

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "B" CHANDIGARH

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No 398/CHD/2022

निर्धारण वर्ष / Assessment Year : 2017-18

Shri Surender Kumar, O Shri Ganesh Milk Chilling Centre, Kaithal Road, Cheeka, Kaithal.	Vs	The PCIT, Rohtak.
स्थायीलेखासं./PAN NO: AJPPK4637F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No 399/CHD/2022

निर्धारण वर्ष / Assessment Year : 2017-18

Shri Sunil Kumar, Shop No. 23, M/s Dhan Luxmi Seeds, New Mandi, Sirsa.	Vs	The PCIT, Rohtak.
स्थायीलेखासं./PAN NO: AAKPC3235D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 400/CHD/2022

निर्धारण वर्ष / Assessment Year : 2017-18

Shri Shakti Sagar Chawla, M/s Shaktiman Seeds, Dabwali Road, Sirsa.	Vs	The PCIT, Rohtak.
स्थायीलेखासं./PAN NO: AEFPC3576C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

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

राजस्व की ओर से/ Revenue by : Shri Rohit Sharma, CIT-DR

सुनवाई की तारीख/Date of Hearing : 18.10.2022

उद्घोषणा की तारीख/Date of Pronouncement : 30.12.2022

आदेश/Order**Per Sanjay Garg, Judicial Member:**

The present appeals have been preferred by the different assesseees against the separate orders of the Id. Pr. Commissioner of Income Tax, Rohtak Ludhiana [hereinafter referred to as 'Id.PCIT'] dated 17.03.2022 agitating the exercise of his Revision jurisdiction u/s 263 of the Income Tax Act, 1961 (in short 'the Act').

2. Since the facts and issues involved in all the appeals are identical, hence, same have been heard together and are being disposed off by this common order. The case of Shri Surender Kumar (ITA 398/CHD/2022) is taken as lead case for the purpose of narration of facts.

ITA 398/CHD-2022 (A.Y. 2017-18)

3. The brief facts of the case are that the assessee has been in the business of Milk Chilling Centre. The survey action u/s 133A of the Income Tax Act was carried out at the premises of the assessee on 03.05.2016. During the survey, again certain discrepancies were found into the account of the assessee which included excess cash found of Rs. 9,60,000/- and advance given to farmers not accounted for in the books of account of

Rs.83,40,000/- . The assessee, when confronted with the above, surrendered an amount of Rs.97,00,000/- out of the income of the assessee for assessment year 2017-18. Thereafter, in the return of income, the assessee showed the said surrendered amount as his additional business income.

4. During the assessment proceedings, the Assessing Officer (in short 'AO') show caused the assessee as to why the said surrender of Rs.97 lacs be not treated as income from unexplained sources and thereby be taxed at a higher rate of tax as provided u/s 115BBE of the Income Tax Act ('the Act'). The assessee replied that the said surrendered amount was duly incorporated in the Profit & Loss Account. That the assessee did not have any other business or source of income except the business of 'milk supply'. That the aforesaid advances were out of the milk trading business of the assessee only. It was explained that the provisions of Section 115BBE were not applicable as the aforesaid income was offered for taxation during the survey action as additional income apart from the income disclosed which meant that the same was related to the additional business income of the assessee. That even the survey party during the survey action did not doubt the above contention of the assessee and had assured the assessee that the additional income declared by the assessee would be taxed as

additional income of the assessee. After considering the aforesaid explanation of the assessee, the AO accepted the returned income of the assessee and completed the assessment u/s 143(3) of the Act.

5. Thereafter, the ld. PCIT invoking his revisionary jurisdiction u/s 263 of the Act show caused the assessee vide notice dated 10.03.2022 as to why the additional income disclosed by the assessee be not subjected to higher rate of tax i.e. @ 60% as per provisions of Section 115BBE of the Act. The ld. PCIT observed that the AO had failed to acknowledge the fact that the surrender represented the undisclosed income of the assessee which would have never come to light, had there been no survey u/s 133A of the Act. Therefore, this undisclosed income could not be treated as normal business income as contended by the assessee. The ld. PCIT therefore, was of the view that as per the amended provisions of Section 115BBE as applicable w.e.f. assessment year 2017-18, tax was to be calculated @ 60% on the income surrendered by the assessee during survey. He, accordingly, passed the revision order u/s 263 of the Act holding that the income surrendered by the assessee was undisclosed income of the assessee and since the said income comprised of unexplained cash and unexplained advances given to the milk suppliers, therefore, the same could not be treated as normal business and

therefore, has to be considered as unexplained income u/s 68 to 69D of the Income Tax Act. He, therefore, held that the order passed by the AO u/s 143 of the Act was erroneous so far as prejudicial to the interests of the Revenue. He, accordingly, set aside the assessment order passed by the AO u/s 143(3) with direction to pass an order afresh in accordance with law after giving the reasonable opportunity of being heard to the assessee.

6. Being aggrieved by the said order of the ld. PCIT, the assessee has come in appeal before us.

7. At the outset, ld. counsel for the assessee has submitted that the AO vide questionnaire dated 09.12.2019 issued u/s 142(1) of the Act had specifically raised query about the taxability of amount of Rs.93 lacs surrendered during the survey action and a specific reference has been made to the applicability of Section 115BBE of the Act. The ld. counsel for the assessee in this respect has referred to Paper Book page 23-24, which is copy of the notice wherein aforesaid query has been raised by the AO. The ld. counsel has further invited our attention to page 25 of the Paper Book which is the copy of the reply filed by the assessee dated 23.12.2019, wherein, the assessee had duly explained that the aforesaid cash/advance given to the milk supplier was generated from the business income of the assessee and that the assessee did not have any other source of income

except the milk supply business. It was also explained in the said reply that the provisions to Section 115BBE were not applicable to the case of the assessee as the object and purpose of the aforesaid amendment to charge tax at the higher rate of 60% was to discourage deposits from unexplained sources by the citizens during the demonetization period. However, in the case of the assessee, the advance given to the suppliers was given in the course of business and was also generated in the course of business. It has also been mentioned that even during the survey action, the survey party did not doubt the business operations of the assessee and even did not doubt about any other source of income of the assessee. The ld. counsel, therefore, has submitted that during the assessment proceedings, the AO had duly considered the issue of application of Section 115BBE to the surrendered income of the assessee and the AO was duly satisfied with the reply given by the assessee and thereby duly accepted the surrendered income as additional business income of the assessee.

8. The ld. counsel has further invited our attention to Paper Book page 29 to 34 which is the copy of Audit Memo dated 22.02.2022 of the Income Tax Officer (Audit) Karnal to submit that the ld. PCIT has invoked his jurisdiction on the basis of the audit report dated 22.02.2022. The ld. counsel has further

invited our attention to page 35 to 37 of the Paper Book which is copy of the proposal report dated 02.03.2022 regarding the audit objection sent by the ITO to ld. PCIT requesting him to invoke his Revisionary Jurisdiction u/s 263 of the Income Tax Act in the light of the Audit Report dated 22.02.2022. The ld. counsel, therefore, has submitted that in this case, the ld. PCIT has not applied his independent mind, rather, has invoked his jurisdiction u/s 263 of the Act on the basis of the proposal submitted by the subsequent AO in view of the Audit Objections made by the Audit Party. That otherwise there was no error in the assessment order passed u/s 143 of the Act and that the ld. PCIT was not justified in invoking his Revisionary jurisdiction u/s 263 of the Act.

9. The ld. DR on the other hand has submitted that while exercising the Revisionary jurisdiction, all records were available to the ld. PCIT and, that the ld. PCIT has invoked his revisionary jurisdiction u/s 263 of the Act after examination of record. That, merely because the information had come to the ld. PCIT through the AO that does not mean that the ld. PCIT had not applied his mind. The ld. DR has further relied upon decision of the Hon'ble Supreme Court in the case of CIT Vs Manjunathesware Packing Products & Camphor Works, order dated 02.12.1997 to submit that the word 'record' does not only mean the 'record' which was

available to the Income Tax Officer at the time of passing of the assessment order, however, it could also include the new material which comes to his possession and he would be entitled to take that no new material into account and that it would be open to take into consideration all records available at the time of examination by him. The ld. DR in this respect has submitted that ld. PCIT was justified in taking into consideration the Audit Report and the proposal submitted by the AO for the purpose of forming the opinion that the impugned assessment order was erroneous and prejudicial to the interests of the Revenue.

10. We have considered the rival contentions and have gone through the record. As per the provisions of Section 115BBE of the Act, the income tax on income referred to in Section 68 or Section 69 or Section 69A or Section 69B or Section 69C or Section 69D are chargeable to tax at a higher rate. Now a perusal of the provisions of Section 68, 69, 69A, 69B, 69C and 69D would reveal that those provisions are attracted in respect of the credits, cash, expenditure, investment etc. regarding which the assessee offers no explanation about the nature and source thereof. It is to be pointed out that the income is to be assessed u/s 68 wherein any sum is found credited in the books, of which the assessee offers no explanation about the 'nature and source thereof' or the explanation offered by him is not found

satisfactory by the AO. Section 69 is attracted to the unexplained investments of which the assessee offers no explanation about the 'nature and source' thereof or the explanation is not found satisfactory. Similarly, Section 69A is attracted in case of money, bullion, jewellery or other valuable articles, Section 69B refers to the investments, Section 69C refers to the expenditure and Section 69D refers to the amount borrowed or repaid on hundi. The provisions of these Sections are attracted and the income is assessed under these Sections, if, the assessee fails to give the explanation about the 'nature and source' of such undisclosed income. The ld. PCIT in our view, in this case has confused himself between the 'undisclosed income' and the word 'unexplained income'. As per provisions of Section 68 to 69D are attracted in respect of the undisclosed income but the condition for assessing such income under the said provisions is that the assessee has either failed to disclose the nature and source of such income or the AO does not get satisfied with the explanation offered by him.

11. Now, coming to the Audit Report which has the triggering effect in this case leading to the impugned order u/s 263 of the Act. Para 3 of the said Audit Report is relevant, which for the sake of ready reference, is reproduced as under :

3. *During the course of assessment proceedings vide questionnaire date 09.12.2019, the assessee was asked that why the surrender amount may*

not be taxed separately at the maximum rate in view the provisions of section 115BBE of the Income Tax Act. In its reply, the assessee quoted various explanation/case examples to prove its point, it is important to mention here that, such surrender/additional income is disclosed only when survey u/s 133A of the I.T.Act, 1961 was carried out at the premises of the assessee. Needless to mention here that the assessee would never have disclosed this income voluntarily if the survey operation had not been conducted at his premises, this surrender income of Rs. 93,00,000/- are income of the assessee as income referred in section 69, section 69A 69B Section 69C or Section 69D. Therefore, those such income shall be taxed as per section 115BBE (applicable w.e.f. A.Y. 2013-14) tax was to be calculated @ 30% upto A.Y. 2016-17 and 60% for the A.Y. 2017-18 onwards on this additional income.

12. A perusal of the above observation of the Audit Party reveals that the Audit Party has pointed out that had the survey action be not taken at the premises of the assessee, the aforesaid additional income would not have been discovered and thereby offered by the assessee. The Audit Party, therefore, held that the surrendered income of the assessee was the income as referred to u/s 68 to 69D of the Act.

13. Now coming to the proposal made by the AO to the ld. PCIT for invoking Revisionary power u/s 263 of the Act, wherein, the ld. AO has made the following proposal :

5. The observation raised by the audit party has been examined that the assessee has surrendered additional income of Rs.93,00,000/- over and above its normal income. As per section 115BBE, tax was to be calculated @ 60% on its additional income as per provisions of section 68/69 of the Income Tax Act.

14. Now coming to the Show Cause Notice issued by the ld. PCIT, the relevant part of which, is reproduced as under :

“During assessment proceedings, you were asked why the surrendered amount

may not be taxed as per Section-115BBE having tax rate @ 60% levied proceedings for the A.Y. 2017-18. In response to the same, you have contended that the surrendered income was from business and Section-115BBE was applicable on "Income from other sources" only. You had also contended that Section-115BBE was not applicable for assessment year 2017-18. However, the AO failed to acknowledge the fact that the surrender represented the undisclosed income of the assessee which would never come to light had there been no survey u/s 133A of the Act. Therefore, undisclosed income cannot be treated as normal business income as contended by the assessee. Thus, in view of amendment in Section-115BBE(applicable w.e.f A.Y. 2017-18) retrospectively, tax was to be calculated @60% on this additional income as per provisions of section 68/69/69A/69B/69C of the act for the A.Y. 2017-18 and the AO has failed to do so."

15. The perusal of the above relevant part of the Audit Report proposal of the AO and Show Cause Notice issued by the Id. PCIT u/s 263 of the Act, would show that all the aforesaid authorities have been swayed by the notion that the income surrendered by the assessee was undisclosed income of the assessee and therefore, the same has to be assessed u/s 68 to 69D, as the case may be, of the Income Tax Act and thereby would be charged to higher rate of tax u/s 115BBE of the Act. However, as noted above, for an income to be taxed u/s 68 to 69D, as the case may be, it should not only be the undisclosed income but the essential condition is that the assessee has failed to disclose the 'nature and source' of such undisclosed income or that the explanation offered by the assessee is not found satisfactory by the AO. In the case in hand, as noted above, the AO duly made enquiries from the assessee as to the nature and the source of the aforesaid surrendered income and has also show caused the

assessee as to why the same should not be charged at a higher rate of tax as per provisions of Section 115BBE of the Act. The ld. AO after considering the submissions and explanations of the assessee accepted the contention of the assessee that the surrendered income was out of the business income of the assessee. The perusal of the impugned order of the ld. PCIT would show that the ld. PCIT has not pointed out as to why the explanation offered by the assessee to the AO was not satisfactory and further what more enquiries are required to be conducted in this case, which the AO had failed to conduct. The ld. PCIT has simply based his opinion and order on the Audit Objections/Report as pointed out even in the Audit Report that since the same was undisclosed income of the assessee which was surrendered by the assessee during the survey action and therefore, the same was to be assessed under the provisions of Section 68 to 69D of the Act. The above reasoning of the survey party is not in accordance with the relevant provisions of the Act. Therefore, we do not find any justification on the part of the ld. PCIT in invoking the Revisionary jurisdiction in this case. The Co-ordinate Bench of the Tribunal in the case of Gandhi Ram Vs PCIT itaNo.121/CHD/2021 order dated 04.08.2022, under somewhat similar circumstances, has made the following observations :

7. We have heard the rival contentions and perused the material available on record. For exercise of jurisdiction u/s 263 of the Act, the order passed by the Assessing officer should satisfy the twin tests of being erroneous as well as prejudicial to the interest of the 10 ITA No. 121/Chd/2021 Gandhi Ram Revenue. As per Id PCIT, the discrepancies found, confronted and accepted by the assessee during the course of survey attract the deeming provisions of section 68, 69, 69A, 69B & 69C and the income referred therein is chargeable to tax at rate prescribed under section 115BBE Act. As per Id PCIT, the Assessing officer has failed to enquire about the source of income in order to assess the income under the appropriate head of income or the relevant deeming provisions and accordingly, the order so passed has been held as erroneous and prejudicial to the interest of Revenue. Thereafter, the Id PCIT has gone ahead and held that income of the assessee is income referred in the aforesaid deeming provisions and chargeable to tax under section 115BBE of the Act.

8. Firstly, how the Id PCIT has arrived at a conclusive finding that the discrepancies found, confronted and accepted by the assessee during the course of survey attract the deeming provisions of section 68, 69, 69A, 69B & 69C is not apparent from the impugned order. Merely stating that excess cash is clearly covered u/s 68 or 69A, excess stock is covered u/s 69 or 69B, construction of Shed/Godown is covered u/s 69B or 69C and advances made to Sundry Parties is covered u/s 69, 69B or 69D is like an open ended hypothesis which is not supported by any specific finding that the matter shall fall under which of the specific sections and how the 11 ITA No. 121/Chd/2021 Gandhi Ram conditions stated therein are satisfied before the said provisions are invoked. It is like laying a general rule, which to our mind is beyond the mandate of law, that wherever there is a survey and some income is detected or surrendered by the assessee, the deeming provisions are attracted by default and by virtue of the same, provisions of section 115BBE are attracted. The Id PCIT has to record his specific findings as to the applicability of the relevant provisions and how the explanation called for and offered by the assessee is not acceptable in the facts of the present case which is clearly absent in the instant case. Therefore, where the Id PCIT himself is not clear about the applicability of relevant provisions and in the same breath holding the Assessing officer to task by not invoking the said provisions is clearly shooting in the dark which cannot be sustained in the eyes of law and the order so passed therefore cannot be held as erroneous in the eyes of law.

9. Now, coming to the findings of Id PCIT that the Assessing officer has failed to enquire about the source of income in order to assess the income under the appropriate head of income or the relevant deeming provisions of the Act. In this regard, we find that there are documents in form of statement of the assessee recorded u/s 133A during the course of survey and the surrender letter dated 21.10.2016 submitted by the assessee at the time of survey and 12 ITA No. 121/Chd/2021 Gandhi Ram these documents are very much part of the records which is available at the time of assessment as well as at the time of examination by the Id PCIT. In the statement so recorded at the time of survey, the assessee was specifically asked about the source of his income and in response, he has submitted that he is getting income from Gandhi General Store and share of profit from partnership firm, M/s Gandhi Soap and Detergent Industries. Thereafter, in respect of excess cash found at the time of survey, the assessee was asked a specific question to explain the difference and in response, he has submitted that the difference or the excess cash is on account of sales realization during the previous days which he offers over and

above his normal business income. Thereafter, in respect of difference in stock of Rs 25,50,000/-, he has submitted that the difference is on account of higher gross margins in the earlier period and which he surrenders in addition to his normal business income. Similar questions have been raised regarding nature and source of cost of construction of building amounting to Rs 25,00,000/- and advances given to various persons. We therefore find that the assessee has been asked specific questions regarding not just the discrepancy but the nature and source thereof during the course of survey and it is clearly emerging that the source of such income is his business income. 13 ITA No. 121/Chd/2021 Gandhi Ram Further, the said fact is corroborated by the surrender letter dated 21.10.2016. Apparently, the Id PCIT has failed to take into consideration these documents which are very much part of the records. Following the surrender so made, the assessee has offered the additional income as business income in his return of income and paid due taxes thereon. During the course of assessment proceedings, the Assessing officer has specifically taken cognizance of these facts, as apparent on the face of the assessment order, that assessee has voluntarily surrendered Rs 1,02,00,000/- over and above the normal business income in his return of income and has accordingly not drawn any adverse inference. We therefore find that the Assessing officer has duly taken cognizance of statement of the assessee recorded during the course of survey, the surrender letter and the return of income, and after examination thereof and due application of mind has not drawn any adverse inference and income has been rightly assessed under the head "business income". In light of the same, we are of the considered view that the order so passed by the Assessing officer cannot be held as erroneous due to lack of enquiry or for that matter, requisite enquiry on the part of the Assessing officer. Where the Assessing officer after due appreciation of facts and circumstances of the case, assessed the income under the head "business income" and 14 ITA No. 121/Chd/2021 Gandhi Ram didn't invoke the deeming provisions as so suggested by the Id PCIT, we do not believe that there is any error on part of the Assessing officer and the order so passed by him cannot be held as erroneous. As we have stated above, the Id. PCIT without recording any specific findings as to the applicability of deeming provisions has gone ahead and held that the deeming provisions are applicable in the instant case. Even for sake of argument, where such a view is taken on face value, it would be a case where a different view has been expressed by the Id PCIT, however, the same doesn't lead to the conclusion that the view taken by the Assessing officer as erroneous as the AO has taken into consideration the entirety of facts and circumstances of the case, the explanation offered by the assessee during the course of survey regarding the source of such income and thereafter, has assessed the income under the head "business income". The view so taken by the Assessing officer is after due application of mind and therefore cannot be held as unsustainable in the eyes of law. In the facts and circumstances of the present case, where there are specific questions asked during the course of survey regarding the nature and source of income and which has been adequately responded to by the assessee and thereafter acted upon in terms of disclosing the income in the return of income under the appropriate head of income and where 15 ITA No. 121/Chd/2021 Gandhi Ram the same is duly examined and taken into consideration by the Assessing officer during the course of assessment proceedings, the order so passed by the Assessing officer cannot be held as erroneous in nature.

10. In light of aforesaid discussions and in the entirety of facts and circumstances of the case, the order so passed by the Id PCIT u/s 263 cannot be sustained in the eyes of law and is hereby set-aside and that of the Assessing officer is sustained.

In the result, the appeal of the assessee is allowed."

16. In view of the discussion made above, the revision order passed by the Id. PCIT u/s 263 of the Act, in our view has been passed by wrongfully exercising the jurisdiction u/s 263 of the Act and the same is, therefore, held as bad in law and is accordingly, quashed.

ITA No. 399/CHD/2022 & ITA No. 400/CHD/2022 :

17. The facts and issues involved in ITA 399/CHD/2022 and ITA 400/CHD/2022 are also identical to ITA 398/CHD/2022, therefore, our discussion in ITA 398/CHD/2022 would apply mutatis-mutandis to 399/CHD/2022 and ITA 400/CHD/also. The impugned orders of PCIT u/s 263 in the said appeals are also hereby quashed.

18. In the result, all appeals of the assesseees are hereby allowed.

Order pronounced in the Open Court on 30th December,2022.

Sd/-

Sd/-

(VIKRAM SINGH YADAV)

लेखा सदस्य/ Accountant Member

"Poonam."

(SANJAY GARG)

न्यायिक सदस्य/ Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar