आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES, ''SMC'' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 157/JP/2022
निर्धारण वर्ष/Assessment Year : 2017-18

M/s.Quasar Developers Pvt. Ltd 202, Ridhi Sidhi Bhawan, Ahinsa Circle C-Scheme, Jaipur	बनाम Vs.	The ITO Ward- 6 (2) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACQ 2638 P		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal, CA
राजस्व की ओर से/ Revenue by: Mrs. Monisha Choudhary, JCIT

सुनवाई की तारीख/ Date of Hearing : 29/11/2022
उदघोषणा की तारीख/Date of Pronouncement: 08/02/2023

आदेश/ ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the ld. CIT(A) dated 21-03-2022, National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] for the assessment year 2017-18 wherein the assessee has raised the following grounds of appeal.

''1. The ld. CIT(A) has erred on facts and in law in confirming the addition of Rs.33,98,989/- u/s 69A of the Act by

treating the cash deposit to this extent as unexplained income of the assessee.

2. The ld. CIT(A) has erred on facts and in law in taxing the above amount @ 60% by not accepting the contention of assessee that section 115BBE substituted by Taxation Laws (Second Amendment Act), 2016 which received the assent of President on 17-12-2016 and made applicable from 01-04-2017 is not applicable to A.Y. 2017-18.''

2.1 Brief facts of the case are that the AO invoked the provisions of Section 145(3) of the Act and concluded that there was defects and anomalies in the reply/ submissions filed by the assessee and consequently the AO made an addition of Rs.33,98,989/- by holding that during the year under consideration, the assessee company has deposited total cash amounting to Rs.36,92,500/- in SBN during demonetization period on 16-1-2016 in his saving bank account No. 3642000100144701 maintained with Karnataka Bank Ltd. During the assessment proceedings, the assessee was asked to furnish statement of monthly cash deposits during the F.Y. 2016-17 and 2015-16 and quantify the income declared with the cash deposited in his bank account(s). In response to this, the assessee furnished the details which are reproduced as under:-

Details of cash deposit in Bank

1	(a)	Total cash deposit in bank F.Y. 2015-16	0
	(b)	Total cash deposit in Bank from 01-04-2015 to 08-1-2015	0
	©	Total cash deposit in bank from 09-11-2015 to 31-12-2015	0
2	(a)	Total cash deposit in Bank F.Y. 2016-17	36,92,500/-
	(b)	Total cash deposit in Bank from 01-4-2016 to 08-11-2016	0
	©	Total cash deposit in Bank in Bank from 09-11-2016 to 31-12-2016	36,92,500/-
3.	(a)	Percentage increase between 2(a) and 1(a)	100
	(b)	Percentage increase between 2(b) and 1(b)	0
	©	Percentage increase between 2© and 1©	100

details of cash sales

(a) (i)Total cash sale in F.Y. 2015-16 0

(ii) Total VAT Receipt in cash F.Y. 2015-16 0

(b) (i) Total cash sale from 01-04-2015 to 08-11-2015 0

(ii) Total VAT Receipt cash from 01-04-2015 to 08-11-2015 0

(c) (i) Total cash sale from 09-11-2015 to 31-12-2015 0

(ii) Total VAT Receipt in cash from 09-11-2015 to 31-12-2015 0

(a) (i) Total cash sale in F.Y. 2016-17 4350638

4394147

(ii) Total VAT Receipt in cash in F.Y. 2016-17 43509

2(b) (i) Total cash sale from 04-01-2016 to 8-11-2016 4324349

4367595

(ii)Total VAT receipt in cash from 01-04-2-15 to 8-11-2015 43246

© (i) Total cash sale from 09-11-2016 to sd31-12-2016 26289

26552

(ii) Total VAT receipt from 09-11-2015 to 31-12-2015 263

(a) Percentage increase between 2(a) and 1(a) - 100

3(b) Percentage increase between 2(b) and 1(b) - 100

© Percentage increase between 2© and 1© - 100

From the above table, it is crystal clear that the assessee has not made any cash deposit during the F.Y. 2015-16 more even the assessee has not made any cash deposit till 8-11-2016 i.e. before the demonetization period during the F.Y. 2-16-17. But surprisingly, the assessee made huge cash deposit of Rs.36,92,500/- between 9-11-2016 to 31-12-2016 during the demonetization period. Further, on

