

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI G D PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.30/RPR/2016
निर्धारण वर्ष / Assessment Year :2012-13

M/s. Kulkarni & Sahu Buildcon Pvt. Ltd.
B-495, Cross Street-25,
Smriti Nagar, Bhilai-490020 (C.G.)
PAN :AAECK3160C

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax-1(1),
Bhilai (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by :Shri Nilesh Jain, CA
Revenue by :Shri Choudhary N.C Roy, Sr. DR

सुनवाई की तारीख / Date of Hearing :12.09.2022

घोषणा की तारीख / Date of Pronouncement : 12.12.2022

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the CIT(Appeals)-II, Raipur, dated 29.01.2016, which in turn arises from the order passed by the A.O. u/s. 143(3) of the Income-tax Act, 1961 (for short 'Act'), dated 30.01.2015 for A.Y. 2012-13. The assessee has assailed the impugned order on the following grounds of appeal before us:

"1. (a). The Id. Commissioner of Income-tax erred in confirming that the income surrendered during survey is assessable as 'undisclosed income' u/s 69 of the Act.

(b) The decision of the jurisdictional High Court followed by him nowhere says that such income is to be assessed as 'undisclosed income'.

(c) Sec. 69 speaks only of 'deemed income' in relation to unexplained investment.

(d) The only source of income of the appellant is business in civil contracts and road works.

(e) The excess stock is irretrievably linked only and wholly to such business.

(f) Entries as regards the impugned investments have been recorded in the books of account and accepted as correct.

(g) There is no separate Head of Income under which deemed income can be taxed.

2. (a) The Id Assessing Officer has not identified any instance of unverifiable or inadmissible nature of entries in the audited books of accounts that was produced before him.

(b) Mere variance in rate of net profit is not a ground for making estimated additions.

(c) The very fact that the AO has made the addition for "possible" leakage shows that he was guided by mere conjecture and surmises.

3. (a) The Id CIT(A) has misread and misinterpreted the order of the jurisdictional High Court, firstly to describe the surrendered income as 'undisclosed income' and, then to hold that the claim of depreciation on the 'undisclosed income' is not maintainable.

(b) That the shuttering materials were being used for business is an undeniable fact that was verified at the time of survey.

4. (a) The Id Assessing Officer has not identified any instance of unverifiable or inadmissible nature of entries except in general terms.

2. Succinctly stated, the assessee company which is engaged in the business of civil construction had e-filed its return of income for A.Y.2012-13 on 30.09.2012, declaring an income of Rs.1,32,56,660/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s.143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee company on 02.11.2011 was subjected to a survey action u/s.133A of the Act. It was observed by the A.O that the survey team had come across a difference in the closing stock/work-in-progress. On a perusal of the records, it was observed by the A.O that as on the date of survey proceedings as on 02.11.2011 the closing stock/WIP was valued at Rs.1,55,71,500/-, as against that shown by the assessee in its books of account at Rs.1,25,00,000/-. As such, it was observed by the A.O that survey team had unearthed the excess WIP of Rs.30,71,500/-.

Also, it was noticed by the A.O that the survey team had come across excess stock of building material, which included shuttering material of a value of Rs.24.60 lac. On the basis of the aforesaid facts as had emerged in the course of the survey operation, the assessee was called upon to put forth an explanation both as regards the difference in the value of WIP of Rs.30,71,500/-(supra), and also the source of investment made in shuttering material of Rs.24.60 lac (supra). As the assessee failed to come forth with any explanation as regards the difference of Rs.30,71,500/-(supra) qua the excess WIP that had surfaced in the course of survey operation, therefore, the same being in the nature of unexplained investment was surrendered by it as its undisclosed income for the year under consideration. Apropos the value of shuttering materials of Rs.24.60 lacs (supra), as the assessee stood at a no better footing and failed to explain the source of the investment made in the same, therefore, the investment to the said extent was also surrendered by it as its undisclosed for the year under consideration.

4. On a perusal of the financial statements that were filed by the assessee a/w. its return of income, it was observed by the A.O that though the assessee had credited the surrendered income of Rs.30,71,500/-(supra) and Rs.24.60 lacs (supra) aggregating to an amount of Rs.55,31,500/- in its trading/works account but had not shown the same

separately in its computation of income. The A.O was of the view, that as the excess stock or unexplained investment or cash surrendered during the course of survey operations was nothing but the accumulation of the profits of the assessee, which it had been systematically enjoying, and hence on being detected was surrendered in the course of survey operation as undisclosed income, thus, the same was liable to be assessed as the assessee's undisclosed income against which no deduction for any expenditure would be allowable. On the basis of his aforesaid conviction, the A.O excluded the amount of the undisclosed income surrendered by the assessee from its declared net profit and brought the same to tax separately as its income under the head "business income" u/s.69 of the Act. In support of his aforesaid view, the A.O had relied on the judgment of the Hon'ble High Court of Chhattisgarh in the case of Dhanush General Stores Vs. CIT (2011) 339 ITR 651 (CG).

5. Considering the aforesaid facts and on recasting the profit & loss account of the assessee company, i.e, after excluding the amount of surrendered income from its disclosed net profit, the A.O observed that the NP rate of the assessee worked out at 4.04% which was substantially lower than that of the immediately preceding year. On being queried about the aforesaid decline in the NP rate, it was the claim of the assessee that as the undisclosed income that was surrendered during the course of the

survey proceedings was credited in the profit & loss account, therefore, there was no justification in recasting the financial results and drawing adverse inferences in its hands. Apart from that, it was the claim of the assessee that as the business/market condition in all the years cannot be found to be uniform/static, therefore, on the standalone basis that there was a decline in NP rate no adverse inferences could be drawn in its hands. However, the aforesaid explanation of the assessee did not find favor with the A.O. Considering the aforesaid facts, the A.O observing the rejection of books of account as per various judicial pronouncements was held to be proper when the purchases were not entered in the books of accounts therefore, he though without specifically rejecting the books of account of the assessee, but at the same time not finding favor with its undisclosed NP rate 4.04%, therein, in order to avoid possible leakage of revenue made a lump sum addition of Rs.3 lacs to its disclosed book results. Also, the assessee's claim for deduction of depreciation of Rs.1,84,500/- on shuttering materials was declined by the A.O. The A.O after, inter alia, making the aforesaid additions/disallowance, vide his order passed u/s.143(3) dated 30.01.2015 assessed the income of the assessee company at Rs.1,71,93,370/-.

6. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals) but without any success in so far the aforesaid addition/disallowance made by the A.O were concerned.

7. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

8. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

9. Apropos the re-characterizing and dubbing of the unexplained investment of Rs. 55,31,500/- (supra) surrendered by the assessee during the course of survey operation, which, thereafter, was credited in its trading/works account, we may herein observe that the A.O while framing the assessment had categorically observed that the excess stock or unexplained investment or cash surrendered during the course of survey operation was nothing but the accumulation of the profit which the assessee had been systematically enjoying and were detected during the survey action and surrendered by it as its undisclosed income. For the sake of clarity the observation of the A.O is culled out as under:

“3. In the return filed it is seen that the assessee has credited the surrendered income of Rs.30,71,500/- and Rs.24,60,000/- totaling to Rs.55,31,500/- in Trading/works a/c. and not shown separately in the computation of income. **It may be mentioned here that the excess stock or unexplained investment or cash surrendered during the course of survey operations was nothing but the accumulation of the profits which the assessee has been systematically enjoying and hence such differences detected during the survey and surrendered as undisclosed income is assessable as undisclosed income.....”**

(emphasis supplied by us)

Ostensibly, the aforesaid observation of the A.O in a way relates the amount surrendered by the assessee during the course of survey operation to the accumulated profit which the assessee had been systematically enjoying and thus, by no means could solely be related to the year under consideration. In fact, the aforesaid observation of the A.O finds support from the judgement of the Hon'ble Supreme Court in the case of Anantharam Veerasingaiah & Co. vs Commissioner of Income Tax, (1980) 123 ITR 457 (SC). It was observed by the Hon'ble Supreme Court that secret profits or undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books.

10. Be that as it may, as it is not the case of the assessee that the income disclosed during the course of survey proceeding does not pertain to the year under consideration, therefore, we confine our adjudication to the issue in hand, i.e., as to whether or not the income disclosed during

the course of survey proceedings had rightly been offered by the assessee as its business income?

11. On the said aspect, we are unable to comprehend that now when the A.O had himself observed as herein above that the excess stock or undisclosed investment or cash surrendered during the course of survey operation were nothing but the accumulation of profits which the assessee had been systematically enjoying and the differences was detected during the course of survey operation, therefore, on what basis a view to the contrary was taken by him to justify the treating of the same as the investment made by the assessee from its unexplained sources. In sum and substance, now when the A.O had himself observed that the undisclosed income surrendered by the assessee was nothing but the accumulation of the profit which it had been systematically enjoying, then, drawing of a view to the contrary and holding the same as not being sourced out of latter's business but having been sourced from its income from undisclosed sources within the meaning of Section 69 of the Act is beyond comprehension. We are of the considered view that now when the A.O had observed that the excess stock or unexplained investment or cash surrendered were nothing but the accumulation of profit which the assessee has been systematically enjoying then, he had, in fact, admitted that the undisclosed income was sourced out of the business activities of

the assessee. In so far the judgment of the Hon'ble High Court of Chhattisgarh in the case of Dhanush General Stores Vs. CIT (2011) 339 ITR 651 (CG) that had been relied by the A.O is concerned, we are of the considered view that the same is clearly distinguishable on facts. Unlike the facts involved in the case before the Hon'ble High Court in the case of Dhanush General Stores Vs. CIT (supra), wherein the amount surrendered by the assessee was though shown in the Profit & loss account but did not form part of its returned income. In the case present case before us, the amount surrendered was not only considered in the assessee's Profit & loss account but also formed part of its taxable returned income. On the said aspect, neither any fact to the contrary is available on record nor anything to the contrary had been brought to our notice by the Ld. DR in the course of hearing of the appeal. Considering the aforesaid facts, we are of the considered view that the undisclosed income of Rs.55,31,500/- (supra) surrendered by the assessee during the course of survey operation had rightly been offered to tax by the assessee under the head "business income", and in light of the clearly established source of the corresponding investment the same could not have been held to be the deemed income of the assessee under Section 69 of the Act. Our aforesaid conviction is all the more fortified by the order of the Tribunal in the case of M/s. Shree Sita Udyog Vs. DCIT & Ors, Bhilai in ITA No. 249 to 255/RPR/2017, dated 22.07.2022 wherein, involving identical facts, it was observed by the

Tribunal that the amount surrendered by the assessee qua the investment in the excess stock was liable to be taxed under the head “business income” and not under the head “income from other sources”. For the sake of clarity the relevant observations of the Tribunal in the aforesaid case are culled out as under:

“ 8. We have heard the rival contentions, perused the material available on the records. In principle, we find force in the argument and contentions of the Ld AR on the following aspects:

a. Ld AO himself has observed that the Excess Stock or Unexplained investment or cash surrendered during the course of survey operations was nothing but the accumulation of profits which the assessee has been systematically enjoying and hence difference detected during the survey and surrendered as undisclosed income is assessable as undisclosed income, thereby, has admitted that the undisclosed stock was part of the business of assessee.

b. From the order of Hon’ble Jurisdictional High Court in the case of Dhanush General Store (Supra) it is emerged that the assessee has shown the income trading and P&L account but not in computation of income. However, in the present case which is distinguished on the facts and verifiable from the records that the amount surrendered was duly considered in the Audited P&L account and finally was became part of the taxable income in the computation of income.

c. During the survey Statement of Mr Suresh Kumar Agarwal as a partner of the assessee partnership firm were taken on oath u/s 131 of the Income Tax Act. Q no 3 and answer given are relevant, which was place in paper book of the assessee at page 9-12, the same is reproduced as under:

प्र.3-सर्वेक्षण के दौरान दिनांक 17/01/2012 को आपके कंपनी के व्यावसायिक/फैक्टरी परिसर में उपलब्ध स्टॉक का आपके समक्ष एवं आपके कर्मचारियों की मदद से भौतिक समापन कर सूची तैयार की गई भौतिक समापन पर पाये गये स्टॉक का आपके द्वारा सर्वेक्षण दिनांक 17/01/2012 तक की दिये गये ट्रेडिंग एकाउन्ट में दर्ज Closing Stock से मिलान करने पर निम्नानुसार स्थिति परिलक्षित होती है :-

स्टॉक का विवरण	भौतिक सत्यापन परस्टॉक	खाते बही के अनुसार स्टॉक	भौतिक सत्यापन पर अधिक पाया
-------------------	--------------------------	-----------------------------	-------------------------------

			गया स्टॉक
धान	23108.00 किं.	19778.31 किं.	3329.70 किं.
चावल	7849.74 किं.	7276.99 किं.	572.75 किं.

उपरोक्तानुसार भौतिक सत्यापन पश्चात 3329.70 किं. धान एवं 572.75 किं. चावल का स्टॉक बही खाते में दर्ज स्टॉक से अधिक पाया गया। उक्त अधिक पाये गये स्टॉक का आपके द्वारा तायेगये मूल्य/बाजार मूल्य के आधार पर निम्नानुसार मूल्यांकन किया गया—

		स्टॉक	दर(रु./किं.)	कुलमूल्य
(I)	धान	3329.70 किं.	रु. 1050/-	रु. 3496185/-
(II)	चावल	572.75 किं.	रु. 1750/-	रु. 1002313/-
				रु. 44,98,498/-

कृपया इस अधिक पाये गये रु. 44,98,498/- मूल्य के स्टॉक बावत अपना स्पष्टीकरण साक्ष्य सहित दें।

उ. - इस बावत ठीक-ठीक स्पष्टीकरण देने में मैं असमर्थ हूँ। हो सकता है कि बही खाते में स्टॉक संबंधी प्रविष्टियां करते समय कुछ प्रविष्टियां त्रुटिवश छूट गई हों। मेरे पास इस बावत कोई साक्ष्य नहीं है। अतः सवैक्षण के दौरान इस अधिक पाए गए रु. 44,98,498/- मूल्य के स्टॉक की रकम को चालू वित्तीय वर्ष 2011-12 की फर्म की अघोषित आय में से स्टॉक में निवेश (Investment) मान ले हुए, कर निर्धारण वर्ष 2012-13 के लिए कराधान हेतु प्रस्तुत करना चाहता हूँ। तथा उक्त अघोषित Investment / आय रु. 44,98,498/- पर नियमानुसार अग्रिम कर का भुगतान करने का वचन दे ता हूँ।

9. On perusal of the above question and answer offered by the assessee during the survey proceedings, it is very clear that the excess stock was found in the business premises of the assessee on physical verification by the survey team with the help of employees of the assessee. Assessee, without objecting to the figures of excess stock arrived at by survey team accepted the same and offered the same as undisclosed income for the current year. In this context, we are of the considered view that since the excess stock of rice and paddy are the commodities

in which the assessee was dealing under his regular business and accordingly any surrender on account of mismatch in physical stock and accounting balance of the stock cannot be treated as income from the other source, the same has to be brought to tax under income from business, which the assessee has rightly done. Our view on this aspect has a concurrence from the finding of Hon'ble Rajasthan High Court in the case of CIT Vs. Bajrang Traders, which is discussed here under in the coming paras.

Relevant Case laws and findings :

i) Sagar Samrat Vs. ACIT, ITA No.546/Pun/2017, order dated 27.10.2020, wherein the Pune Bench of the Tribunal has held as under :-

4. Having heard both the sides through virtual court and gone through the relevant material on record, it is found as an admitted position that during the course of survey at the business premises of the assessee certain excess cash, excess stock and undisclosed advances receivable totaling Rs.50.25 lakh and odd were found and the assessee offered the same as additional income. On such declaration, necessary entries were passed and the amount was credited to the Profit and loss account at the time of finalization of accounts and also offered it for taxation. The assessee worked out the amount of partners' remuneration by including such surrendered amount. The AO came to hold that such surrendered amount was separately taxable under sections 69/69A and hence does not fall under Chapter IV-D dealing with the income under the head 'Profits and gains of business or profession'.

5. Section 40(b) of the Act provides for allowing remuneration and interest to partners on the amount of 'book-profit'. This expression has been defined in Explanation 3 to mean 'the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV- D...'. The crux of the controversy is to ascertain whether the income offered by the assessee is covered u/ss 69/69A of the Act as held by the AO or can be classified as 'Business income' as claimed by the assessee.

6. Section 69 provides that: 'Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year.'. Section 69A is also almost similarly worded to this extent by providing that: 'Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of

income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.'

7. At this juncture, it is significant to take note of section 14 of the Act, with the caption 'Heads of income', which provides that : 'Save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income..'. There are five heads, which include 'Profits and gains of business or profession'. Sections 69 and 69A fall under the Chapter VI of the Act with sub-head 'Aggregation of income'. From the language of these sections as reproduced supra, it is overt that they deal with deeming unexplained investments and unexplained money etc. as income of the financial year in which the assessee has made unexplained investments or found to be owner of unexplained money etc. These provisions do not provide for any separate head under which such incomes are to be covered. On a conjoint reading of section 14 porunaparte and sections 69/69A porotraparte, it turns out that such incomes have to be classified under one of the five heads. This proposition of law has been judicially recognised in certain decisions including CIT VS. Shilpa Dyeing & Printing Mills (P.) Ltd. (2013) 219 Taxman 279 (Gujarat).

8. It is observed that the survey was conducted at the business premises of the assessee. Excess cash, stock and unrecorded advances were found from the business premises only. The AO has not referred to any other source of income of the assessee-firm apart from the business carried on by it. In such circumstances, the only circumstantial inference that can be drawn is that the excess cash, stock and advances were generated from the income earned from the business carried on by the assessee, therefore, also justifying treating such amount as 'Business income'.

9. Earning an income and spending it are two different things. Income earned is indicative of the source of income and not its destination in the end utilization. If suppose some income from business is earned outside the books of account and the same is invested in purchase of some immovable non-business property, we will determine the source of income by seeing wherefrom the income was earned and not where it was spent. Adverting to sections 69/69A of the Act, it is noticed that these are attracted when : 'the assessee offers no explanation about the nature and source of the investments ...'. Emphasis in this provision is on the non-satisfactory explanation about the source of investment and not the investment itself. Amount of investment is only a measure for quantifying the amount of addition. Raison d'etre for the addition is not giving any satisfactory explanation about the source of income, which was used for investment. If source is explained, there can be no addition on account of investment.

10. Extantly, we are confronted with a situation, in which both the source and destination are business inasmuch as the source of the income is business and the destination of such income is again in the nature of business assets, that is, stock, cash and receivables. As a fortiori, such an income will be considered as 'Business income' covered under Chapter IV-D of the Act forming part of book-profit for the purposes of allowing remuneration to partners. As the assessee offered Rs. 50,25,997/- in the return of income by treating the same as part of business profit, in our view, the AO was obliged to consider it the same way at the time of computation of "book profit" by allowing claim of remuneration etc. We, therefore, overturn the impugned order and restore the assessee's calculation of remuneration to partners etc.

ii) Lovish Singhal &Ors. Vs. ITO &Ors., (2018) 53 CCH 0250 /ITA No.142-146/Jodh/2018, order dated 25.05.2018, the ITAT Jodhpur Bench of the Tribunal has held in para 13 as under :-

13. I have heard the rival contentions and record perused. I have also carefully gone through the orders of the authorities below. I have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id AR during the course of hearing before the ITAT in the context of factual matrix of the case. From the record, I find that during the course of survey, income was surrendered by the assessee on account of stock, excess cash found out of sale of stock and also in respect of incriminating documents. As per judicial pronouncements cited by the Id. AR and also the decision of Hon'ble Rajasthan high court in the case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017 I observe that the Hon'ble High Court in respect of excess stock found during the course of survey and surrender made thereof was found to be taxable under the head 'business and profession'. Similarly in respect of excess cash found out of sale of goods in which the assessee was dealing was also found to be taxable as business income. Applying the proposition of law laid down in the judicial pronouncements as discussed above, I hold 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. Thus, there is no justification for taxing such income U/s 115BBE of the Act."

iii) Pr.CIT Vs. Bajargan Traders, in ITA No.258/2017, vide order dated 12.09.2017, the Hon'ble Rajasthan High Court has held as under :-

1. By way of this appeal, the appellant has assailed the judgment and order of the Tribunal whereby the Tribunal has allowed the appeal of the assessee.

2. Counsel for the appellant has framed the following substantial questions of law:-

“i) Whether the Tribunal was legally justified in reversing the findings of the CIT(A) and deleting the addition of Rs. 70,04,814/- which was surrendered by the assessee by holding that such amount was included in the purchases and was reflected in the sales and closing stock, specifically when the assessee failed to show that the said amount was included in the sales and closing stock?

ii) Whether the Tribunal was legally justified in treating the investment in excess stock for Rs.70,04,814/- found during the course of survey as ‘business income’ instead of ‘income from other sources’ which was to be liable to tax u/s 69?

iii) Whether the Tribunal was legally justified in reversing the findings of the CIT(A) and deleting the addition of Rs. 1,39,366/- made on account of less interest charged by the firm from the wife of one of the partner specifically when the interest was paid at higher rates on the loans taken?”

3. The Tribunal while considering the matter has observed as under:-

“2.7. It is further submitted that the real issue in this case is whether the excess stock surrendered should be made as a part of business income or not and if so, assessee can claim deduction on account of payment of remuneration to partners on account u/s 40b(v). In this regard, our reference was drawn to the decision of Coordinate Bench in case of Shri Ramnarayan Birla (in ITA No. 482/JP/15 dated 30.09.2016). In that case, the question before the Coordinate Bench was “whether the CIT(A)-2, Udaipur has erred in directing the AO to assess the unexplained investment surrendered by the assessee under the head “income from Business” ignoring the decision of the Hon’ble Gujarat High Court in the case of Fakir Mohd. Hazi Hasan 247 ITR 290 that unaccounted income ought to be categorized under the residuary head of ‘Income from other sources’. In respect to the said issue, the findings of the Coordinate Bench are as follows:

“We have heard the rival contentions and perused the material available on record. Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed that assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs.77,66,887/- was found in respect of gold and jewellery. The Coordinate Bench in the case of Choksi HiralalMangnlal vs. DCIT 131, TTJ (Ahd.) 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 u/s 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 observed that there is no conflict with the decision of Hon'ble Gujarat High Court in the case of Fakir Mohd. Jajihasan (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, the Hon'ble Coordinate Bench held 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. In the present case the excess stock was part of the stock. The revenue has not pointed out that the excess stock has any nexus with any other receipts. Therefore, we do not find any fault with the decision of the Id. CIT(A) directing the AO to treat the surrendered amount as excess stock qua the excess stock found."

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/- 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.

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.

3.2. The Id. AR of the assessee submitted that at the outset, it may be noted that the AO has made addition on account of notional interest of Rs. 1,39,366/-. There cannot be any addition on account of notional income as held by the Hon'ble Supreme Court in case of E.D. Sassoon & Co. &Ors. vs. CIT (1954) 26 ITR 27 and Godhra Electricity Co. Ltd. vs. CIT (1997) 225 ITR 746 where it was held that only real income can be taxed, hypothetical income cannot be taxed nor income can be taxed in vacuum. Therefore, the addition made by the AO

is not as per law and the same be deleted. The Id. CIT(A) has confirmed the addition by stating that it is the disallowance of interest. It is submitted that the lower authorities have not disputed about the commercial expediency about the advance given to Smt. Rita Gupta. In fact, the advance was given to Smt. Rita Gupta in earlier years for construction of godown and the same was given on rent by the assessee. Therefore once commercial expediency for giving the advance is established, no part of the interest expenditure can be disallowed in view of the decision of Hon'ble Supreme Court in case of S.A. Builders 288 ITR 1 and Hero Cycles Pvt. Ltd. vs. CIT 379 ITR 347 where it was held that the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximize his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman. Further, in past, no such disallowance/addition was made. Therefore, neither the addition of notional interest made by the AO or disallowance of interest as held by the Id. CIT(A) is Rs. 1,96,73,637/-. Partners are paid interest @ 12% the balance in the partners account is much more than the amount advanced to Smt. Rita Gupta who is a wife of one of the partner. Therefore, even the disallowance made @ 4% is not justified and the same should be restricted @ 2% only. Reliance is also placed on the following cases.

CIT vs. Ram Kishan Verma (2016) 132 DTR 107/132 Taxman 107 (Raj.)(HC)

CIT vs. Vijay Solvex Ltd. (2015) 113 DTR 382 (Raj.) (HC)

4. We are in complete agreement with the view taken by the Tribunal. No substantial question of law arises.

10. In view of the above judicial pronouncements as well as the facts and circumstances of the case, we are of the opinion that the investment in the excess stock ought to be taxed under the head "business income" and not under the head "income from other sources". Accordingly, we set aside the orders of the authorities below and direct the AO to delete the

addition. Thus, we allow the sole ground of assessee and consequently appeal of the assessee in ITA No.249/RPR/2017 is allowed.

11. Since the issues in all the appeals are similar and identical, except variation in figures, therefore, our observations made in ITA No.249/RPR/2017 shall be applied mutatis mutandis to the other appeals also i.e. to ITA Nos.250-255/RPR/2017. Accordingly, ITA Nos.250-255/RPR/2017 are allowed.”

We, thus, in terms of our aforesaid observations, are of the considered view, that the assessee had rightly offered the undisclosed income of Rs.55, 31,500/- (supra) that was surrendered by it during the course of survey proceedings to tax under the head “business income”. Accordingly, on the basis of our aforesaid observations, we set-aside the view to the contrary drawn by the lower authorities. Thus, the **Ground of appeal No.1** raised by the assessee is allowed in terms of our aforesaid observations.

12. Now we shall deal with the grievance of the assessee that the A.O had erred in law and the facts of the case in rejecting the books of account of the assessee, for the reason that there was comparative decline in the NP rate (as per the re-casted financial results).

13. As observed by us herein above, the A.O after excluding from the net profit of the assessee company the amount of the undisclosed income that was surrendered by it during the survey operation, had reworked out its NP rate at 4.04% (as against that disclosed by the assessee at 6.94%). Considering the aforesaid recasted NP rate of 4.04%, the A.O was of the

view that the same had witnessed a steep decline as in comparison to that of the immediately preceding year. Although, it was the claim of the assessee that the undisclosed income surrendered during the course of the survey action formed part of its net profit for the year under consideration, but the said contention did not find favor with the A.O. Also, the claim of the assessee that the uniformity in the profit considering the fluctuating business/market condition cannot be accepted over the years was also not accepted by the A.O. It was observed by the A.O that various courts/forums had observed that where purchases were not properly entered in the books of account, then the same were liable to be rejected. Although the A.O had not specifically rejected the books of account of the assessee in the body of the assessment order, but had made a lumpsum addition of Rs.3 lacs to its returned income in order to cover possible leakage of the revenue to some extent.

14. On appeal, the CIT(Appeals) taking cognizance of the fact that the lump sum addition was made by the A.O on the basis of vital facts that had emerged during the course of survey action, which revealed unrecorded stock and also the fact that the assessee had been conducting its business outside of his books of account, upheld the aforesaid addition of Rs.3 lacs made by the A.O.

15. We have given a thoughtful consideration to the orders of the lower authorities qua the issue of rejection of its books of account, and the lump sum addition of Rs.3 lac (supra) made in its hand in order to cover possible leakage in profit to some extent. On a careful perusal of the assessment order, we find that the A.O had not specifically rejected the books of account of the assessee but on the contrary had made a lumpsum addition of Rs.3 lac (supra) only for the reason that the NP rate of 4.04% (as recasted by the A.O.) was found to be lower as against that of the preceding year. Admittedly, the A.O had observed that in case where purchases were not properly entered in the books of account, then the rejection of the books had been upheld by the various courts, but the said observation of his was not carried any further by him to justify the lump sum addition of Rs.3 lac (supra) to the book results of the assessee company. Although the CIT(Appeals) had upheld the view taken by the A.O, observing that as the information unearthed during the course of survey action revealed that the books of accounts of the assessee were not in order, however, we are unable to persuade ourselves to subscribe to the view so taken by him. We, say so, for the reason, that the CIT(Appeals) while concluding as hereinabove, had lost sight of the fact that the discrepancies which had emerged in the course of the survey action that was conducted on the assessee on 02.11.2011, were thereafter taken care of by the assessee by disclosing an additional income, which, alongwith the

corrected state of affairs was incorporated in the books of account that were set in order. In fact, it is a matter of fact borne from record that the A.O had made a lumpsum addition of Rs.3 lac (supra) only for the reason that as per him NP rate of 4.04% (recasted) was lower than that of the preceding year. In our considered view, in absence of any infirmity in the books of account of the assessee company as were there before the A.O in the course of the assessment proceedings, there was no justification on his part to have drawn adverse inferences as regards the disclosed business results in the hands of the assessee company. We, thus, in terms of our aforesaid observations not finding favor with the ad-hoc disallowance of Rs.3 lac (supra) made by the A.O, vacate the same. Thus, the **Ground of appeal No.2** raised by the assessee is allowed in terms of our aforesaid observation.

16. We shall now advert to the grievance of the assessee that both the lower authorities had erred in declining its claim of depreciation, for the reason that now when the surrendered income had been held as “undisclosed income” of the assessee, therefore, the aforesaid claim for deduction would not be maintainable. As we have hereinabove concluded that the income surrendered by the assessee was liable to be assessed as its “business income”, therefore, the aforesaid grievance of the assessee is subsumed in our aforesaid adjudication. Accordingly, the assessee’s claim

of depreciation is allowed in terms of our aforesaid observation. Thus, the **Ground of appeal No.3** raised by the assessee is allowed in terms of our aforesaid observation.

17. As the Ld. AR had not placed any contentions in respect of the **Ground of appeal No.4**, therefore, the same is dismissed as not pressed.

18. In the result, appeal of the assessee is allowed in terms our aforesaid observations.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-

G D PADMAHALI
(ACCOUNTANT MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 12th December, 2022

***SB

Sd/-

RAVISH SOOD
(JUDICIAL MEMBER)

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals), Raipur (C.G)
4. The CIT, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.