IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.42/SRT/2022

Assessment Year: (2017-18)

(Physical Hearing)

Samir Shantilal Mehta, 1003, 10th Floor, Sagardeep, South Ridge road, Malabar Hill, Mumbai – 400006.	**Vs.**	The ACIT, Central Circle-4, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AACPM5453D**		
(Assessee)		**(Respondent)**

Assessee by	Shri Vartik Choksi and Biren Shah, AR
Respondent by	Shri Ashok B. Koli, CIT(DR)
Date of Hearing	26/04/2023
Date of Pronouncement	08/05/2023

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2017-18, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-4, Surat [in short "the ld. CIT(A)"] in Appeal No. CIT(A)-4/10551/2018-19, dated 28.12.2021 which in turn arises out of an assessment order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 28.12.2018.

2. Grounds of appeal raised by the assessee are as follows:

"1. In law & as per facts and in the circumstances of the assessee case, the Hon'ble CIT(A) has erred in upholding the view of the Id. A.O. relating to the amendment to section 115BBE which was made vide The Taxation Law (Second Amendment) Act, 2016 dated 15.10.2016 while the search operation was conducted on 16.08.2016 at the premises of the assessee i.e. before such amendment came into effect. Thus, the provisions set out in the Second Amendment Act should be applied prospectively and not retrospectively. The Hon'ble CIT(A) has erred in interpreting that the same is retrospective in nature i.e. from A.Y. 2017-18 and thus the order passed deserves to be quashed.

2. In law & as per facts and in the circumstances of the assessee case, the Hon'ble CIT(A) has erred in upholding the levy of tax u/s 115BBE at the rate of

60% by treating the same as retrospective in total disregard of the decisions relied upon by the assessee.

3. The assessee craves leave to add, amend, alter or modify the ground or grounds of Appeal on or before the hearing."

3. The solitary grievance of the assessee in this appeal is that whether provisions of section 115BBE would be applicable to tax the unexplained money being undisclosed gold, Jewellery found during the course of search, when the date of search is 16.08.2016?

4. Learned Counsel for the assessee argued that the issue is relating to taxing the unexplained money being undisclosed and gold jewellery found during the course of search u/s 115BBE of the Act. In this appeal the contention of the assessee is that as on the date of search i.e. 16.08.2016, the amendment to section 115BBE of the Act which is applied by the assessing officer was yet to come into the statute as the said amendment came into effect after demonetization by Taxation Laws (Second Amendment) Bill 2016 which is effective from 01.04.2017. Hence, it was pleaded that the provision of section 115BBE of the Act has been applied retrospectively. The ld Counsel of the assessee submitted that considering the rational behind amendment to section 115BBE of the Act, the assessee strongly believed that subsequently enacted tax rate shall be applicable on those cases where undisclosed assets in the form of cash are deposited in the bank account, in post demonetization. As the assets were found in the premises of the assessee prior to demonetization, the provisions of section 115BBE are not applicable to the case of the assessee. The ld Counsel has relied upon the following judicial pronouncement in support of his submissions:

- ***Karimtharuvi Tea Estate Ltd. v. State of Kerala (1966) 60TTR 262***
- ***CIT vs. Scindia Steam Navigation Co. Ltd. (1961) 42 ITR 589 (SC)***
- ***CIT(Central)-I, New Delhi v. Vatika Township (P.) Ltd. is notable***

5. On the other hand, Ld DR for the Revenue submitted that there is no dispute as such on taxing the undisclosed cash and gold jewellery found during the course of search as the same was offered to tax in the return of Income. The

only dispute is on treating the said unexplained assets as unexplained money u/s 69A and taxing the same as per the provisions of section 115BBE of the Act. It is correct that the provisions of section 115BBE of the Act as amended were brought into the Act by Taxation, Laws (Second Amendment) Act, 2016, however, the said amendment has been made effective from 01.04.2017 and hence applicable to the impugned assessment year i.e. AY.2017-18. Therefore, the amendment in question is not retrospective as claimed by the ld Counsel of the assessee. Though, the intention of the Legislature was to bring the amendment was to tax the unexplained assets after demonetization but the amendment covers all sections from 68 to 69D of the Act irrespective of whether the undisclosed assets found/taxed are prior to or after the demonetization period. Therefore, if any income from AY 2017-18 is taxed u/s 68 to 69D of the Act, the provision of section 115BBE of the Act would apply to all such incomes.

6. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. Counsel, we find that the issue involved in the present appeal is no longer *res integra*. The question as to whether provisions of section 115BBE would be applicable to tax the unexplained money being undisclosed gold, Jewellery found during the course of search, when the date of search is 16.08.2016,was considered by various judicial forums across India. The said issue is considered by Co-ordinate Bench of ITAT, Indore in ITA No.677/Ind/2019, wherein it was held as follows:

> *"11. Allowing the appeal on the chargeability of tax as per normal rates instead of amended provision of Section 115BBE of the Act is the subject matter before us. The assessee has challenged the chargeability of tax @ 77.25% by invoking the amended provision of Section 115BBE of the Act on account of additional income declared at the time of search, survey and also the addition made by the assessing officer.*
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> *12. The case of the assessee is this that the amendment in Section 115BBE came into force only on 15.12.2016 whereas the search was conducted on 21.09.2016 and the assessee has paid tax @ 30%. The provision of Section 115BBE of the Act tax prior to the amendment reads as follows:*
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> > *"115BBE. (1) Where the total income of an respondent 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 respondent assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).”

13. The second amendment came into force w.e.f. 15.12.2016 whereas the Income Tax Act Search and Survey was conducted prior to that date and, thus, at the time of declaring the additional income the second amendment was not available under the Income Tax Act. The said amendment took place with the following manner:

“(1) Where the total income of an respondent assessee, —

(a) includes any income referred to in section 68, section 69, section 69A,

section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(b)determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of—

(i) the amount of income-tax, calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and

(ii) the amount of income-tax with which the respondent assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i)

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

After the amendment total income includes additional income as voluntarily declared by the assessee in the return of total income whereas the amount of addition made by the assessing officer included both the amount, and the provision of section 115BBE of the Income Tax Act was applied. Therefore, the assessee made out the following case against the order passed by the Ld. assessing officer:

“2.2.5] That provision of section 68, 69, 69A, 69B, 69C and 69D of the Income Tax Act is attracted when the additional income as offered or amount as added attract the provision of sections 68, 69, 69A, 69B, 69C and 69D of the Income Tax Act. The present case in hand, the assessing

officer made addition to the total income of the respondent assessee by invoking the provision of section 69B of the Income Tax Act

> ***"69B.*** *Where in any financial year the respondent 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 respondent assessee for any source of income, and the respondent 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 respondent assessee for such financial year."*

2.3] That provision of section 69B of the Act though invoked in the case of the above respondent assessee. However, the excess Jewellery as found was part of stock in trade of the respondent assessee company and not found as Investment as envisage in the provision of section 69B of the Income Tax Act. That provision of section 68 to 69D are residuary sections and the same is applied only where the amount was not taxed under any specific chapter. In the present case in hand, the respondent assessee company is engaged in the business of Jewellery. The difference in the quantity of stock was during the normal business activities of the respondent assessee company. The excess Jewellery as found was part of its stock in trade and found in the business, premises of the respondent assessee company. It was also explained by the respondent assessee that the same was out of its normal business income and therefore the same is taxable under the head of business income. That when income is taxable as business income of the respondent assessee. In that case, the assessing officer was not justified in adding the same by invoking the provision of section 69B of the Income Tax Act. Thus, the addition as made by invoking the provision of section 69B of the Act was not justified. That when the excess amount of stock was taxed as business income of the respondent assessee on account of closing stock valuation, in that case there was no justification for invoking of the provision of section 115BBE of the Act.

2.4] The respondent assessee company carrying manufacturing and trading business of Jewellery from last several years. During the course of Search and Survey Proceedings respondent assessee company had offered an amount of Rs. 10,14,95,122/-and Rs. 1,20,02,793/- on account of discrepancies in Stock. In addition to that the Ld. A.O. also added Rs. 14,07,74,248/- on account of excess valuation of closing stock in value terms only.

2.5.1] That while filing the return the respondent assessee company included the surrender amount of Rs. 11,34,97,915/- under the head "Business Income" and paid tax at applicable normal rate of 34.60%.

2.5.2] The Assessing Officer treating the difference in stock as "Unexplained Investment" and covered the same under deeming provisions of section 69B of the Income tax and after applying the provisions of section 115BBE tax @ 77.25% .

2.5.3] That the issue in this ground is that under which head excess stock found in the Search & Survey is to be taxed ,whether under the head income from business or treated as unexplained investment by applying deeming provisions of section 69B of the Act.

2.5.4] That during the course of Search Proceedings vis-a-vis assessment proceedings the respondent assessee has explained before the Ld. A.O. that surrender of Excess Stock was in relation to business activities and it had direct nexus with business activities, accordingly the respondent assessee company included the same under the head "Business Income".”

14. It is also a fact that the Ld. assessing officer has not brought on record any evidence or material to establish that the assessee was involved in any other activities or having any other source of income. While deleting the addition made by the Ld. assessing officer the Ld. CIT(A) observed as follows:

“First of all let me discuss whether the provisions of section 115BBE are applicable to this case or not. The provision of disallowance of any loss with the income as computed under clause (a) of sub section (1) of section 115BBE came into force w.e.f 01.04.2017. Hon'ble Supreme court in the case of CIT vs Vatika Township Pvt Ltd (2014) 24 ITJ 532 (SC); (2014) 271 CTR 1: (2014) 227 Taxmann 121 has held that "An amendment made to the 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. Hon'ble ITAT Indore in the case of Priyadharshani Construction vs ITO (2012) 19 ITJ 276 (Trib-Indore) has held that "Substantive law shall be understood to be applicable prospectively unless made specifically retrospective. Thus, it is settled position of law that provision of section 115BBE of the Act is clearly not applicable in case of business income which is taxed under section 28 to 44 of the Income Tax Act. The assessing officer also failed to bring on records any other source of income of the assessee apart from the one that is shown in return of income. The assessee in support has also relied on the following decision:-

• Hon'ble Rajasthan High Court in the case of CIT vs Bajargan Traders [Appeal No 258/2017 dt 12-09-2017];

• Hon'ble Ahmedabad bench of ITAT in the case of Chokshi Hiralal Maganlal vs DCIT as reported in 141 TTJ 001;

• Hon'ble Jodhpur bench of ITAT in the case of Lovish Singhal & Others vs ITO [Appeal No 143/ Jodh/ 2018];

• Hon'ble Jaipur bench of ITAT in the case of DCIT vs Ramnarayan Borla [Appeal No 482/ JP/ 2015 dt 30-09-2016];

• Hon'ble Supreme Court in the case of Lakhmichand Baijnath Vs CIT as reported in 35 ITR 416;

• Hon'ble Apex Court in the case of Nalini Kant Ambalal Mody vs SAL Narayan Row as reported in 61 ITR 428.

Considering the submission made and decisions referred, it is undisputed that the assessee is having only source of income from Trading and Manufacturing of jewellery. The additional income was offered on account of difference in the stock as per books of accounts and as actually found during the course of search. The difference in stock as fund was also related to the business of the assessee. I therefore hold that additional income offered and addition made was on account of business income of the assessee and is therefore liable to be taxed under the head of income from business and profession only. The provisions of section 115BBE of the Income Tax Act are applicable where addition is made under section 68, 69, 69A, 69B, 69C and 69D i.e. from residuary category w.e.f 01.04.2017. However, in the present case in hand, additional income was offered and even addition was made on account of difference in the stock which was liable to be taxed under the head of income from business and profession only and valuation of stock was done on the basis of various observations drawn during the course of search & survey which took place on 28.09.2016 & 15.11.2016 respectively. Since, the search in the case of assessee was carried out on 28.09.2016 and additions were made consequential to search, therefore, the assessing officer, was not justified in stating that provisions u/s 115BBE were invoked by the assessee which in fact was applicable from 01.04.2017 and not from 28.09.2016 (date of search). Thus, the assessing officer is hereby directed to calculate tax as per normal rate applicable in the case of the assessee Therefore, appeal on this ground is ***Allowed.****"*

Since the search in the case of the assessee was carried out before the amendment the addition ought to have been made in terms of the prevailing provision and therefore, the addition made by the assessing officer invoking Section 115BBE provision of which came into force only on 01.04.2017 is not sustainable. Therefore, the order passed by the Ld. CIT(A) deleting the addition made on that premise is according to us just and proper so as to warrant interference. Hence, the appeal preferred by the Revenue found to be devoid of any merit and is dismissed.

15. In the result, the appeal filed by the Revenue is dismissed."

7. The said issue is also covered by another Co-ordinate Bench of ITAT, Jabalpur in the case of Sandesh Kumar Jain, in ITA No. 41/Jab/2020, wherein it was held as follows:

"4.2 As regards the assessee's second, without prejudice, argument, i.e., qua non-retrospectively, we find considerable force therein. Section 1(2) of the Amending Act provides that save as otherwise provided therein, it shall come into force "at once". The same only conveys the intent for, except where a later date is specified, the legislation to take immediate effect, i.e., as soon the assent of the Hon'ble President of India is received, by signing the same. The words „at once" convey an urgency, so that the same represents the earliest point of

time at which the same is to take effect, i.e., 15/12/2016 itself, and which also explains the same being enacted during the course of the fiscal year, tax rates for which stand already clarified at the beginning of the year per the relevant Finance Act (FA, 2016). The said words "at once" would loose significance if the provisions of the Act are to, as stated by the ld. CIT(A), be read as effective 01/04/2017, implying AY 2018-19. The same, for substantive amendments, as in the instant case, represents the first day of the assessment year, i.e., AY 2017-18, which explains the assessee's grievance of it being thus effective for FY 2016-17 or, w.e.f. 01/4/2016. Enacting it mid-year and, further, making it applicable "at once", becomes meaningless if the same is to take effect retrospectively, or is made effective from a later date (01/4/2017), which could in that case be by Finance Act, 2017. True, the amendment, where so read, does gives rise to a peculiar situation inasmuch as two tax rates would obtain for the current year, i.e., one from 01/04/2016 to 14/12/2016, and another from 15/12/2016 to 31/03/2017, but, then, that is no reason to read retrospectively where the applicable date is clear and, further, there is nothing to suggest retrospectively. Further, extraordinary and supervening circumstance of the Demonetization Scheme, 2016, brought out by the Government of India in November, 2016, explains the urgency in bringing an amendment mid-year. Further, the tax rate being in respect of incomes which are imputed with reference to a transactions, it is possible to administer the same, another aspect of the matter that stands considered by us. That is, a tax rate for transactions made up to 14/12/2016, and another for those thereafter. Subsequent mention of the applicability of the amended provisions of ss. 271AAB and 271AAC with reference to the date on which the Presidential assent to the Act is received, further corroborates this view, which is based on the clear language of the Amending Act, as well as the principle that a substantive amendment is to be generally prospective. We draw support from the decision in Vatika Township Pvt. Ltd. (supra), reiterating the settled law of the rule against retrospectively. The tax rate applicable to the impugned income would, therefore, be at 30%, i.e., the rate specified in sec. 115BBE as on 30/11/2016, the date of the surrender of income per statement u/s133A (PB-1, pgs.35-44). This, it may be noted, is also consistent with our view that the income is liable to be assessed u/s. 69B (see para 4.1).

4.3 The Revenue, accordingly, fails on it's Ground 2."

8. We note that case of the assessee, under consideration is that the amendment in section 115BBE came into force only on 15.12.2016 whereas the search was conducted on 16.08.2016 and the assessee has paid tax @ 30%. Since the search in the case of the assessee was carried out before the amendment the addition ought to have been made in terms of the prevailing provision and therefore, the addition made by the assessing officer invoking section 115BBE, provision of which came into force only on 01.04.2017, is not sustainable. Therefore, we note that assessee's issue is squarely covered by the aforesaid precedents, hence we allow the appeal of the assessee.

9. In the result, appeal filed by the assessee is allowed.

Order is pronounced on 08/05/2023 in the open court.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat
दिनांक/ Date: 08/05/2023
SAMANTA

Copy of the Order forwarded to

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2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
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By Order

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