

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट
IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

(Conducted Through Virtual Court)

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER, JUDICIAL MEMBER

ITA No.239/RJT/2018
Assessment Year :2014-15

ITO, Ward-2 Gandhidham.	Vs.	M/s.Riddhi Siddhi Jewellers Shop No.1, Plot No.68 BBA (Sough) Gandhidham-Kutch.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/(Respondent)
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Assessee by :	Shri D.M. Rindani, AR
Revenue by :	Shri B.D. Gupta, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : 11/04/2023
घोषणा की तारीख /**Date of Pronouncement**: 05/07/2023

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the Revenue against order passed by the ld. Commissioner of Income Tax (Appeals)-3, Rajkot [hereinafter referred to as "Ld.CIT(A)"] under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) dated 16.3.2018 pertaining to the Asst.Year 2014-15.

2. The grounds raised are as under:

“1. The ld.CIT(A) has erred on facts and law in deleting the addition made by AO u/s.69A of the Act of Rs.1,93,69,473/-

2. The ld.CIT(A) has erred on facts and law in deleting the addition made by AO u/s.69C of the Act of Rs.7,20,600/-

3. At the outset itself, it was pointed out that the solitary grievance of the Revenue against order of the ld.CIT(A) was allowing the assessee's claim of treating the income surrendered during survey as being in the nature of business income and thus allowing deduction of interest and salary paid to partners against the same.

4. The facts of the case, it was pointed out to us, was that the assessee was engaged in the business retail trading in diamond and gold ornaments. During the impugned year survey action under section 133A of the Act was carried out on 20.11.2013 at the business premises of the assessee and during the course of survey, unexplained bullion, gold ornaments, cash and unaccounted expenditure to the tune of Rs.2,00,90,073/- was found in the following manner:

1.	<i>Value of unexplained bullion found 3923 grams @ 3110 per gram</i>	<i>Rs.1,22,00,530/-</i>
2.	<i>Value of unexplained gold ornaments found 380.148 grams @Rs.2950 per gram</i>	<i>Rs.70,21,437/-</i>
3	<i>Amount of unexplained cash found in shop</i>	<i>Rs.1,47,506/-</i>
4.	<i>Amount of unaccounted expenses found incurred for shop renovation</i>	<i>Rs.7,20,600/-</i>

5. The same was surrendered in entirety by the assessee. However in the return of income filed, the assessee declared total income of Rs.80,14,612/- only. The discrepancy between the disclosed income and returned income related to allowability of remuneration paid to partners in terms of section 40(b) of the Act. The assessee had disclosed the entire surrendered income but claimed deduction of partners remuneration against the same. The AO treated the entire surrendered income as unexplained

investment and unexplained expenditure in terms of sections 69A and 69C of the Act, Rs.1,93,69,473/- being the value of unexplained bullion, gold and cash treated as unexplained investment as per section 69A of the Act, and Rs.7,20,600/- being unaccounted expenditure brought to tax as unexplained expenses in terms of section 69C of the Act. Accordingly he held that the assessee was not entitled to claim remuneration to partners on the same since it was not in the nature of business income. The Id.CIT(A) however upheld the claim of the assessee of treating the income so surrendered as business income and accordingly allowed claim of deduction of partners' remuneration against the same.

6. We have heard both the parties. The case of the Revenue, as transpires from order of the AO, is that merely stating that the unexplained gold, bullion etc. was part of the business income would not fulfill the requirement and conditions laid down in section 69A and 69C of the Act to escape from the rigors of the said section treating undisclosed investments and expenditures as deemed incomes. As per the Revenue the assessee was required to explain the nature and source of acquisition of the said assets and expenditure found during survey as arising out of its business income to qualify as business income, and thus taking it out from the purview of section 69A and 69C of the Act. That having failed to do so, the income so surrendered by the assessee was rightly treated by the AO as unexplained investment/expenditure/deemed income, against which no set off of any expenditure was to be allowed to the assessee. We have noted that the AO has relied heavily on the decision of the Hon'ble jurisdictional High Court in the case of Fakir Mohmed Haji Hasan Vs. CIT, (2001) 247 ITR 290 (Guj) in support.