perusal of the sale of the assessee, it is revealed that between 8.00 PM to Midnight 12.00 on 8-11-2016, the assessee has made whole cash sales of Rs.33,98,989/- which is farfetched from ground reality and jewellery market trends or any other business trends. Further, the assessee did not produce bills/vouchers of sale in support of its contention. Thus, the whole cash deposit as claimed and audited results depicted by the assessee does not reflect true pictures and seems to be cooked up and in view of this, the cash sale on 08-11-2016 as claimed by the assessee was never ever happened in a very few hours before declaring demonetization. Nor the assessee produced any purchase bills in support for verification so that the fact may be verified.

2.2 During the appellate proceedings, the ld. CIT(A) after considering the written submissions filed by the assessee which are at para No. 4.2 of the impugned order, dismissed the appeal of the assessee, thereby upholding the addition made by the AO. The operative portion of the order of the ld. CIT(A) is contained in para 4.3 and the same is reproduced herein below.

> ‘’4.3 I have carefully considered the matter. Assessee is stated to have started its own Jewellery business from November, 2015 and claimed to have made regular purchases of jewellery from M/s. Nakshatra Brands Ltd Mumbai. For the period from 01.04.2016 to 31.03.2017, the assessee claimed to have purchased mix jewellery worth Rs.4,86,30,978.00 from M/s Nakshatra Brand, Mumbai. But there seems to be hardly any sale which was commensurate with the purchase. According to the AO, total sales for the whole year was Rs.62,66,499/- Out of that total sales, assessee had claimed that there was sales to the tune of

Rs.33,98,989/- on the night of 08.11.2016. Therefore, it is seen that for the rest 364 days of the year, there was sales of Rs.28,67,510/-. That gives total daily average sale of Rs.7,856/- for the rest of the year. Considering this aspect of the matter, it can by no means be said that assessee, at that point of time, was a reputed jewellery dealer of Jaipur. If assessee was not such a reputed dealer, it cannot be understood as to how people suddenly flocked there to make purchase of more than Rs.30 lakh in few hours of time. Demonetised currencies could have been used by people in other reputed jewellery shops available in Jaipur. People were given opportunities to deposit the demonetized currency even in banks in the coming months after demonetization. It is just beyond the pale of human probability that a jewellery dealer having average daily sale of less than Rs.10,000/- should attract so many customers when many other dealers were also there in the city. Besides, the AO pointed out that there was hardly any cash sale in prior to demonetization and even thereafter. The jewellery business was stated to have started in November, 2015. However, the AO pointed out that sale in FY 2015-16 was NIL AO also stated that accounts for A.Y. 2018-19 was unaudited, meaning thereby that sales were below the threshold limit for audit. All these go to show that the cash sales claimed to have happened within few hours of 08.11.2016 is a concocted story.

4.3.1 In the written submission, assessee claimed that all books of accounts were maintained. In this regard, it must be stated that in this kind of situation, any amount of books can be in manufactured and maintained. Filing of VAT return and paper evidence of purchases and sales are no real proofs of actual transaction having taken place. Acceptance of sales by VAT authority is also of no-moment.

In the written submission, appellant pointed out many case laws in espousal of its cause. But the fact in case of assessee has to be seen from its peculiar perspective. Therefore, the case laws cited cannot be said to be applicable or binding on me while deciding this case.

Therefore, assessee's claim of sale amounting to Rs.33,98,989/- is rejected.

4.3.2 At one part of the written submission, appellant stated that since the tax on profit out of sales out of sales of Rs.33.98,989/- was already subject to tax, the AO doubly taxed assessee's income. In this regard, since claim of sale of Rs 33,98,989/- is treated as bogus, the AO is directed to reduce the profit declared by assessee on this part of the sales claimed in proportion to turnover declared. This aspect of argument is allowed.

4:33 At another part of written submission, the appellant argued that tax rate prescribed u/s 115BBE is not applicable in A.Y. 2017-18. In this regard, it is

seen that the Taxation Laws (Second Act) 2016 says that the amendment will be applicable from 01.04.2017. Therefore, the same will be applicable in A.Y. 2017-18. Unless any Hon'ble High Court or Hon'ble Court adjudged the amendment to be unconstitutional, have no authority to say that tax rate will not be applicable in AY. 2017-18.

This aspect of argument is rejected.

Appeal is treated as partly allowed.

Addition of Rs.33,98,989/- is confirmed AO is also directed to give relief per para 4.3.2 of this order.''

2.3 Now before us, the ld. AR has filed the written submission in respect of both the grounds which are reproduced as under:-

''Ground No. 1. The Ld. CIT(A), NFAC has erred on facts and in law in confirming the addition of Rs.33,98,989/- u/s 69A of the Act by treating the cash deposit to this extent as unexplained income of the assessee.

Submission:-

1. The various observations/ allegations made by the lower authorities to consider the cash deposit of Rs.33,98,989/- in the bank account out of sale of jewellery made by the assessee on 08.11.2016 as undisclosed income are incorrect as explained hereunder:-

a. AO observed that assessee did not furnish any documentary evidence in support of transportation of jewellery during purchase ignoring that jewellery of Rs.4,01,50,530/- (4,86,30,978- Debit Note of Rs.85,25,488/-) **(PB 4)** lying in the shop of assessee in which M/s Nakshatra Brands Ltd. was conducting its business was transferred by it against the security deposit of Rs.4 cr. **(PB 3)** and thus, there is no transportation cost involved. In any case it has no relevance with the sales made on 08.11.2016.

b. The AO made comparison of sales with the sales of last year ignoring that in last year assessee has not done any jewellery business in as much as the assessee took sales tax registration for conducting jewellery business in Nov., 2015 and the stock was transferred to it during the year itself. Hence, the comparison made by the AO with last year has no relevance.

c. The lower authorities observed that jewellery business was unknown to the assessee, there are other reputed dealers in Jaipur, when the average daily sales was less than Rs.10,000/-, how many customers would come to the shop of assessee and therefore, sale of jewellery worth Rs.33,98,989/- to number of persons in few hours is a fabricated story. In making such observation it is ignored that even before demonetization the assessee was making cash sales as per ledger account placed at **PB 5-6**. Immediately on announcement of demonetization at 8.00 PM on 08.11.2016, there was rush at all jewellery shops throughout the country where people purchased the jewellery against the SBN and assessee is no exception to that. In fact the assessee was dealing in branded Nakshatra jewellery and therefore, it was able to make cash sales to 25 customers on 08.11.2016 which considering the exceptional situation on that date by no stretch of imagination can be considered to be too large or against the human probability.

d. The observation of AO that assessee has not segregated trading/ P&L A/c for both the business and that books of accounts for AY 2018-19 was not audited has no relevance for the AY under consideration considering the fact that in the year under consideration assessee did not carry out any real estate activity. All the activities of the year is of jewellery business and therefore, the observation of AO that the segregated trading/ P&L A/c is not made has no impact. Further non audit of accounts for AY 2018-19 has no relevance for the AY under consideration.

e. The AO incorrectly stated that the assessee has not furnished bills/ vouchers of sales made on 08.11.2016 whereas the same were furnished vide submission dt. 27.11.2019 as per the table given at Pg 9 of the CIT(A) order.

f. The observation of Ld. CIT(A) that books are manufactured is without basis. Further his observation that filing of VAT return, paper evidence of purchase & sale are not proof of actual transaction having taken place without bringing any material on record that purchase & sales are not genuine cannot be viewed against the assessee more particularly when sales declared is accepted and no evidence is brought on record that such sale is not a genuine sale.

Thus, the various observation made by the lower authorities by not accepting the cash sales made on 08.11.2016 are on surmises & conjectures and therefore, such cash sales cannot be considered to be introduction of on money through a concocted story.

2. It is submitted that in the course of assessment proceedings assessee has furnished the complete purchase ledger, sales ledger, purchase & sales invoice, stock details and VAT returns as listed at Pg 9 of the CIT(A) order. In the details so furnished no discrepancy as such is found

except presuming the cash sales made on 08.11.2016 as non genuine whereas all sales made on that date are of Nakshatra brand and sales bills were furnished. This apart AO has accepted the closing stock of jewellery declared by the assessee. Thus, when the sales made on 08.11.2016 is already considered by the assessee in its revenue, the same cannot be added u/s 69A of the Act by invoking section 145(3).

