आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT "**SMC**" BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

आ.अ.सं./ITA No.293/SRT/2022 (AY 2017-18)

(H*earing in Physical Court)*

Rajendrabhai Ramanlal Desai, AT N Post-Kharvasa, Via-Udhna, Tal: Choryasi, Dist. Surat-394210 **PAN No: ABKPD 0975 E**	Vs	Income Tax Officer, Ward-3(2)(8) Room No.109, Anavil Business Centre, Maher Nager, Jalaram Society, Adajan Gam, Surat,-395009
अपीलार्थी/Appellant		**प्रत्यर्थी** /Respondent

निर्धारिती की ओर से /Assessee by	Shri Mehul Shah, C.A
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
सुनवाई की तारीख/Date of hearing	01.03.2023
उद्घोषणा की तारीख/Date of pronouncement	22.05.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre, Delhi [for short to as "NFAC/Ld. CIT(A)"] dated 23.09.2022 for assessment year 2017-18, which in turn arises out assessment order passed by Income Tax Officer, Ward-3(2)(8), / Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 05.12.2019. The assessee has raised the following grounds of appeal:-

"1. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in sustaining the

addition of Rs.5,00,000/- out of Rs.16,60,000/- made by Assessing Officer u/s 69A of the Act.

2. *Even otherwise the amendment in provisions of Section 115 BBE specifying higher rate of tax @ 60% cannot be applied retrospectively.*
3. *It is therefore prayed that assessment framed u/s 143(3) of the Act may kindly be quashed and/or addition made by Assessing Officer may please be deleted.*
4. *Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."*

5. Brief facts of the case are that assessee is an individual and retired employee of Gujarat State Roadways Transport Corporation (GSRTC), filed his return of income for assessment year 2017-18 on 24.07.2017 declaring total income at Rs. 97,140/-. The case of assessee was selected for scrutiny for the reasons that the assessee made 'large value cash deposits during demonetisation period as compared to return of income'. During assessment the assessing officer noted that assessee made cash deposits between the period of 9th November 2016 till 31st December 2016 aggregating of Rs.16.60 lakhs in three bank accounts of assessee with all Bank of Baroda, out of which one account is joint account. The Assessing Officer asked the assessee to substantiate such huge cash deposits vide notice dated 03.07.2019 and again on 22.08.2019. The assessing officer recorded that in response to show cause

notice the assessee stated that he had made deposits of Rs.2.50 lakh in account No. 20343 in Bank of Baroda out of cash withdrawal of Rs. 80,000/- and Rs. 50,000/- on various dates from his account No. 15213. The Assessing Officer noted that withdrawal of cash is only of Rs. 1,30,000/- and cash deposits were Rs.16.60 lakh and thus, the assessee has not sufficient cash balance as on 03.12.2016. Thus the assessee has not furnished the explanation of remaining of Rs.15.30 lakh. The Assessing Officer issued details show cause notice to assessee to explain the source of entire cash deposits of Rs.16.60 lakh during the demonetization period. The contents of show cause notice is recorded in para-3 in assessment order. The Assessing Officer recorded that no reply was furnished by assessee. Accordingly, the Assessing Officer made the addition of Rs.16.60 lakh and brought to tax net under section 115BBE of the Act.

6. Aggrieved by the addition made in the assessment order, the assessee filed appeal before Ld. CIT(A). Before NFAC/Ld. CIT(A) the assessee filed his detailed written submission. The submission of assessee is recorded in para-4 of the

order of NFAC/Ld. CIT(A). In the submission, the assessee stated that he is a farmer and also a retired employee of GSRTC and having pension income. The Assessing Officer made addition by taking view that assessee has made cash deposits of Rs.16.60 lakh in his various bank accounts of Bank of Baroda. The assessee submitted that he has made deposit of Rs. 2.50 lakh in his bank account No.246020030343, out of past savings and cash withdrawal of Rs. 80,000/- on 07.11.2015 and Rs. 50,000/- on 04.05.2016 from his bank account No.2810100015213 respectively. For deposits in bank account in 2460600001999, the assessee stated that he has obtained a loan of Rs.10.00 lakh, which was credited/ disbursed in account No. 2460100020583 on 25.05.2015. The assessee withdrawn the cash of Rs.10.00 lakh in cash on 29.05.2015 and deposited in 2460600001999 on 03.12.2016, as it was compulsory as per guidelines of Reserve Bank of India. The assessee furnished account statement of loan account. On the basis of such explanation, assessee submitted that he is explained entire cash deposits. The assessee also relied on certain case law also.

7. The NFAC/Ld. CIT(A) after considering the submission of assessee granted substantial relief to assessee in deleting the addition of Rs.11.60 lakh and remaining addition of Rs.5.00 lakh was upheld. The NFAC/Ld. CIT(A) while granting relief to the assessee held that Assessing Officer made the addition on the ground that assessee has not provided complete explanation of his deposits as the source of deposits were not satisfactorily explained. The ld CIT(A) recorded that assessee claimed the source of Rs. 10.00 lakhs as withdrawal from loan account. Before disallowance the assessing officer has not made any inquiry from the bank if the loan amount was withdrawn in cash or it was used elsewhere and the nature and purpose of loan. However, the ld CIT(A) not accepted the explanation of the assessee that cash deposit of Rs. 2,50,000/- in the bank account was out of past savings as there was cash withdrawal of Rs. 50,000/- and Rs. 80,000/- only. The ld CIT(A) held that assessing officer made addition as no evidence was furnished about agriculture income and past savings. The ld CIT(A) further noted that the assessee has not shown agriculture income in his return of income. On

the basis of aforesaid observation, the ld CIT(A) held that the addition of Rs. 16.60 lakh is result of misappropriation of fact and cannot be upheld fully. The ld CIT(A) upheld that addition to the extent of Rs.5.00 lakhs only thereby deleted the substantial addition of Rs. 11.60 lakhs. Further aggrieved assessee has filed present appeal before Tribunal.

8. I have heard the submission of Ld. Authorized Representative (Ld. AR) for the assessee and Ld. Senior Departmental-Representative (Ld. Sr-DR) for the Revenue. The Ld. AR for the assessee submits that Assessing Officer has not accepted the explanation of cash deposit of Rs.2.50 lakh deposited in two separate bank accounts with Bank of Baroda of assessee. The assessee was employed with GSRTC and retired on 19.03.2012 and assessee was having pension income also. The Circular of Central Board of Direct Taxes (CBDT) 03/2017 dated 21.02.2017 clearly allowed the deposit up to Rs.2.50 lakh without any inquiry or investigation. The ld CIT(A) has not appreciated the agriculture income and the withdrawal of Rs. 1.30 lakhs.

9. On ground No.2, which relates to taxing the addition under section 115BBE, the ld AR for the assessee submits that

Second Amendment Act 2016 was brought on statue only after the announcing the demonetisation made on 08th November 2016. Before that, the rate of taxation under section 115BBE was 35.54% including surcharge and cess by way of this amendment, the rate was increased to 77.25% retrospectively for AY 2017-18. The amendment is in contradiction with the law and policy of taxation. The assessee cannot be asked to pay at tax at the increased rate by way of retrospective amendment. To support his submissions, the ld AR for the assessee relied on the following decisions;

- Karimtharuvi Tea Estate Ltd Vs State of Kerala (1966 ITR 262-SC),
- CIT Vs S A Wahab (1990) 48 Taxman 362 (Kerala),
- Avani Export Vs CIT (2012) 23 taxmann.com 62-Gujarat,
- PCIT Vs Aacharan Enterprises (P) Ltd (2020) 117 taxmann.com 745 (Rajasthan).

10. On the other hand, Ld. Sr-DR for the Revenue supported the order of ld CIT(A) and would submit that the assessee has already allowed substantial relief to the assessee. It was submitted that CBDT Circular was issued for guidance of Officer of Department about the issue of cash deposits, which was not examined uniformly. So far as taxing of

additions under section 115BBE, the ld Sr DR for the revenue submits that amendment made in this section is clearly made with retrospective effect. Therefore, the assessee is cannot claim to be taxed at the lower rate of tax.

11. I have heard the rival submissions of both the parties and have gone through the orders of lower authorities carefully. As recorded above the assessing officer made addition of Rs. 16.60 lakhs by taking view that despite giving opportunity the assessee failed to substantiate the deposit in bank three account. The ld CIT(A) granted substantial relief of Rs. 11.60 lakhs by taking view that before making addition the assessing officer has not made any inquiry from the bank if the loan amount was withdrawn in cash or it was used elsewhere and the nature and purpose of loan. I find that ld CIT(A) not accepted the explanation of the assessee that cash deposit of Rs. 2,50,000/- in the bank account was out of past savings as there was cash withdrawal of Rs. 50,000/- and Rs. 80,000/- only. Remaining additions were upheld by ld CIT(A) by taking view that assessing officer made addition as no evidence was furnished about agriculture income and past savings. The ld CIT(A) further

held that the assessee has not shown agriculture income in his return of income and upheld that addition to the extent of Rs.5.00 lakhs only. Before me the ld AR for the assessee has not filed any evidence of agriculture income or any evidence about the retiring benefits from GSRTC. I also noted that the ld CIT(A) has already granted the substantial relief from addition of cash deposits, therefore, I do not find any reason to grants further relief to the assessee. Hence, ground No.1 of the appeal is dismissed.

12. So far as taxing of addition under section 115BBE is concerned, I find that the ld CIT(A) confirmed the action of assessing officer in taxing the addition at higher rate by simply holding that section 115BBE was inserted by Finance Act 2012, w.e.f. 01.04.2014. the ld CIT(A) has not considered the amended provision of as amended by Second Amendment Act 2016 made effective from 01.04.2016. I find that coordinate bench of Indoor Bench in DCIT Vs Punjab Retails Pvt Limited in ITA No. 677/Ind/2019 dated 08.10.2021 passed the following order;

"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.

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:

> *"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."

13. Thus, by following the ratio of decision of coordinate bench, in the above case, I direct the assessing officer to tax the addition at the normal rate of tax applicable prior to Second Amendment Act 2016. In the result, ground No.2 of the appeal is allowed.

14. In the result, the appeal of the assessee is partly allowed.

Order announce in the open court on 22/05/2023.

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL MEMBER]

सूरत /Surat, Dated: /05/2023
Dkp. Out Sourcing Sr.P.S

Copy to:
1. Appellant-
2. Respondent-
3. CIT
4. DR
5. Guard File

By order

// True Copy //

Senior Private Secretary, ITAT, Surat