7. The Id.counsel for the assessee, on the otherhand, has pointed to us that the Id.CIT(A) has rightly taken note of the fact that thealleged unexplained investment of the assessee pertained to the excess stock of assets in which the assessee dealt in the course of its business i.e. of bullion and jewellery, ornaments and the unaccounted expenditure pertained to that incurred for renovation of shops where the business of the assessee was being run. Therefore, whatever was found and surrendered by the assessee had no separate identity but was found tobe part of the business of the assessee only, and was also explained by the partners of the assessee firm in the statement recorded during the survey to have been made out of the undisclosed income of the business of the assessee firm. He thereafter pointed out that even the source of investment in bullion and gold ornaments and in unexplained expenditure was clarified by partners of the assessee-firm in the statement recorded which fact was duly noted by the Id.CIT(A). He pointed out that the Id.CIT(A) had rightly appreciated the fact that no counter question was asked by the Revenue to partners of the firm when theyadmitted to the said fact, and infact admission of the partners to the effect that the investment in excess stock of bullion ,jewellery etc was made out of unaccounted business income of the assessee, was accepted by the Revenue without any question. It was also pointed out to us that the assessee had not only declared the income on account of excess stock, cash or expenditure found during the survey, but had also booked corresponding purchases relating to the same in its profit & loss account. In this regard our attention as drawn to the audited profit & loss account of the assessee before us at page No.16 pointing out therefrom that while disclosing income declared during survey of Rs.2,00,90,073/-, the assessee at the same time had also disclosed purchases of gold or

bullion from unregistered dealer to the tune of Rs.1,25,16,530/- in the same P&L account. Our attention was also drawn to the P&L account prepared post survey for the period from 20.11.2013 to 31.3.2014 reflecting both again the income disclosed during survey and purchase of gold bullion from unregistered dealers of 1.25 crores placed before us at PB-26. It was also pointed out to us that the said purchases were also declared in VAT return filed by the assessee and no input credit was claimed against on account of the same. Our attention was drawn to VAT return filed for the period placed before at PB Page NO.54. The contention of the ld.counsel for the assessee, relying heavily on the finding of the ld.CIT(A), that the asset found during survey having no distinct and separate identity, but being part of the stock of the business in which the assessee dealt with and the assessee having explained the source of investment in the same as being out of its undisclosed business income which was not called into question by the Revenue authorities during the statement recorded by the partners, the ld.CIT(A) had rightly allowed the assessee's claim to treating the assessee's income as business income of the assessee. He also pointed out that the ld.CIT(A) had relied upon the decision of ITAT Bench in the case of Ms.Fashion World Vs. ACIT, ITA No.1634/Ahd/2006 order dated 12.2.2010 wherein dealing with an identical issue, the surrender made on account of excess stock found during the survey, the same was treated as business income of the assessee and the decision of Hon'ble Gujarat High Court in the case of Fakir Mohammed Haji Hasan (supra) was also distinguished in the said case. Our attention was drawn to the finding of the ld.CIT(A) from para 8 to 8.9 of the order as under:

"8.0 There is no dispute about the fact of declaration of appellant of the sum of Rs.2,00,90,073/- as it unaccounted business income during survey conducted at the appellant's premises on 20.11.2013. Such declaration has

been made by the appellant in his statement before the survey party as well as by way of an affidavit prepared consequent to the survey on 29.11.2013. These facts are not disputed by the A.O. In the said affidavit, the appellant has given the back ground of the declaration as well as the break up the declaration as under:-

“(Quote)” An action u/s.133A of the Income tax Act, 1961 was carried on the firm situated at BBZ, Sec.8, Opp. Show room, Zanda Chowk, Gandhidham, Kachchh on 20.11.2013, where the officials of Income tax department had found excess stock of bullion and gold ornaments, excess cash on hand and a paper containing an account of expenses, incurred on shop renovation. During the course of proceedings I was asked to explain and clarify the particulars of such excess stock, cash and expenses incurred.

After obtaining consent of all my partners and while explaining above stated differences/documents I had made disclosure of undisclosed income which has been earned by the firm from the business activities carried on during the financial year 2013-14 relevant to assessment year 204-15 and which has not been recorded in books of accounts in the statement recorded during the proceedings. I on behalf of the firm and all partners declare that the firm is ready to pay tax on declaration of business income which is as follows.

