dt. 22/08/2022*) wherein it was held that where the assessee has no other source of income either disclosed or unearthed by the Revenue except business income, the invocation of provisions of section 115BBE was held not to be in order. It was submitted that the facts in the present case are on stronger footing as it is a case under section 263 where the AO has already taken a possible view unlike the aforesaid decision where the matter under appeal relates to assessment order u/s 143(3)/153 of the Act.

3.2 It was further submitted that even the Ld. PCIT(C) was not of confirmed view as to whether the provisions of Section 115BBE are applicable or not as in para 6 of the impugned order, he has merely set aside the matter to the file of the AO to pass a fresh order keeping in mind the observation made in the impugned order. It was submitted that though the Ld PCIT has held that the AO will apply rate of tax u/s 115BBE after giving opportunity to the assessee, the finding so recorded by the Ld. PCIT(C) in para 6 is contradictory and is not a confirmed finding and therefore where the Ld. PCIT(C) himself was not clear and of the confirmed view, the order under section 263 deserves to be quashed.

4. Per contra, the Ld. CIT/DR submitted that the contention of the Ld AR that the Ld PCIT has not recorded a specific finding regarding applicability of rate of tax as per section 115BBE is concerned is not correct and our reference was drawn to para 6 of the impugned order where specific finding has been recorded by the Ld PCIT. Further, our drawn our reference to the detailed findings of the AO wherein the addition have been made under section 69C as well as under section 69 of the Act and it was submitted that where the AO has invoked the provision of Section 69C and 69 of the Act and there is a complete failure on the part of the assessee to furnish any explanation, provision of Section 115BBE are clearly attracted. It was accordingly submitted that there is no infirmity in the order so passed by the Ld. PCIT and the same should be confirm. In support, reliance was placed on the decision of Hon'ble Punjab & Haryana High Court in case of Pr. CIT Vs. M/s Khushi Ram & Sons Food(P) Ltd. in ITA No. 126 of 2015 (O&M) vide order dated. 21/07/2016 and in case of M/s Kim Pharma (P) Ltd. Vs. CIT 216 Taxman 153 and decision of Hon'ble Gujarat High court in case of Fakir Mohmed Haji Hasan Vs. CIT 120 taxman 11.

5. In his rejoinder, the Ld. AR submitted that the Ld. CIT, DR had argued that once the Assessing Officer having mentioned in the order, while making the addition u/s 69C as per para 3.11 of the Assessing Officer's order, then the

provisions of section 115BBE are automatically applicable is not correct. It was submitted that Section 69 clearly states, that if the assessee does not offer the source of expenditure or any explanation or he offers some explanation, but in the opinion of the Assessing Officer that explanation is not satisfactory only then, section 69 can be invoked and merely writing of section 69C would not suffice that the provisions of section 115BBE are applicable. Thus, there has to be clear cut finding and satisfaction recorded by the Assessing Officer before the provisions of section 115BBE or section 69C are invoked. It cannot be automatic and there are certain checks and controls, before invoking section 69 or provisions of section 115BBE. The said view has been taken by the Hon'ble Bench in the case of Sh. Gandhi Ram in ITA No. 121 /Chd/2021 and reliance is being made to para 7, 8 & 9 of the order and, thus, the observation of the Ld. DR is not correct.

5.1 As regards the judgment of 'M/s Kim Pharma' relied upon by the Ld. CIT/DR, it was submitted that the same has been considered by the Chandigarh Bench of the ITAT in the case of 'M/s Sham Jewellers' at page 128 of the Paper Book, filed by the assessee in para 10.22, and the judgment of 'Fakir Mohamded Haji Hasan' was also part and parcel of the judgment referred to in the case of 'Kim Pharma'. Thus, in a way, that judgment have been considered by the Bench, while giving the judgment in the case of M/s Sham Jewellers and Others.

5.2 Further, referring to the judgment of Chandigarh Bench in the case of M/s Sham Jewellers, it was submitted that as per ground No.5, there is reference to section 69, with regard to addition on account of unaccounted investment in stocks and then again at page 86, again there is reference to excess cash u/s 69 and by way of ground No.8 & 9, the challenge has been made on account of the judgement in the case of Kim Pharma. Thus, the arguments of the CIT, (DR) that whether this invoking of section 69 was or not there in the case of M/s

Sham Jewellers, it is submitted that by going through the order in the case of M/s Sham Jewellers, there also the addition was made u/s 69A. Then again at page 107, there are grounds of appeal with regard ITA No. 315/Chd.2022 in the case of M/s Sham Fashion Mall and then finding has been recorded by the Bench at page 124 to page 129, holding that the provisions of section 115BBE are not applicable.

5.3 It was submitted that the judgment of M/s Khushi Ram & Sons as quoted by the Ld. CIT,(DR) has been taken note off in the judgment of 'M/s Famina Knit Fab' and which has duly been considered in the case of M/s Sham Jewellers in para 10.19, page 126 and after discussing the various judgments and also the judgment of 'Kim Pharma' and referring to section 69, 69A, 69B, 69C and various other cases and the provisions of the Act, a detailed order has been passed. Similarly, the judgment of 'M/s Khushi Ram and Sons' have been discussed by the Chandigarh Bench in the case of 'M/s Khurana Rolling Mills' and 'M/s Khurana Steels' and reference has been made to page 9, 12 and page 17 of that judgment and while giving the judgement, the Bench have relied on the judgment of 'Famina Knit Fab', which have been discussed in the case of M/s Sham Jewellers, at page 126. Thus, all the judgments as cited by the Ld. CIT, DR have been considered by the Bench in the case of M/s Sham Jewellers.

5.4 Further, it was submitted that this is a case u/s 263 and the reliance is being placed in the case of Sh. Gandhi Ram (*Supra*) and also on the judgment of Andhra High Pradesh in the case of PCIT Vs Decan Jewellers, reported in 438 ITR 131 as per page 125 and being a debateable issue, the order of the Ld. PCIT may be set-aside.

6. We have heard the rival contention and perused the material available on the record. It is noted that the AO while passing the assessment order has made an addition towards unexplained expenditure of salary under section 69C

of the Act amounting to Rs. 42,04,640/-, which on appeal by the assessee, has subsequently been sustained by the Ld. CIT(A) to the extent of Rs. 28,37,506/- and thereafter, on further appeal before the Tribunal, has been sustained to the extent of Rs. 10,71,106/- by Coordinate Chandigarh Benches vide its decision dt. 19/05/2022. The other addition made u/s 69 has since been deleted by the Ld CIT(A) and which has been affirmed by the Coordinate Benches. Therefore, as submitted by the Id AR, the effective addition which now stand is the amount of Rs. 10,71,106/- under section 69C as so confirmed by the Coordinate Benches vide its order dt. 19/05/2022.

7. Though the quantum of addition so made by the AO has been restricted on subsequent appeals, the findings of AO continues to remain relevant for determining whether the provision of Section 115BBE are attracted in the instant case or not and whether there is a failure on the part of the AO to invoke the said provisions and apply the rate of tax as so specified therein especially where the provision of Section 69C of the Act have been invoked by the AO and applicability thereof sustained by the Ld. CIT(A) as well as by the Coordinate Chandigarh Benches or the AO has consciously and after due application of mind didn't invoke the provisions of section 115BBE of the Act.

8. In this regard, we refer to the finding of the AO wherein the AO on the basis of incriminating material seized i.e Annexure A-3, A-4, A-5 during the course of search and seizure operations at business and residential premises has analyzed the salary payments not debited in the P&L account for A.Y. 2016-17 to 2018-19. Referring to Annexure-A5 which is a manual ledger containing employee/worker wise cash payments made during the financial year 2016-17, the AO has referred to Table B containing name, cash payment during the year besides opening and closing balances and corresponding written page numbers and such Table find mention as part of and at pages 5-7 of the assessment order has determined the figure of Rs. 42,04,640/- pertaining to F.Y.

2016-17 relevant to A.Y. 2017-18. Thereafter, the AO has referred to the show-cause notice issued to the assessee, the reply of the assessee, the statement of Shri Manik Sachdeva recorded during the course of search and statement of Shri Sat Pal Sachdeva recorded during survey and at para 3.10 and 3.11 of the assessment order has recorded his finding stating that inspite of providing several opportunity to the assessee, the assessee has failed to give requisite explanation regarding the document seized from the business and residential premises of the assessee, failed to reconcile the transactions with the regular books of accounts and has thus failed to substantiate his claim and accordingly it is clearly established that the assessee has incurred unexplained expenditure on salary to the tune of Rs. 42,04,640/- and the said findings of the AO read as under:

During the post search/ survey enquiry proceedings in this office, 6 separate opportunities of being heard have been granted on different dates vide order : entries starting from 11.01.2018 till 08.03.2018. Assessee could not give the requisite explanation on contents of Annexure-A3, A4 &A5, seized from the residence and Annexure-A3 impounded from the business premises. Moreover, assessee has failed to reconcile the transactions entered in the above mentioned Annexures with the regular books of accounts of M/s Agya Ram Manohar Lai in corresponding years {these Annexures relate to F.Ys. 2015-16, 2016-17 & 2017-18}. Further, during the course of assessment proceedings assessee has failed to substantiate his claim inspite of numerous opportunities afforded to him. Hence, it is clearly established that assessee has failed to give any explanation vis-a-vis Annexure-A3 impounded from its business premises during the course of survey AND Annexure-A2, A3, A4 & A5 seized from residence during the course of search."

