

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायि कसदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No.406/JPR/2022
निर्धारणवर्ष/Assessment Years :2013-14

Mukesh Goyal P/o Jagdish Prasad Suresh Chand, New Mandi, Gangapur City.	बनाम Vs.	ITO, Sawaimodhopur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AFGPG 0341 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Sh. Dinesh Kumar Jain (Adv.)
राजस्व की ओरसे / Revenue by: Ms Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 21/02/2023
उदघोषणा की तारीख / Date of Pronouncement: 22/02/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the National Faceless Appeal Centre, Delhi [Here in after referred as to "NFAC"/ CIT(A)] for the assessment year 2013-14 dated 21.09.2022, which in turn arises from the order passed by the Income Tax Officer, Ward-1, Sawaimadhopur passed under Section 154 of the Income Tax Act, 1961 (in short 'the Act') dated 08.01.2021

2. The assessee marched this appeal on following grounds;

“1. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in confirming the action of Id. AO in making order u/s 154 by invoking section 115BBE where the section 68 & 69 had not applied in original assessment u/s 147/143. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

2. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in not considering the submission that not invoking section 68/69 and 115BBE in the original assessment, is not an apparent mistake but it is a change of opinion, therefore order u/s 154 cannot be issued. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

3. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in not considering the submission that the Ld. A.O. had not issued any show-cause notice for invoking provisions of section 69 of the Act. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

4. The Appellant craves his rights to add, amend or alter any of the grounds on or before the hearing.”

3. The facts as culled out from the records is that the assessment u/s 147/143(3) of the Act was made on 22.11.2018 by making addition of Rs. 2,00,000/- and issued demand of Rs. 23,340/- applying normal slab rate of income tax and interest. Later on notice u/s 154 dated 29.12.2020 was issued to rectify the assessment order u/s 147/143(3) dated 22.11.2018 earlier to invoke section 68/69 of the Act and apply section 115BBE of the Act for tax calculation of at specific rate of tax instead of

slab rate of tax as per normal provision of the Act. The AO has passed the order u/s 154 of the Act on 08.01.2021 by invoking considering that the addition is based on provision of section 68/69 and therefore, the rate of tax should have been applied in the computation sheet in accordance with the provision of section 115BBE not attracted and thus, issued demand of Rs. 1,15,710/-.

4. As the assessee was aggrieved by the order of the assessing officer, the assessee has filed the appeal before the Id. CIT(A) and the Id. CIT(A) after hearing the contention of the assessee given his relevant findings on the issue, which reads are as under:-

“5. Decision

I have gone through the facts of the case, the grounds of appeal and the submissions made during the appellate proceedings. The fact of the case and assessment u/s 143(3)/147 was framed for A.Y.2013-14 dated 22/11/2018. Subsequent to this assessment, the A.O. passed an order u/s 154 dated 08/01/2021 where he applied the tax rate as per the provisions of section 115BBE. That was done because in the 143(3)/147 assessment addition was made on account of undisclosed or unexplained income and the tax rate was to be charged at 60% as contained in the provisions of section 115BBE. The main contention of the appellant is that the said tax rate cannot be applied u/s 154. The appellant claims that section 154 is applicable in cases where mistakes are apparent from record. He claims that the mistake of application of section 115BBE is not to be considered as a mistake apparent from record and therefore the Assessing Officer has wrongly applied the provisions

of section 154 of the Act. In support of his contention the appellant has relied upon the decision of the Hon'ble ITAT Jaipur Bench case of ACIT vs Sudesh Kumar Gupta for A.Y. 2014-15 ITA No. 976/JP/2019.

I have perused the submission of the appellant but I am not in agreement with the contention raised. It is observed that the addition made is on account of unexplained income. There is no dispute that the amount of Rs. 2,00,000/- have been added by considering the same as undisclosed income. In the case of the undisclosed income section 68 has to be applied and once the income is assessed u/s 68 then automatically the provisions of section 115BBE are applicable. Since in the present case the Assessing Officer has by mistake not applied the said applicable Income-Tax provision, therefore the same has been sought to be rectified by applying section 154. This is something which is quite apparent from record. It is provided in law that once an addition is made under a particular section then the tax rate applicable shall be as per another particular section that in the present case happens to be 115BBE. The Assessing Officer has followed the due procedure, he has given the opportunity of being heard to the appellant and thereafter has accordingly applied the section 115BBE provisions. The case law supra relied upon by the appellant is not applicable in the present case because that case is a case of unexplained stock and that too in a situation where survey was carried out. Whereas in the present case there was no survey and the income was determined as undisclosed income during assessment proceedings. Thus the facts being not the same with the case law cited that case law is not applicable. In view of the above discussion, I am of the view that the action of the Assessing Officer is correct and there is no need for any intervention. Hence the appeal of the appellant is dismissed and the action of the Assessing Officer is upheld.

6. In the Result, the appeal is dismissed.”

5. As the assessee did not find any favour from the order of the Id. CIT(A) he has preferred the present appeal before the tribunal. To support the grounds so taken by the assessee, the

Id. AR of the assessee has submitted his written submission and the same is reiterated here in below:-

“ Fact of the case: Assessment 147/143(3) was made by making addition of Rs.2,00,000/- and issued demand of Rs.23,340/- applying normal slab rate of Income tax and interest.

To get peace and to avoid litigation, appellant did not file any appeal against the assessment order and deposited aforesaid demand.

Later on, notice issued u/s 154 on 29.12.2020 to rectify the first assessment order made u/s 147/143(3) to invoke section 68/69 and to apply section 115BBE for tax calculation instead of slab rate tax. The Ld A.O. has issued order u/s 154 on 08.01.2021 by invoking section 68/69 & 115BBE and issued demand of Rs.1,15,710/-.

Aggrieved with the order u/s 154, the Appellant filed first appeal to the CIT(A). The Ld CIT(A) has dismissed the appeal.

Ground-wise submissions are as under: -

1. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in confirming the action of Id. AO in making order u/s 154 by invoking section 115BBE where the section 68 & 69 had not applied in original assessment u/s 147/143. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

In this case, the Id. A.O has not invoked section 68/69 while passing first assessment order u/s 143(3). The Id. A.O. has not mentioned for invoking section 69 in his first assessment order.

The Ld. CIT(A) has also mentioned in his order that addition of Rs. 200000/- was an undisclosed income. In the case of undisclosed income, section 68 has to be applied.

The question is whether assessee's income involves income referred to in section 68, It would be appropriate to read provisions thereof as under:

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

[Provided that] where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum No credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

[Provided further] that nothing contained in the first proviso for second provisol shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

The Id A.O. has not completed some basis requirement of the section 68 for invoking the same: -

- Not recorded in the books- Assessee is having income from petty wages & interest and declared the same as Income from other sources. Since the assessee did not have any business income, he need not to maintain books of accounts, therefore, section 68/69 cannot be invoked. Appellant relied on the decision given by the hon'ble Bombay High Court in taken in CIT vs Bhaichand N. Gandhi 141 ITR 67.
- Offers no explanation- Assessee has given proper explanation that impugned amount was deposited out of his brought forwarded cash balance Rs. 5,71,605/- from the preceding year ended on 31.3.2012 and current year's income, therefore, it cannot be said that it is un-explained.
- Formation of opinion for invoking section 68-Ld. A.O has not mentioned any satisfaction note for applying section 68 in his order. Addition was made on assumption and doubt basis.
- Recording of Satisfaction- Nothing mentioned about satisfaction for applying section 68/69 in the order.

Addition was made on doubt basis not on the basis of corroborative evidence –

Appellant has deposited Rs. 4,00,000/- on 26.02.2013 out of his brought forwarded cash balance and current year income. The Id. A.O. has made adhoc addition of Rs. 200000/-out of Rs. 4,00,000/- on the doubt basis. Appellant has submitted the Statement of Affairs as on 31.3.2012 & 31.3.2013 during the assessment, which had a cash balance of Rs.5,71,605/ (see pg no. 4 of paper book). The Ld. A.O. made adhoc addition of Rs. 2,00,000/- on the basis of doubt and not on basis of corroborative evidence.

The Ld. CIT(A) has mentioned in his order that in the case of ACIT vs Shri Sudesh Kumar Gupta (976/JP/2019) on which the appellant is relied upon, is not applicable because in this case there was unexplained stock and survey was carried out. In this regards it is submitted that in the above case the hon'ble jurisdictional ITAT has mentioned in para 12 as given above that:

"the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of

section 69 cannot be independently applied by invoking the provisions of section 154 of the Act."

Facts of the present case are similar to the extent of non-invoking of section 68/69 in the first assessment order and later on, the Ld. A.O. invoked the same through section 154.

2. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in not considering the submission that not invoking section 68/69 and 115BBE in the original assessment, is not an apparent mistake but it is a change of opinion, therefore order u/s 154 cannot be issued. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

the Id A.O. has not invoked section 68/69 in first assessment order. Later on, the Id A.O. changed his opinion by invoking section 68 and applied section 115BBE by rectification u/s 154. It is a case of change in opinion and not a case of mistake apparent from record, therefore, it is not justified to change the opinion by invoking section 68/69 and 115BBE through rectification proceeding u/s 154.

3. In the facts and circumstances of the case and in law, Id. CIT(A) has erred in not considering the submission that the Ld. A.O. had not issued any show-cause notice for invoking provisions of section 69 of the Act. The action of the I d. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the order issued by the Id. A.O. u/s 154.

The Id A.O. has issued first and last notice for rectification of order u/s 154 on 29.12.20 only for applying 115BBE and gave due date of filing response by 04.01.2021, and no other final/show cause notice was issued for enhancing tax burden by applying the alleged provisions through rectification u/s 154.