1.	Value of excess bullion found during survey 3923 grams @Rs.3110 per gram	Rs.122,00,530/-
2.	Value of excess gold ornaments found 2380.148 Gms @Rs.2950 per Gm for 22 Cts ornaments including labour	Rs. 70,21,437/-
3.	Amount of excess cash found in shop	Rs. 1,47,506/-
4.	Amount of expenses incurred for shop renovation	<u>Rs. 7,20,600/-</u>
	Total Rupees	Rs.20,090,073/-

It has been clearly understood by all the partners that the firm shall be responsible for payment of the tax on above business income of the firm and also be abide by the law of income tax Act and all other applicable laws. It is also understood that the above amount of business income is over and above the regular income that the firm shall earned in the normal course of business during the financial year 2013-14. And no deduction in form of expense shall be claimed from such declared amount of income. I also solemnly affirm that the above declaration was made with our consent and without any coercion and undue pressure.

The firm and its partners are, and shall be ready to pay tax in form of advance tax for the assessment year 2013-14 as per provisions of income tax Act, 1961 for which cheques for advance tax payment of tax have been duly submitted to the Income tax Department, Gandhidham.

“(Unquote)”

8.1. Facts of such declaration by way of affidavit and statement is not in the dispute. It is apparent from the P&L account of the appellant that it has credited its account with the item of declaration during survey of Rs. 20090073/-. However, the net profit was only Rs. 80,12,332/-. The main reasons for this lower figure of net profit were following debit entries---

1.	Remuneration to partners	Rs. 1,21,47,977/-
2.	Interest to partners	Rs. 9,85,160/-

The Book Profit was therefore Rs. 20162589/-, the AO has also noted the same in his assessment order in his computation on page 12 of the order. The AO has not disbelieved the other entries of P&L account. His grievance has arisen due to declared net profit being much lower than the amount declared during survey. As it can be seen from the above that it happened due claim of appellant of higher amount of remuneration to partners u/s 40(b) of the Act. Appellant has shown that such claim is approved by the changed partnership deed(dated 13.03.2012), the clause 14 of this deed is concerned with payment of remuneration to the partners. This clause was inline with section 40(b) of the Act, the said computation was submitted to the AO during Assessment proceedings vide appellant's 13.11.2016. The AO has not disputed this computation, however he has noted in para 4.3 of his order that this claim of deduction is the real reason for returned income being much less than the disclosed income. According to the AO this deduction is not available in this case because the disclosure during survey is not the part of the business income, rather it is a deemed income u/s 69.

8.3 Facts of such declaration by way of affidavit and statement is not in the dispute The A.O. has disputed that part of the statement and subsequent submissions in which the declaration has been claimed falling under the head "Income from Business" and not u/s.69. The appellant has continuously submitted that the said declaration was made as undisclosed income earned by the appellant from the business activities carried during the relevant previous year 2013-14 which has not been recorded in the books. The said undisclosed income was disclosed in the form of excess bullion stock of bullion and gold ornament, excess cash found and unexplained expenses incurred during the relevant previous year.

8.4 The appellant had argued that the stock and other assets including expenditure were found at the shop of the firm or found to have been incurred on the business premises and therefore they are apparently derived from business activity and hence includible under the head "Income from Business". The A.O. has not accepted such claim. He has noted that the declared income of Rs.2,00,90,073/- had been reduced to returned income of Rs.80,14,612/- by claiming remuneration paid to the partners under the provisions of Section 40B of the IT Act. According to the A.O. the appellant declared the said income of Rs.2,00,90,073/- crore as "deemed income" being the value of unexplained bullion, gold, cash and unaccounted expenditure admittedly found during the survey under the provisions of section 69A. According to the A.O., the value of unexplained bullions etc found (& declared) during survey doesn't fall under any head of Sec.14. These items (unexplained bullions etc) are covered u/s.69A and like other items of the nature of Sec.68, 69A, 69B, 69C & 69D, the impugned undisclosed income is a deemed income. Extending this logic, A.O. had stated that the deductions otherwise available against business income like Partner's remuneration will not be available against this deemed income.

8.5 It will be prudent to reproduce section 69A;

Section 69A " 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 motion 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. "

It is apparent that invocation of section 69A requires failure of appellant to submit nature and source of acquisition of the impugned asset. In the present case the appellant was asked about excess stock during the survey itself and in reply to question 13 put before him during statement recorded u/s 131 on 20.11.2013 the appellant has clearly stated that this excess stock of gold ornament was bought from the business income earned during the relevant previous year itself from the transactions which were not recorded in the books. Similar explanation was given in respect of unrecorded expenses on shop of the appellant. This explanation was not dismissed by the officer recording the statement; rather in question no. 15 the appellant was asked as to when it will pay the applicable tax on the undisclosed income of Rs. 2,00,90,073/- which was declared "undisclosed income of the current FY 2013-14". It is therefore apparent that the explanation about nature and source of the excess stock and expenses were given by the appellant even during the survey itself and which was implicitly accepted by the department. This explanation was further fortified by filing an affidavit just after survey which again was not rejected by the department. In this circumstances it is very hard and difficult to agree with the observation of the AO that appellant has failed to bring any material to show that appellant's business was the source of such excess stock.

8.6 The A.O. has admitted that in his statement made during the survey the appellant had declared that value of the unexplained gold, bullion etc. were part of the business income. But, according to the A.O. merely on the basis of such statement these items cannot be treated as related to the business activity of the appellant. In plain words according to the A.O. appellant has failed to establish that the said assets were actually derived from the business activities. The A.O. has alleged that by not submitting the details of acquisition of such assets like the time of purchase of these assets, party from whom the said assets were purchased, source of such purchases etc., the appellant has failed to discharge his onus to substantiate that such assets are related to the declared business activities of the appellant and therefore deduction u/s.40B cannot be computed against impugned declared income of Rs.2,00,90,073/- crore as stipulated in Section 115BBE.

8.7 There is no dispute that appellant is in the business of trading in diamond and gold jewellery and survey was conducted on the appellant's business premises i.e. the shop of the appellant. Such trading business of the appellant obviously have the stock in trade in the form of bullion & gold ornaments. There is no dispute that Rs. 1.922 crore of unexplained stock of bullion and gold ornament was found during survey which was declared as additional undisclosed business income of the appellant during survey. The cash and unexplained expenditure incurred on renovation of shop were also

found during survey on the business premises of the appellant. Obviously they were related to the business activity of trading in diamond and gold ornaments. It was admitted that part of profit generated from such trading business were not recorded in the appellant's regular books and they were quantified at Rs. 2,00,90,073/- crore by valuing the excess stock of bullion and gold ornament. These items were not recorded in the books of account of the appellant and therefore no sale purchase and other details of such clandestine activities were found during survey. This is quite natural that no sale/purchase invoices will be found in respect of such unexplained investment in the stock, which had to disclosure by the appellant during the survey. Now the A.O.'s argument is that the appellant had failed to submit documentary evidences and other details related to such alleged trading and therefore it cannot be said that such investment has been derived and hence part of the same business cannot be accepted.

8.8 This is very strange argument in which A.O. is refusing to accept the obvious and logical fact that a person involved in business of trading in ornaments is likely to derive even undisclosed part of his profit from the said trading activities. If A.O. had any doubt that impugned investment were earned from any other activities then he should have pointed out towards likely sources of such undisclosed income. The statement of appellant and subsequent confirmation of the said statement by way of affidavit has been totally disregarded by the A.O. without any reason or logic. There is not an iota of doubt that there was no other plausible source of income available to the appellant and source of excess stock, cash etc found during survey has to be considered having been generated from the only known business of the appellant. In a very recent judgement Hon'ble Income Tax Appellate Tribunal - Jaipur Paliwal Jewellers, Jaipur vs Acit, Jaipur ITA No. 82 & 83/JP/2017 on 27 November, 2017 has dealt with a similar issue as under:

"(Quote)".....

In respect of surrendered stock as income from other sources in place of business income and disallowing the remuneration of Rs. 64,10,000/- to partners, the ld. Counsel for the assessee submitted as under :-

" At the very outset it is submitted that the above matter is directly covered by the recent decision of this Honble bench in the case of DCIT v/s Sh. Ram Narayan Birla in ITA No. 482/Jp/2015 dt. 30.09.2016, where the Honble Bench at page 4 in para 4.3 held that " Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed the assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs.77,66,887/- was found in respect of gold and silver jewellery. The coordinate Bench in the case of Chokshi Hiralal Maganlal v/s DCIT 131 TTJ(Ahd)1 has held that in a case where source of investment/ expenditure is clearly identifiable and alleged undisclosed assets has no independent existence of its own or there is no separate physical identity of such investment/ expenditure then first was to be taxed is the undisclosed business receipts invested in unidentifiable unaccounted assets and only on failure it should be considered to be taxed u/s 69 on the premises that such excess investment is not in the books of account and its nature and sources is not identifiable. Once such excess investment is taxed as undeclared business receipts then taxing it further

as deemed income u/s 69 would not be necessary. Therefore, the first attempt of the AO should be to find out link of undeclared investment/expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipts under the particular head. It is observed that there is no conflict with the decision of Honble Gujrat High Court in the case of Fakir Mohd. Hajihasan(Supra) wherein investment in an assets or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any head. Therefore, the Honble Coordinate Bench held that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable(mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case stock was part of the stock. The revenue has not pointed out that excess stock has any nexus with any other receipts. Therefore we do not find any fault with the decision of the ld. CIT(A) directing to the AO to treat the surrendered amount as excess stock qua the excess stock."

Here in the present case is also the same position.

1.2 Further the Honble Bench has followed the above decision in the case of Bajrang Traders v/s ACIT Cir.2 Alwar in ITA No. 137/Jp/17 dt. 17.03.2017 vide page 6 para 2.7 of the order of Honble ITAT and at page 10 para 2.11 it has been held that " having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or income from other sources. In the present case, the assessee is dealing in sale of food grains, rice oil seeds, and the excess stock which has been found during the course of survey is stock of rice is clearly identifiable and related to the regular business stock of the assessee. The decision of the Coordinate Bench in case of DCIT v/s Sh. Ram Narayan Birla(Supra) supports the case of the assessee in this regard. Therefore the investment in the excess stock has to be brought to tax under the head "business income" and not under the head "income from other sources".

The ld. Counsel placed reliance on the following judgments :-

CIT vs. Babulal K. Daga (2016) 387 ITR 0114 (Guj.) ITO vs. Sadbhav Developers Co Vandana Trading (2013) 37 CCH 0396 (Ahd. Trib.) The ld. Counsel submitted that in view of the above facts, submissions and legal position, the addition so made may kindly be deleted in full.

10.1. On the contrary, the ld. D/R opposed the submissions and supported the orders of the authorities below.

10.2. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. At the time of hearing, the ld. Counsel for the assessee drew our attention to page 53 of the paper book annexure wherein various details of gold and diamonds ornaments and

valuation thereof are mentioned. After considering these details, we find that the details mentioned in the annexure require verification whether the stock surrendered was restricted to gold or diamond as claimed by the assessee. We, therefore, set aside the order of the ld. CIT (A) and restore the file to the AO for decision afresh after making verification of the stocks surrendered. The grounds of the assessee are allowed for statistical purposes.

“(Unquote)”

In present case there is no doubt that impugned excess stock consist of items of trades by the appellant and they are part and parcel of the inventory of the appellant. The excess stock has been quantified by matching the physical stock of Gold ornament found in the shop of the appellant vis a vis stock of the same as found in the book of the appellant. It is not possible to argue that the excess stock found is not related to the regular business of the appellant. Hon’ble Income Tax Appellate Tribunal – Ahmedabad has held in their decision in the case of Fashion World,, Ahmedabad vs. Assessee ITA No. 1634/Ahd/2006 A Y:2002-03

“(Quote)”.....

6. Regarding addition of Rs.10,06,250/- under section 69 ld. AR submitted that this has to be considered as "business income" as what is found is "business stock". It cannot have a different character than the business income. He submitted that in any case, tax has to be levied on total income after clubbing income under different heads including income under section 69. Therefore, there is no separate identity of addition under section 69 even if one follows the decision of Hon. Gujarat High Court in the case of Fakir Mohmed Haji Hasan vs. CIT (supra). He then claimed that once investment in stock is considered as business outgoing then partners of the firm are entitled for higher remuneration as per section 40(b). Ld. AR referred to the decision of Hon. Supreme Court in Lakhmichand Baijnath vs. CIT 35 ITR 416(SC) for the proposition that if credits are found in the business account of the assessee then the Income-tax authorities are entitled to treat the receipts as business receipts chargeable to tax and further that when amount is found credited in books maintained for business then it is not unreasonable inference to draw that it is a receipt from business. He then referred to the decisions of Hon. Calcutta High Court in the case of DaulatramRawatmull vs. CIT 64 ITR 593 (Cal), and CIT vs. Margarets Hope Tea Co. Ltd. 201 ITR 747 (Cal) for the same proposition.

7. The ld. AR further submitted that if there is a positive figure under the head 'business' then it has to be necessarily aggregated with the deemed income under section 69A, 69B & 69C for working out gross total income from which allowable deductions under Chapter-VIA are reduced and thereafter total income is worked out for levy of tax. If positive income under the head 'business' is aggregated with deemed income then there is no reason why negative income i.e. loss be not aggregated with such deemed income. There is no provision under the Income-tax Act that loss under the head 'business' would be carried forward and tax has to be levied only on deemed income. In fact section 68, 69A, 69B & 69C fall under Chapter VI.

8. On the other hand, ld. DR submitted that addition under section 69 has to be separately made following the decision of Hon. Gujarat High Court in *Fakir Mohmed Haji Hasan vs. CIT (supra)* and no set off against business loss has to be allowed.

9. We have considered the rival submissions and perused the material on record. In our considered view there is some misunderstanding about the interpretation of decision of Hon. Gujarat High Court in the case of *Fakir Mohmed Haji Hasan vs. CIT (supra)*. For the sake of convenience we reproduce the head notes from that decision as under :-

"The scheme of sections 69, 69A, 69B and 69C of the Income-tax Act, 1961, would show that in cases where the nature and source of investments made by the assessee or the nature and source of acquisition of money, bullion, etc., owned by the assessee or the source of expenditure incurred by the assessee are not explained at all, or not satisfactorily explained, then, the value of such investments and money or value of articles not recorded in the books of account or the unexplained expenditure may be deemed to be the income of such assessee. It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will, therefore, be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act. When the income cannot be so classified under any one of the heads of income under section 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. The provisions of sections 69, 69A, 69B and 69C, treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head "Income from other sources". Therefore, the corresponding deductions which are applicable to the incomes under any of these various heads, will not be attracted in the case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B and 69C of the Act in view of the scheme of those provisions :

Held, on the facts, that it was clear that when the investment in or acquisition of gold, which was recovered from the assessee was not recorded in the books of account and the assessee offered no explanation about the nature and source of such investment or acquisition and the value of such gold was not recorded in the books of account, nor the nature and source of its acquisition explained, there could arise no question of treating the value of such gold, which was deemed to be the income of the assessee, as a deductible trading loss on its confiscation, because such deemed income did not fall under the head of income "profits and gains of business or profession". Therefore, the Tribunal was perfectly right in holding that the value of the gold was liable to be included in the income of the assessee as the source of investment in the gold or of its acquisition was not explained and that the assessee was not entitled to claim that the value of the gold should be allowed as a deduction from his income."

If we closely examine above judgment we find that for invoking provisions of sections 69, 69A, 69B & 69C two conditions are required to be satisfied. They are (i) investment/expenditure are not recorded in the books of account of assessee & (ii) the nature and source of acquisition of assets or expenditure are not explained or not explained satisfactorily. The expression "nature and source" used in this section should be understood to mean requirement of identification of source and its genuineness. To explain "Nature" it would require the assessee to explain what is description of investment or expenditure, period and the manner in which it was done. To explain the source it would require the assessee to explain the corpus or fund from where investment or expenditure has been met and also the head under which the investment or expenditure would fall such as whether investment/expenditure pertains to business or relates to acquisition of capital asset or to other source or to agriculture. Where the assessee is able to explain nature and source of investment/expenditure and also if they are recorded in the books of account then such investment/expenditure will not be treated as deemed income but where investment /expenditure is not recorded in the books of account and/or their nature and source is not explained or not satisfactory explained, deeming provision under these four sections can be invoked by the AO and investment/expenditure would be treated as deemed income of the assessee. Thus for invoking these deeming sections first condition has to be necessarily satisfied that they are not recorded in the books of account regularly maintained by the assessee. But for establishing nexus of such investment/expenditure with a head of income and to take the benefit of set off, assessee has to necessarily explain the nature and source of such investment/expenditure and establish its nexus with any head of income. Hon. Gujarat High Court further held that for claiming trading loss in respect of an asset whose investment was found unexplained, it was necessary for the assessee to explain the nature and source of its acquisition and on its failure to do so the trading loss on the confiscation of the asset could not be set off.

10. We notice that the set off of any trading loss against deemed income assessed under sections 69, 69A, 69B & 69C is not directly discernible from sections 72 to 79 falling in Chapter-VI. To summarily refer to these provisions we note that in Chapter VI, section 70 provides set off of loss from one source against income from another source under the same head of income. In other words, if under the head 'business' there are two businesses -one is resulting in income and the other is resulting in loss, they are to be set off against each other. Similarly, if there is a loss under the head capital gains in respect of short-term capital gains and there is income in respect of other capital assets then that can be set off as per section 70. Section 71 provides set off of loss from one head against income from another head. Thus where there is a loss under one head being loss other than loss under the head capital gains then it can be set off against any income assessable under another head. Section 71A and section 71B provide for carry forward of set off of loss from house property. Section 72 provides for carry forward of business loss. According to this section if loss under the head business, other than speculation loss, cannot be set off against income under any other head in accordance with section 71, then it has to be carried forward to the following Asst. Years. Section 72A provides provisions of carry forward and accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger. Similarly section

72AA provides such set off and carry forward in the case of banking company and sec.72AB provides set off in the case of Co-op. banks. Section 73 provides for treatment of loss in speculation business. Section 74 provides for treatment of loss under the head capital gains and section 74A provides for treatment to loss arising from sources under the head 'income from other sources'. Section 75 provides for losses in case of firm and section 78 in respect of carry forward and set off of loss in case of change in constitution of the firm and section 79 provides for carry forward and set off of loss in the cases of certain companies. Thus treatment of loss arising under the head business is provided only under section 72 which directs to carry forward the unabsorbed loss to the next year unless it is otherwise provided in any other section of Chapter -VI. We have gone through all the sections under Chapter -VI and we do not find any provision for setting off of business loss against deemed income under sections 69, 69A, 69B & 69C.

11. But this does not mean that loss computed under any of the five heads mentioned in section 14 - (i) 'salary', (ii) 'income from house property', (iii) 'profits and gains from business or profession', (iv) 'capital gains' and (v) 'income from other sources' - cannot at all be adjusted against unexplained investment or expenditure. What is necessary as per Hon. Gujarat High Court is that source of acquisition of asset or expenditure should be clearly identifiable. In the case before Hon. Gujarat High Court the source of gold confiscated was not identifiable and hence adjustment was not permitted.

12. Thus the important aspect that emerges from the entire discussion is that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable asset or expenditure. In the present case we find that entire physical stock of Rs.25,14,306/- was part of the same business. Both kind of stock i.e. what is recorded in the books and what was found over and above the stock recorded in the books, were held and dealt uniformly by the assessee. There was no physical distinction between the accounted stock or unaccounted stock. No such physical distinction was found by the Revenue either. The assessee has repeatedly claimed that unaccounted business income is invested in stock and there is no amount separately taxable under section 69. The department has ignored this claim of the assessee and sought to tax the difference between book-stock and physical-stock as unaccounted investment under section 69 without considering the claim of the assessee that first the business receipt has to be considered and then investment should be treated as coming out of such unaccounted income. The difference in stock so worked out by the authorities below had no independent identity of its own and it is part and parcel of entire lot of stock. The difference between declared stock in the books and what is physically found would only be a mathematical expression in terms of value and not a separate independent identifiable asset. Therefore, it cannot be said that there is an undisclosed asset existed independently. Once this is so then what is not declared to the department is receipt from business and not any investment as it cannot be co-related with any specific asset.

13. Thus in a case where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of

its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premises that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head. It is only where no nexus is established with any head then it should be considered as deemed income under section 69, 69A, 69B & 69C as the case may be. It is because when assessee fails to explain satisfactorily the source of such investment then it should be taxed under section 69, 69A, 69B& 69C as the case may be. It should not be done at the first instance without giving opportunity to the assessee to establish nexus. Therefore, there is no conflict with the decision of Hon. Gujarat High Court in the case of Fakir Mohmed Haji Hasan (supra) where investment in an asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. Therefore, we hold that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment.

14. To conclude sum of Rs.8,10,011/- being difference in stock is represented by undeclared business income. It does not have a separate physical identity. It is to be only taxed under the head 'business'. Other assets have separate physical identity being furniture and fixtures, air conditioners etc. They cannot have a direct nexus with business and therefore investment therein has to be considered under section 69 only.

15. In view of the above, AO is directed to consider the sum of Rs.8,10,011/- as undisclosed business income assessable under the head 'business' and other two sums under section 69. The business income including application of section 40(b) has to be considered accordingly.

For calculation of income in view of our above observations, we restore the matter to the file of AO.

16. In the result, appeal of the assessee is allowed for statistical purposes.

“(Unquote)”

After considering the above cited decisions, I do not find any force in A.O.'s argument that such additional income declared during survey on account of discrepancy in stock was not part of the business income of the appellant. Once the said excess stock was found to be related to the business they will automatically become part of the profit and loss account

of the appellant and appellant was fully entitled to compute partner's remuneration with regard to the enhance book profit of the business. Reliance is placed on the decisions of Ahmedabad Bench ITAT in the case of M/s. Fashion World vs. ACIT in ITA No.1634/Abd/2006, dated 12.02.2010. There is no dispute in respect of the correctness of the computation of deduction u/s.40B, the partnership deed revised on 01.04.2012 also provides for the said computation in sync with the 40B of the IT Act. I therefore, delete the A.O.'s action of treating the amount of Rs.19,33,69,473/- as deemed income u/s.69A and amount of Rs.7,20,600/- as deemed income u/s.69C.

8.9 As an corollary to his action of treating the declared income during survey as deemed income u/s.69A & 69C respectively, The A.O. has sought to apply provision of Section 115BBE but once it is ruled that the declared income is part of the business income of the appellant; this proposal automatically goes out.”

8. Having heard both the parties and having gone through the orders of the authorities below, we find no merit in the contentions and arguments made by the Revenue before us. We completely agree with the Id.CIT(A) that there being no dispute with regard to the fact:

- that the assets which were found during survey not disclosed in the books of the assessee, pertained to the excess stock in which the assessee conducted business, i.e.bullion, gold, jewellery and ornaments, besides, small quantum of excess cash and details of unaccounted expenditure of renovation of shop .
- that in the statement of the partners, recorded during survey, they had admitted to the fact that source of investment in excess stock found was out of the business income of the assessee only.
- that the Revenue never questioned this admission of the partners of the assessee-firm and accepted it as such.

9. In the backdrop of these facts, we hold that the Id.CIT(A) has rightly applied the decision of the ITAT, Ahmedabad Bench in the

case of Fashion World (supra) wherein in identical set of facts, the ITAT had analysed the provisions of section 69A, 69B, 69C etc. and held that for invoking the said provision, there are two conditions to be satisfied; (i) that investment or expenditure is not recorded in the books of the assessee, and (ii) nature & source of acquisition of assets or expenditure are not explained or are not explained satisfactorily. Thereafter the meaning of “nature” was elaborated upon stating that it would require the assessee to explain the description of the investment or the expenditure and to explain the corpus or funds from where investment or expenditure has been met. It further went on to explain that where the assessee is able to explain the nature and source of investment or expenditure, and if they are recorded in the books of accounts, then such investment or expenditure will not be treated as deemed income, but if these conditions are not fulfilled, the same would be treated as deemed income of the assessee. ITAT, thereafter went on to hold that the important aspect that emerges was that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable asset or expenditure, and thereafter they held that in a scenario where excess stock of the business is found, there is no physical distinction between the accounted and unaccounted stock, and such assets found cannot be said to be distinct or separate assets. The ITAT held that the difference in stock has no independent identity of its own and is part and parcel of the entire lot of stock. The difference is only a mathematical expression in terms of value and not a separate independent identifiable asset, and therefore, it could not be stated that there is an undisclosed asset existing independently; that once it was so held, then what was not declared to the department was receipt from business and not any investment. The ITAT thereafter went to distinguish the

decision of Hon'ble Gujarat High Court in the case of Fakir Mohmed Haji Hasan (supra) pointing out that in the said case what was found was separate and distinguishable asset or investment, source of which remained unexplained, and was therefore treated as deemed income of the assessee.

10. The Id.CIT(A), we hold has rightly applied the said decisions to the facts of the present case which are identical as in what has been found during survey is excess stock of the business of the assessee. The assessee's case, in fact, we find on a better footing since the assessee has disclosed investment made by way of purchases for the excess stock not only in its business books of accounts but also in the VAT return filed to the VAT authorities. Therefore undoubtedly the assessee has demonstrated the excess stock as relating to its business. And therefore, the Id.CIT(A), we hold, has rightly treated the same as being derived from the undisclosed business income of the assessee.

In view of the above, we see no reasons to interfere in the order of the Id.CIT(A) treating the surrendered income of Rs.2,00,90,073/- as business income of the assessee. Thus, grounds of appeal of the Revenue are rejected.

11. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Court on 5th July, 2023 at Ahmedabad.

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 05/07/2023

*vk**