3.11 It is pertinent to mention here that assessee is knowingly avoiding the reply to these three Annexures at the time of search, at the time of post-search investigation and during the assessment. These Annexures clearly shows employee wise, month wise and year wise details of payments made to them. Further, assessee has not able to prove that why employee wise, month wise and year wise details of salary paid was written in these Annexures. It was clearly established that during the course of search that the assessee has incurred unexplained expenditure on salary relying upon the findings as per show cause notice, I hereby make "an addition of Rs. 39,88, 288/- for the A.Y. 2016-17, Rs. 42,04,640/- for the A:Y 2017-18 and Rs. 29,66,795/- for the A.Y. 2018-19 as unexplained expenditure on salary u/s 69C of the Act and added back to the total income of the assessee.

(A.Y. 2017-18 Addition of Rs. 42,04,640/-)

9. We therefore find that the AO has given a clear cut finding and recorded his satisfaction that there is clear failure on the part of the assessee to furnish any explanation regarding the unexplained salary expenditure and in view of the same, the provisions of section 69C are clearly attracted and which have accordingly been invoked by him in the instant case. On appeal, as we have noted above, the quantum of additions have been reduced by the Id CIT(A) and thereafter, by the Coordinate Benches, however, as far as applicability of provisions of section 69C is concerned, the same is not disturbed by the Coordinate Benches while disposing off the assessee's appeal.

10. Now coming to the provisions of Section 115BBE of the Act, prior to amendment by the Taxation Laws (Second Amendment), Act, 2016, it provides that:

“(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of-

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause(a).”

11. Vide the Taxation Laws (Second Amendment), Act, 2016 w.e.f 1.4.2017, the provisions were substituted and the same now reads as under:

“(1)Where the total income of an assessee,-

(a) includes any income referred to in section 68, section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a)

the income-tax payable shall be the aggregate of-

(i) the amount of income-tax calculated on the income referred to in clause(a) and clause (b), at the rate of sixty per cent; and "

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause(i)."

12. It is the case of the assessee before the Id PCIT that the Assessing officer was consciously clear that since the additions were made u/s 69C, the tax will be charged u/s 115BBE and after applying his mind and knowing the fact that tax has to be calculated by applying the provisions of section 115BBE, the Assessing officer applied tax rate at the rate of 30%. We therefore find that in the present case, the AO has determined the assessee's income under section 69C of the Act read with section 115BBE of the Act and while determining the rate of tax, has been apparently guided by the pre-amended law where the rate of tax was 30% as against rate of tax of 60% as per the amended law which was applicable for the impugned assessment year 2017-18. Therefore, we find that the issue is not really about the applicability of section 115BBE of the Act rather the real issue is about the rate of tax as per section 115BBE of the Act. Where the Id PCIT has stated that the AO has not applied the rate of tax as per section 115BBE, what he meant was rate of tax of 60% given that the AO has already applied rate of tax of 30% as so submitted by the assessee. It is not the case of the assessee that the amended law is not applicable in its facts and circumstances of the case for the impugned assessment year 2017-18. It is therefore a case where the AO has erred in not applying the rate of tax as per the amended law as applicable for the impugned assessment year and the order so passed is therefore rightly held by the Id PCIT as erroneous in so far as prejudicial to the interest of the Revenue.

13. In light of aforesaid discussions and in the entirety of facts and circumstances of the case, we therefore didn't find any justifiable basis to interfere with the order of the Id PCIT who has rightly exercise his revisional jurisdiction u/s 263 by setting aside the order of the AO to the extent of applying

the rate of tax as per amended Section 115BBE for the impugned assessment year on the quantum of additions made and sustained u/s 69C of the Act.

14. In the light of same, we sustain the order of the Ld. PCIT(C) in light of aforesaid directions and the appeal of the assessee is dismissed.

Order pronounced in the open Court on 10/11/2022.

Sd/-

दिवा सिंह
(DIVA SINGH)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 10/11/2022

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar