

आयकरअपीलीयअधिकरण“बी” न्यायपीठपुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES “B” :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं. / ITA No.870/PUN/2022
निर्धारणवर्ष / Assessment Year : 2015-16

SaitawadekarJewellers, 1825, B2 Padma Talkies Bldg, Opp.Urban Bank Bazar Peth, Chiplun – 415605. PAN : -	Vs	The Pr.CIT, Pune-1.
Appellant/Assessee		Respondent /Revenue

Assessee by	Shri Pramod Shingte – AR
Revenue by	Shri Sardar Singh Meena,IRS – DR
Date of hearing	10/02/2023
Date of pronouncement	03/05/2023

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of
ld. Principal Commissioner of Income Tax, Pune-1 dated
22.11.2022 emanating from the order of the Assessing Officer dated
27.11.2017 under section 143(3) of the Income Tax Act, 1961 for the
A.Y.2015-16. The Assessee has raised the following grounds of
appeal:

“1. On the facts and circumstances of the case and in law the Ld. PCIT in his order u/s 263, while giving effect to the order dtd.31.05.2022 of the honorable ITAT, erred in making the following additions to the income determined vide assessment order

dated 27.11.2017 and directing the assessing officer to accordingly give effect to his order:

- a. Addition of income declared during the source of survey on account of excess stock of Rs.30,01,449.*
- b. Disallowance on account alleged cash payments in violation of Section 40A(3).*

even though, as was substantiated in the submission to the Ld. PCIT, there is neither any violation of S.40A (3) nor the excess income declared during survey has remained to be disclosed, which fact was duly examined by the AO during the assessment proceedings u/s 143(3).

The appellant therefore prays that the order of the PCIT be annulled.

The appellant craves leave to add to amend, alter, modify, delete or add a new ground of appeal before or at the time of hearing.”

Brief facts of the case:

2. As per the assessment order and the paper book of the assessee, the assessee is in the business of Manufacturing, trading of Gold & Silver Ornaments. The assessee is a firm. It had filed return of Income for A.Y. 2015-16 on 16/10/2015 declaring total income of Rs.15,06,560/-. The assessee's case was selected for scrutiny assessment. The assessment order u/s 143(3) for AY 2015-16 was passed on 27/11/2017 accepting the returned income.

2.1 The Pr.CIT Pune after verification of records issued notice u/s.263 dated 16/2/2021 and then passed order u/s 263 dated 18/03/2021. This order was challenged by the Assessee before the

ITAT. The ITAT in ITA 115/Pune/2021 vide order dated 31/05/2022 set aside the order u/s 263 to the Pr.CIT for denovo adjudication after giving opportunity to the assessee. The Pr.CIT passed an order u/s 263 after giving opportunity to the assessee on 22/11/2022. The relevant part of the Order u/s 263 is reproduced here as under :

Quote, ““5. In compliance with the order of the Hon’ble ITAT, a fresh notice was issued by the undersigned on 10.11.2022 calling the submission and supporting material, if any. In compliance with this notice, the assessee submitted its written submission on 13.11.2022, which is brought on record. In this written submission, the assessee admitted that there was excess stock found during the course of survey u/s 133A of the Income-tax Act, 1961 to the tune of Rs. 30,01,449/- which was declared by the assessee as unexplained. The assessee further stated that this unexplained stock has duly been added in the stock while finalizing the Balance Sheet and Profit & Loss account.

Thus, it is undisputed fact that there was unexplained stock of Rs.30,01,449/- which was disclosed by the assessee as additional income of the year. The treatment given to this excess stock in the Profit & Loss account is not correct. The unexplained stock found in the survey is to be taxed under section 69/69B of the Income-tax Act, 1961 and it would be in addition to the regular income of the assessee as is held in the following cases:-

- 1. Vimla Stores vs CIT (2009) 308 ITR 89 (Pat)*
- 2. Dhanush General Stores vs CIT (2011) 339 ITR 651 (CG)*
- 3. Fakir Mohd Haji Hasan vs CIT, 249 ITR 290 (Guj)*

In view of the law laid down in these cases, the amount of excess stock found during the survey viz. Rs. 30,01,449/- is to be added back in the assessee’s regular income.The tax on this amount is to be computed u/s 115BBE of the Income-tax Act, 1961.

6. The assessee has made purchases to the tune of Rs.8,23,642/- from Un-Registered Dealers and that too in cash. Thus, it is to be

added u/s 40A(3) of the Income-tax Act, 1961. On this issue, the assessee submitted that the Assessing Officer in the order passed u/s 143(3) r.w.s. 263 has not made any addition on this issue and hence it stands deleted which is evident from the assessment order. Since the order of the Assessing Officer has become infructuous in view of the order of the Hon'ble ITAT and hence, the stand taken by the Assessing Officer cannot be pleaded against this addition. Nothing else has been submitted by the assessee on this issue and hence, I presume that the assessee has nothing to submit further. I, therefore, add Rs.8,23,642/- in the returned income of the assessee." Unquote.

Submission of Ld. Authorised Representative (ld.AR):

3. The Ld.AR of the assessee filed a factual paper book. The Ld.AR submitted that the assessee had declared undisclosed stock of Rs.30,01,499/- during the survey conducted on 19/12/2014. The Ld.AR submitted that the said stock has been shown in the Profit and Loss Account for A.Y.2015-16 by the assessee as the assessee had time to file the return of Income for AY 2015-16. This fact has been explained to the AO during the scrutiny assessment. The Ld.AR invited our attention to Paper book page 28 which was notice u/s 142 dated 29/09/2017 vide which specific question was asked regarding survey declaration. The assessee replied the said notice vide his letter dated 14/10/2017 which was at page number 31-39 of the paper book. The ld.AR submitted that the assessee had explained the AO regarding the survey declaration and how the assessee had shown it in the P&L account. Therefore, ld.AR submitted that the AO had carried out necessary verification and applied his mind. Hence

Ld.AR submitted that the assessment order was not prejudicial and erroneous.

Departmental Representative's Submission:

4. The Ld. Commissioner of Income Tax, Mr. Sardar Singh Meena, Departmental Representative strongly relied on the order of the Pr. CIT. Ld. DR took us through the statement of Mr. Mangesh Saitavadekar, partner of assessee recorded during the survey on 19/12/2014. Ld. DR submitted that excess stock was found during the survey. The partner has accepted this fact that the excess stock found during the survey was not recorded in the books of the firm. Therefore, the partner accepted additional income of the assessee. The Ld. DR submitted that 'excess stock , found means the assessee had invested his unaccounted money in purchase of the said excess stock which was admittedly not recorded in the regular books. This means, the impugned 'excess stock' found during the survey was 'unexplained money, bullion, jewellery' as mentioned in the section 69A,69B of the Act. Therefore, the impugned excess stock should have been added u/s 69B of the Act which is taxable u/s 115BBE. However, the AO has not added it u/s 69B, hence the assessment order is erroneous. Whether the assessee had submitted the details or not is not important in this case as the AO has erroneously not applied the correct section of the Act. The Ld. DR read out the

Section 263 and its explanation. Ld. DR submitted that as per the explanation to Section 263, the assessment order is erroneous and prejudicial to the interest of the revenue.

Findings and Analysis:

5. We have heard both the parties and perused the records. It is a fact that excess stock was found during the survey conducted on 19/12/2014. It is an admitted fact by the partner of the assessee firm that the said excess stock was not recorded in the books of the firm. In the statement the partner of the firm in question number 3 has admitted that the books are written up to 19/12/2014 i.e. up to the date of the survey. The partner has admitted in answer to question number 17 that the excess stock of 1058.686 grams in fine weight of Gold and 1060.825 grams of silver was not recorded in the books. The statement of the partner was recorded in the presence of Authorized representative Mr. S.P. Vaidya CA. The partner of the Assessee firm had admitted additional income as under :

Excess Cash Found	Rs.4,98,550/-
Excess stock of gold	Rs.29.64.321/-
Excess stock of Silver	Rs.37128/-
Total for AY 2015-16	Rs.34,99,999/-

5.1 In answer to question number 18, the partner of the firm has specifically admitted that he has discussed the issue with the CA Mr. S.P. Vaidya who was present during the entire survey operation , and then admitted the declaration of additional income of Rs.34,99,999/- for AY 2015-16. Thus, there is no dispute that there was excess stock of Gold and Silver which was not recorded in the books.

5.2 The assessee in the return of Income for AY 2015-16 has shown the said excess stock found during the survey in the Trading Account in Closing Stock. The AO has accepted the returned Income of the assessee. It is the claim of the appellant assessee that AO had verified the issue of excess stock . However, the question before us is that had the assessee shown the unaccounted Excess Stock found during the survey u/s 69B separately in the computation of Income ? The obvious answer is NO.

5.3 In this case it is a fact that there was unaccounted stock, means the assessee had used its unaccounted money to purchase the said stock. The said stock is outside its purchase register. It means it is 'unexplained investment'. The AO had erroneously not verified this aspect. Section 69B is reproduced here as under :

Amount of investments, etc., not fully disclosed in books of account.

69B. Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.

5.4 As per section 115BBE specifies the tax for such additions. Section 115BBE as applicable for AY 2015-16 is reproduced here as under :

Tax on income referred to in [section 68](#) or [section 69](#) or [section 69A](#) or [section 69B](#) or [section 69C](#) or [section 69D](#).

115BBE. (1) Where the total income of an assessee includes any income referred to in [section 68](#), [section 69](#), [section 69A](#), [section 69B](#), [section 69C](#) or [section 69D](#), the income-tax payable shall be the aggregate of—

- (a) the amount of income-tax calculated on income referred to in [section 68](#), [section 69](#), [section 69A](#), [section 69B](#), [section 69C](#) or [section 69D](#), at the rate of thirty per cent; and*
- (b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).*

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

5.5. The Section 69B, 69A, 69 has introduced a deeming provision. The AO has failed to verify this aspect of the impugned excess stock declared during the survey. Therefore, the assessment order is erroneous and prejudicial to the interest of the revenue.

6. The relevant Section 263 as applicable at that point of time is reproduced here as under :

Revision of orders prejudicial to revenue.

263. (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

***Explanation 1.*—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—**

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—

- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;**
- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.**

***Explanation 2.*—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—**

- (a) the order is passed without making inquiries or verification which should have been made;**
- (b) the order is passed allowing any relief without inquiring into the claim;**
- (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119;
or**
- (a) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.**

The explanatory Memorandum to Finance Act has explained the Amendment to Section 263 as under :

Quote, “Revision of order that is erroneous in so far as it is prejudicial to the interests of revenue The existing provisions contained in sub-section (1) of section 263 of the Income-tax Act provides that if the Principal Commissioner or Commissioner considers that any order passed by the assessing officer is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making an enquiry pass an order modifying the assessment made by the assessing officer or cancelling the assessment and directing fresh assessment.

The interpretation of expression “erroneous in so far as it is prejudicial to the interests of the revenue” has been a contentious one.

In order to provide clarity on the issue it is proposed to provide that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,— (a) the order is passed without making inquiries or verification which, should have been made; (b) the order is passed allowing any relief without inquiring into the claim; (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or (d) the order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person. This amendment will take effect from 1st day of June, 2015. [Clause 65]” Unquote.

7. Thus, the Memorandum has clarified that the expression “*erroneous in so far as prejudicial to the interest of revenue*” was a contentious issue hence in order to provide clarity the explanation 2 has been introduced w.e.f. 01/06/2015. Thus, as per Explanation 2 of Section 263 an assessment order is Erroneous and Prejudicial to the Interest of the Revenue if the Id. Commissioner or Id. Pr. Commissioner of Income Tax is of the opinion that it has been passed without making proper inquiry or verification which should have been made. Thus, with the

introduction of Explanation 2 to Section 263, the Act has widened the powers of CIT/PCIT of revision. The explanation 2 to Section 263 has introduced a deeming fiction. The Explanation 2 to Section 263 has explained the meaning of word erroneous for the purpose of section 263. Therefore, after the introduction of explanation 2 to section 263, it is the relative satisfaction of the CIT/PCIT regarding enquiry required in a particular case. Therefore, if the Pr.CIT/CIT is of the opinion that inquiry required to be made in a particular case has not been made the assessment order will be deemed to be erroneous and prejudicial to the interest of the revenue.

8. In this case the AO has failed to apply proper and correct section of Income Tax Act to the “Investment in the Undisclosed Stock”. The undisclosed investment in the unaccounted stock needs to be taxed separately as Income of the assessee as per the deeming provision of the Act. The tax liability is calculated as per section 115BBE of the Act .Hon’ble Madras High Court in the case of SVS Oil Mills vs ACIT 418 ITR 442 has upheld the addition of excess stock found during survey u/s69B. The AO has failed to verify this aspect. Hence, we are of the opinion that the Assessment Order is erroneous and prejudicial to the interest of

the revenue. This is not the case where two plausible views are possible and the AO has adopted one plausible view. Hence, the order u/s 263 is upheld qua '*the investment in the undisclosed stock*'.

9. The Pr. CIT has also observed that the Assessee has made URD purchases in cash. However, the assessee had submitted before the AO that the assessee has accepted old gold ornaments and given the new ornaments. The Assessee had submitted this fact before the AO during the Assessment Proceedings u/s 143(3) r.w.s. 263. The AO had not made any addition on this issue in the order u/s 143(3) r.w.s. 263. The Assessee has filed copies of the bills raised by the assessee for the so called URD purchases before the ITAT. We have observed that the assessee had accepted old ornaments and then converted them into new ornaments by adding some gold. Thus, the assessee has not made any actual purchases. Therefore, the order u/s 263 qua "URD Purchases" is annulled.

10. Thus, we are upholding the order u/s 263, only qua "investment in the unaccounted stock found during survey".

11. Accordingly the appeal of the assessee is Partly Allowed.

Order pronounced in the open Court on 03rd May, 2023.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 03rd May, 2023/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.