3. The AO has made the addition of cash deposited in the bank u/s 69A of the Act. Section 69A reads as under:-

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.

Thus, section 69A is applicable when the money found is not recorded in the books of accounts. In the present case, the cash received on cash sales is duly recorded in the books of accounts and the cash as per the cash book has been deposited in the bank account. Hence, no addition u/s 69A can be made.

4. Reliance is placed on the following cases where it is held that cash received on cash sales deposited in the bank account, duly recorded in the books of accounts cannot be added either u/s 68 or u/s 69A of the Act.

ACIT Vs. Hirapanna Jeweller (2021) 202 DTR 337/ 189 ITD 608 (Visakha) (Trib.)
Assessee having accounted the high denomination notes deposited in bank as cash sales in its books of accounts and produced the sales bills for the same and the AO having accepted the sales & the stock and found no defect in the purchases or sales which match with the inflow/outflow of stock, addition u/s 68 could not be made in respect of the same amount.

PCIT Vs. Agson Global (P) Ltd. (2022) 210 DTR 225 (Del.) (HC)
Having regard to the extensive material which has been examined by the Tribunal, in particular, the trend of cash sales and corresponding cash deposited by the assessee with earlier years, the Court is of the view that there was nothing placed on record which could have persuaded the Tribunal to conclude that the assessee had in fact earned unaccounted income i.e., made cash deposits which were not represented by cash sales. Therefore, the Tribunal correctly found in favour of the assessee and deleted the addition made by CIT(A) u/s 68.

CIT Vs. Kailash Jewellery House ITA No. 613/2010 order dt. 09.04.2010 (Delhi) (HC)

In the facts of above case cash of Rs.24,58,400/- was deposited in bank account. The Assessing Officer made the addition on the ground that nexus of such deposit was not establish with any source of income. The assessee claimed that it was duly recorded in the books on account of cash sales and was considered in the Profit and Loss Account. The Assessing Officer had verified the stock and cash position as per books and had accepted the same. Complete books of account and cash book were submitted to the Assessing Officer and no discrepancy was pointed out. On this basis CIT(A) deleted the addition. Tribunal also observed that it is not in dispute that sum of Rs.24,58,400/- was credited in the sale account and had been duly included in the profit disclosed by the assessee in its return. Therefore, cash sales could not be treated as undisclosed income and no addition could be made once again in respect of the same. The Hon'ble High Court dismissed the appeal filed by the Department.

New Pooja Jewellers Vs. ITO ITA No.1329/Kol/2018 (Kol.) (Trib.)
The relevant Para 15 of the order reads as under:-

15. Be it as it may, in the normal course, we would have restored the issue to the file of the AO for fresh verification of the claim of the assessee that it had received advances from customers on the occasion of Ramnavami Nayakhata. In other words, we would have given the AO more time to conduct enquiries and investigation. In this case we find that these advances have subsequently been recorded as sales of the assessee firm and that these sales have been accepted as income by the AO during the year. He has not disturbed the sales of the assessee. When a receipt is accounted for as income, no separate addition of the same amount as income of the assessee under any other Section of the Act can be made as it would be a double addition. In the result, we delete the addition made and allow its claim of the assessee.

DCIT Vs. M/s Karthik Construction Co. ITA No.2292/Mum/2016 order dt. 23.02.2018 (Mum.) (Trib.)
A reading of section 69A of the Act makes it clear, addition can only be made when the assessee is found to be in possession of money bullion jewellery, etc., not recorded in his books of account. It is not the case of the Department that the loan repayment made during the year was either not recorded in the books of account or the source of fund utilised in repaying the loan is doubtful. That being the case, the addition under section 69A of the Act cannot be made.

In view of above, addition confirmed by Ld. CIT(A) be directed to be deleted. ''

''Ground No. 2. ***The Ld. CIT(A), NFAC has erred on facts and in law in taxing the above amount @ 60% by not accepting the contention of assessee that section 115BBE substituted by Taxation Laws (Second Amendment Act), 2016 which received the assent of President on 17.12.2016 and made applicable from 01.04.2017 is not applicable to AY 2017-18.***

Facts & Submission:-

1. The assessee before the Ld. CIT(A) stated that section 115BBE is not applicable in AY 2017-18. The Ld. CIT(A), however, held that the amendment is made applicable from 01.04.2017 i.e. AY 2017-18 and therefore, unless the Hon'ble High Court or Apex Court adjudged the amendment to be unconstitutional, he has no authority to say that this section is not applicable in AY 2017-18.

2. It is submitted that substituted section 115BBE by Taxation Laws (Second Amendment Act), 2016 received the assent of President on 17.12.2016. The section is made applicable w.e.f. 01.04.2017. Hence, this section will operate on the income referred to in sections 68, 69, 69A, 69B, 69C or 69D which accrues or arises on or after 01.04.2017. For this reliance is placed on the decision of **Supreme Court in case of Karimtharuvi Tea Estate Ltd. Vs. State Of Kerala 60 ITR 262** wherein it is held that it *is well-settled that the IT Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force. In the instant case, there is no escape from the conclusion that the Surcharge Act not being retrospective by express intendment, or necessary implication, it cannot be made applicable from 1st April, 1957 as the Act came into force on 1st September of that year. Since the Surcharge Act was not the law in force on 1st April, 1957 no surcharge could be levied under the said Act against the appellant in the asst. yr. 1957- 58.*

Further the Full Bench of **Patna High Court in case of Loknath Goenka Vs. CIT (2019) 417 ITR 521/266 Taxman 199** with reference to insertion of section 64(1)(iii) w.e.f. 01.04.1976 held that the tax liability under the said provision could be charged on the assessee in the assessment which was to be made for that accounting year i.e. 1976-77 which would be done in A.Y. 1977-78 as the amending act introducing a new tax liability which came into force w.e.f. 01.04.1976 could not be given a retrospective effect and be made applicable to assessment year 1976-77. The relevant part of the judgment reads as under:-

"2. The point for consideration in the reference is whether the Appellate Tribunal was correct in law in holding that the share income of minor sons of the assessees, including the share in interest on capital credited to the minor sons out of the partnership firm was to be computed in the hands of their father under Section 64(1)(iii) in the Assessment year 1976-77. The said provision was introduced in the Income Tax Act by the Taxation Law (Amendment) Act 1975 with effect from 1.4.1976, whereas the accounting year of the assessee(s) in the instant case(s) came to an end on 10.8.1975 and on 31.12.1975 in Taxation Case No. 126 of 1983 and Taxation Case No. 28 of 1986 respectively.

.....17. Reading the judgment of the Apex Court in the case of ***Kesoram Industries and Cotton Mills Ltd. vs Wealth Tax Commissioner (Central), Calcutta AIR 1966 SC 1370*** *harmoniously with the Constitution Bench judgment of the Apex Court in the case of* ***Karimtharuvi Tea Estate Ltd AIR 1966 SC 1385****, this Court would observe that the argument advanced by Counsel for the assessees (Amicus Curriae) as well as the*

Department can be made only in respect of a rate prescribed under a Finance Act or an Act providing a surcharge if the same is brought into force on the lst of April of the assessment year in which assessment for the previous year is being done as the same would only provide for ascertaining the rate, for existing liability under the Income Tax Act. But that is not the case here. Under the new provision, i.e. Section 64(1)(iii) a new liability has been prescribed and not the rate for ascertaining the liability. Such new liability under the Income Tax Act cannot be given a retrospective effect. Such liability can only be fastened on an individual if the same was existing at the time of accrual and not at the time of assessment. The observations of the Apex Court in paragraph 33 of the judgment in the case of ***Keshoram Industries and Cotton Mills (supra)****, clarifies this position.*

18. In view of the judgments of the Apex Court in the case of ***Keshoram Industries (supra)*** *as well as* ***Karimtharuvi Tea Estate Ltd (supra)*** *this Court would have no hesitation in holding that for deciding the liability of a particular provision of the Income Tax Act, the date of accrual of income would be relevant. If the provision comes into force in a particular financial year, it would apply to the assessment for that year but cannot be made applicable in respect of assessment for a previous year.*

19. The Amending Act introduced a new Section 64(1) (iii) in the Income Tax Act with effect from 1.4.1976. The tax liability under the said provision could therefore be charged on the assessee, in the assessment which was to be made for that accounting year i.e. 1976-77, which would be done in the assessment year 1977-78. The Amending Act introducing a new tax liability which came into force with effect from 1.4.1976 could not be given a retrospectivity and be made applicable to the previous accounting year i.e. 1975-76 corresponding to the assessment year i.e. 1976-77."

In the present case also, section 115BBE was substituted by Taxation Laws (Second Amendment Act), 2016 whereby the tax rate under this section was increased from 30% to 60%. This amendment received the assent of President on 17.12.2016. The section is made applicable w.e.f. 01.04.2017. Hence this section will operate on the income referred therein which accrues or arises on or after 01.04.2017. In the present case, cash of Rs.33,98,989/-was deposited in the bank account on 10.11.2016. During this period the substituted section 115BBE was not in the Statute. Hence, even if section 115BBE is applied, the pre-substituted section 115BBE would be applicable and not the substituted section and therefore, even u/s 115BBE, the cash deposit would be subjected to tax @ 30% and not 60%.

3. It may also be noted that Taxation Laws (Second Amendment Act), 2016 also inserted a new sub clause (1A) to section 271AAB whereby the liability of penalty in case of searches was increased. However this clause was specifically made applicable only where searches has been initiated on or after the date on which the Taxation Laws (Second Amendment Act) Bill, 2016 receives the assent of President and thus this clause was specifically made effective only where the searches took place on or after 15.12.2016. Section 115BBE inserted by the same Amendment Act is specifically made effective from 01.04.2017. Thus from the analogy of section 271AAB it is evident that section 115BBE is also applicable where income referred to in

that section is assessed on or after 01.04.2017 i.e. AY 2018-19. Hence the substituted section 115BBE is not applicable for AY 2017-18.

4. It is a settled proposition of law that legislations which modify accrued rights or which impose obligations or imposed new duties or attach a new disability have to be treated as prospective. This is so held by the **Hon'ble Supreme Court in case of CIT Vs. Vatika Township Private Limited (2014) 109 DTR 33** where the Hon'ble court has given the following finding for deciding whether a provision has prospective operation or retrospective operation:-

"39(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002. Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

*40. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in **Suresh N. Gupta** treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. Said judgment is accordingly overruled."*

In view of the above discussion it is clear that the amendment made in section 115BBE by Taxation Laws (second Amendment) Act 2016 which received the assent of President on 17.12.2016 and made effective from 01.04.2017 would apply in FY 2017-18 i.e. AY 2018-19. Thus the amended section is not applicable for AY 2017-18 and therefore tax charged by AO on the cash deposited @ 60% instead of taxing it under the regular provisions of the Act is not as per law.''

2.4 During the course of hearing, the ld. DR relied upon the order of the ld. CIT(A) and also relied upon the decision in the case of Sanjay Kapur vs ACIT [2022] 138 taxmann.com 207 (SC).

2.5 The Bench has heard both the parties and perused the materials available on record alongwith citations referred by the parties. Admittedly, the Photostat copy of Franchisee Agreement dated 23-07-2013 allegedly entered between the assessee with M/s. Nakshatra Brands Ltd., Mumbai was neither before the AO at the time of assessment nor before the ld. CIT(A) at the time of appellate proceedings. Even before the Bench, no application for additional evidence as prescribed under Rule 29 of Income Tax (Appellate Tribunal) Rules, 1931 has been moved. In this situation, the Bench cannot accept the unverifiable Photostat copy of alleged agreement. It is also noted that even before the Bench no documents in the shape of bills etc. containing complete details of the alleged purchases who allegedly

purchased jewellery in cash has been placed on record. The Bench has also considered the citations referred by the assessee but the same are not found applicable in the case of the assessee on factual aspect. In view of the above deliberations, the Bench does not find merit in the submissions of the assessee and find no infirmity in the order of the ld. CIT(A) which is sustained. Thus the appeal of the assessee is dismissed.

3.0 In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 08 /02/2023.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 08/02/2023
*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. The Appellant- M/s. Quasar Developers Pvt. Ltd.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 6 (2), Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 157/JP/2022)

आदेशानुसार / By order,

Asstt. Registrar