The Id A.O. has mentioned in his order that assessee has not submitted any explanation to his notice u/s 154 by 04.01. 2021.It is not true.

Appellant has filed online response on 04.01.2021 vide ack no. 04012113714549, copy of acknowledgement is given on pg. no. 12 of the paper book. The Ld. A.O. has passed order u/s 154 on 08.01.2021. Hence the order passed u/s 154 without considering the response of appellant is illegal, unjustified, arbitrary and against the facts of the case.

The Ld. A.O has not followed the due standard procedure for invoking section 68/69 and applying section 115BBE.

4. The Appellant craves his rights to add, amend or alter any of the grounds on or before the hearing.

Appellant don't want to add, amend or alter any of the grounds of appeal.

In view of foregoing submissions of facts, objections, and contentions and on the merits, assessee prays to accept appeal and quash the order passed u/s 154 by the Ld. Assessing Officer.

I hope this fully explains the issue; however, I shall be happy to elucidate further if needed.”

6. The Id. AR of the assessee in addition to the written submission so filed also submitted that the assessee does not maintain the regular books of account, his explains about the source of income and the cash deposited into the bank account has been verified as the assessee has deposited a sum of Rs. 15,40,000/- as against the allegation of the revenue for Rs. 27,90,000/-. The revenue has disputed the fact the assessee is engaged in the labour work and interest income. His source of income on a one particular day out of Rs. 4,00,000 deposited only part amount was not considered by the Id. AO as income arising out of the small business activity done by the assessee. The Id. AO did not give specific finding that whether for this amount he has initiated the provision of section 68, 69,69A or 69B. Even the assessee was no confronted by the assessee while making the addition and looking to the smallness of the amount added as regular income of the assessee. Now, in proceeding u/s. 154 the Id. AO cannot review his own order and levy the tax rate as provided in those sections for which specific tax rate u/s. 115BBE is enacted. To drive home to this

contention the Id. AR of the assessee has relied upon this coordinate bench decision in the case of ACIT vs. Shri Sudesh Kumar Gupta in ITA No. 976/JP/2019 dated 09.06.2020.

7. Per contra Id. Sr. DR appearing on behalf of the assessee reiterated the finding of the lower authorities and submitted the fact of the case relied upon and the fact of the case on hand are different. She has also argued that as the assessee could not satisfactorily explained the cash deposit of Rs. 4 lac the Id. AO has accepted the version of the assessee partly and only added Rs. 2 lac as undisclosed income and so the applicability of section 115BBE is automatic and supported the action of the AO and thus, also supported the order of the Id. CIT(A).

8. In the rejoinder the Id. AR of the assessee that Id. AO choose tax the income of the assessee in addition to the income already offered and therefore, to attract the provision of section 115BBE the order of the Id. AO should specifically give finding that under which provision he is making the addition. Thus, by invoking the provision of section 154 the Id. AO is reviewing his own order and the same is not permitted.

9. We have heard the rival contentions, perused the material on record, orders of the lower authorities and also gone through the judgment cited by the Id. AR of the assessee. The Bench noted that out total cash deposit of Rs. 15,40,000/- Id. AO has made an addition of Rs. 2 lac as income in addition to what has been returned by the assessee. The assessee has already accepted the addition and preferred an appeal considering the same as income of the assessee. On going through the order passed u/s. 143(3) r.w.s. 147 of the Act we are of the considered view that the Id. AO has not invoked any under which provision he has added a sum of Rs. 2 lac. In the absence of any specific finding the Id. AO cannot charge the said income within the provision of section 115BBE as specific rate of tax for this addition therefore, action of charging the specific tax u/s. 115BBE in the proceeding u/s. 154 of the Act is not correct considering the peculiar fact of the case on hand. Similar view has been taken by this bench in the case of ACIT vs. Shri Sudesh Kumar Gupta in ITA No. 976/JP/2019 dated 09.06.2020 at para 12 of the order and the same is reiterated here in below:-

“12. It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE of the Act. Had that been the case, it would clearly be a case of rectification and powers under section 154 can be invoked. However, in the instant case, the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act. We therefore upheld the order of the Id CIT(A) and the matter is decided in favour of the assessee and against the Revenue. “

9.1 Being consistent on the finding given by the co ordinate bench we also held that as there is no finding in the assessment order that the income added is under which provision of the act and therefore, charging the specific tax rate u/s. 115BBE is not in accordance with the provision of law and the same is quashed. In terms of these observation the appeal of the assessee is allowed.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 22/02/2023.

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 22/02/2023
*Santosh

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखासदस्य / Accountant Member

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Mukesh Goyal, Gangapur City.
2. प्रत्यर्थी / The Respondent- ITO, Sawaimadhopur.
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No. 406/JPR/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar