

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER  
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No. 103/Asr/2023  
Assessment Year: 2019-20**

Sham Lal & Sons, 2788/1-24, Outside Sheranwala Gate Near Dr. Daljit Singh Eye Specialist Amritsar. [PAN:-ADCFS1640R] <b>(Appellant)</b>	Vs.	PCIT, Central, Ludhiana.  <b>(Respondent)</b>
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<b>Appellant by</b>	Sh. P.N. Arora, Adv.
<b>Respondent by</b>	Dr.Vedanshu Tripathi, CIT DR.

<b>Date of Hearing</b>	11.07.2023
<b>Date of Pronouncement</b>	18.07.2023

**ORDER**

**Per: Anikesh Banerjee, JM:**

The instant appeal of the assessee was filed against the order of the ld. Principal Commissioner of Income-tax, Central, Ludhiana, (in brevity ‘the PCIT’) order passed u/s 263 of the Income-tax Act, 1961 (in brevity the Act) for assessment year 2019-20.

2. The assessee has taken the following grounds:

*“1. That the order passed by the Principal Commissioner of Income Tax (Central), Ludhiana u/s 263 of the Income Tax Act,*

*1961 dated 30/03/2023 is against the facts of this case and is untenable under the law.*

*2. That no reasonable and proper opportunity of being heard was allowed by the Principal CIT before passing the said order u/s 263 of the IT Act, 1961. As such the order passed is bad in the eyes of law and the same is liable to be cancelled.*

*3. That the worthy Principal CIT issued a show cause notice u/s 263 dated 17/03/2023 and a reply was duly filed in response thereto on 27/03/2023. A copy of the said reply is made part & parcel of grounds of appeal. The facts of the said reply have not been appreciated and considered and as such the order passed u/s 263 is bad in the eyes of law and the same may be cancelled.*

*4. That the Principal CIT did not appreciate that all these questions and queries have already been examined by the A.O. during the course of assessment proceedings and the Pr.CIT did not appreciate that there was enquiries which were made in response to said questionnaire.*

*5. That the Ld. Principal CIT did not appreciate that this was not a case where the explanation or enquiry has not been made. The Pr. CIT failed to appreciate that this case does not fall within the mischief of section 263. As such the order passed by the worthy Principal CIT is not based on any facts and circumstances. As such the order passed u/s 263 may be cancelled.*

6. *That the Principal CIT did not appreciate that the appeal was pending before the CIT(A) relating to AY 2017-18. As such there was no justification for passing the order u/s 263.*

7. *That the Principal CIT failed to appreciate that all the enquiries were duly raised by the AO and after raising these enquiries and after considering our replies, the AO has completed the assessment. The Ld. Principal CIT did not appreciate that the AO was aware of the fact that the surrender was made in the stock as well as in the cash and after considering the same, the AO arrived at a conclusion that the provisions of section 115BBE are applicable to cash found at the time of survey and not on stock which was surrendered at the time of survey. Thus it is a clear where proper enquiry has been made and after considering all the facts, replies and the statement recorded at the time of survey, the assessment has been completed.*

8. *That there was no reason and occasion to invoke the provisions of section 263 when enquiry has been made by the AO during the course of assessment proceedings. The Ld. Principal CIT did not appreciate that this was a case of enquiry. Thus, this case does not fall within the mischief of section 263 and the Ld. Principal CIT was grossly erred in invoking the provisions of section 263 without any rhyme & reason. As such the order passed u/s 263 is illegal, invalid and void ab initio and the same is liable to be cancelled.*

9. *That any other grounds of appeal which may be argued at the time of hearing of appeal.”*

3. The brief fact of the case is that the survey was conducted in assessee's premises and assessee declared amount of Rs.60,06,166/-. Out of this total undisclosed stock amount of Rs.51,93,840/- and cash amount of Rs.8,12,326/-. The total amount was declared during filing of return u/s 139(1). The assessment was completed, and the assessee was asked to submit the details during the assessment proceeding. The assessee's income was duly accepted, and assessment order was passed. During the assessment proceeding, the cash amount which was declared in the survey Rs.8,12,000/- was taxed under special rate as per provision of section 115BBE of the Act. But the stock was taxed under normal rate. The Id. PCIT issued noticed u/s 263. The grievance of the Id. PCIT was that the stock was not properly verified and was erroneously taxed in normal rate. The Id. PCIT set aside the assessment order passed on dated 04.03.2021 u/s 143(3), for the erroneous and prejudicial to the interest of the revenue. Being aggrieved assessee filed an appeal before us by challenging the order U/s 263.

4. The Id. AR for assessee filed written submission, which is kept in the record. During proceeding u/s 263, the Id. AR submitted the letter with an explanation for the undisclosed stock amount of Rs.51,92,752/- which was already declared in the return of income, copy of the letter **APB pages 3 to 4**. The Id. AR further invited our attention in the notice u/s 142(1) issued by the Id. Assessing Officer (in brevity AO) in **APB page nos. 5 to 7**, the question no. 9 of the notice is duly reproduced as below:-

*“9. During the course of survey proceedings you had surrendered additional income of Rs.60,05,118/-. It is observed that amount of Rs.60,05,118 has been surrendered, on account of excess stock of Rs.51,92,752/- and excess cash of Rs.8,12,326/- found during the course of survey proceedings. Please also explain the source of addition undisclosed income offered with supporting documents and explain how it is earned.”*

4.1 The ld. AR in argument placed that the details of the reply duly placed before the ld. AO which is annexed in **APB page nos. 12 to 17**. As per his submission that there is no such any lack of inquiry from the end of the ld. AO and the ld. AO had agitated the issue and verified during the assessment proceeding. So, there is a change of opinion in between ld. AO and the ld. PCIT. Accordingly, the order u/s 263 be quashed.

5. The ld. DR vehemently argued and placed that the ld. AO had not made any proper inquiry for accepting the undisclosed stock which was duly declared during the time of survey. So, the provision of section 115BBE is attracted for the assessee. The paragraph no. 5.6 of the order of 263 is reproduced as below:

*“5.6 Effect of aforesaid entries is to be understood. On perusal of the entries, it is clear that the assessee has capitalized the two items in the books of accounts. In this way profit and loss account credited with the amount surrendered during the survey and enhanced capital in the books of account. However, the important question that arises here is whether the assessee*

*has explained source of the additional income surrendered in the form of excess cash and stock. The answer is clear 'No'. It would be evident from the reply of the assessee captured in para '4' above. The assessee has admitted that entries were made to account for the aforesaid sums in the profit and loss account. The main submission of the assessee is that AO was explained that the excess cash represented sales made and excess stock was belonging to the business. This simple explanation is without any basis and untenable. In case, the excess cash represented sales then assessee has to answer how goods sold became inventory of the assessee. In any case, if sale was not made and cash had not come, stock found would have further increased (except for G.P.). But the facts remains it has not been accounted for. If it was accounted for as sales, stock as per books on drawing up of trading account would have gone up. Be that as it may, the assessee has not offered any explanation or linkages of excess stock and cash with that of the business income."*

6. We heard the rival submissions and considered the documents available in the record. The issue is only related to application of provision of 115BBE related to the unexplained stock, surrendered during the time of survey. The same amount was also declared in the return of income by the assessee and paid the normal tax. During the assessment proceeding the Id. AO was duly considered the issue and discussed the relevant paragraph no. 4 of the assessment order is duly reproduced as below:

*“4. During the course of survey cash of Rs.24,89,640/- was found whereas cash as per trial balance as on date of survey i.e.01.08.2017 was Rs. 15,69,532/-. Thus, excess cash of Rs.8,12,300/- was found. On being confronted, assessee has stated that he is unable to explain the difference of cash of Rs.8,12,320/- as per Books of account and as per physical verification and voluntarily offered Rs.8,12,320/- as additional income over & above normal income in the hands of M/s Sham Lai & Sons. Thus, nature and source of excess cash found during Survey proceedings was not explained. It was stated that cash found may be out of sale made and could not be recorded in Books. Reference is being invited to the decision of Hon’ble Punjab & Haryana High Court in the case of M/s Kim Pharma Pvt. Ltd., where the Hon’ble Court has confirmed the findings of Tribunal that cash is not assessable as income from business. Availability of cash is not directly relatable to the business. Source of cash cannot be said to be business having no direct link with business. Accordingly, amount of Rs.8,12,300/- is being treated as unexplained investment u/s 69A of the I.T.Act, 1961 in the form of cash not recorded in Books of account to be taxed under the provisions of section 115BBE of the I.T.Act as per section 115BBE(2) of the I.T.Act no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provisions of this Act in computation of his income in respect of this addition. Penalty proceedings u/s 271AAC of the I.T.Act, 1961 has separately been initiated as tax has not been paid in accordance with section 115BBE of the I.T.Act, 1961.”*

6.1 The issue is not covered by absence of verification but a lack of investigation. Therefore, in our considered view the finding rendered by the PCIT was perverse for the reason that there was no specific lacuna was found out related application of special rate of tax U/s 115BBE on undisclosed stock, declared by the assessee. The amount was declared by the assessee in return of income. The observation of Hon'ble Supreme Court of India in the case of **MalabarIndustrialCo. Ltd.v.Commissioner of Income-tax, [2000] 109 Taxman 66 (SC)** is relevant in this aspect. The relevant paragraph is extracted as below: -

*“9. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue - Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)”.*

The order cannot be as erroneous on the point of verification and difference of opinion in between the assessing authority and the ld. PCIT. We respectfully relied on the order of **Malabar Industrial Co. Ltd**(supra). The revision order of the ld. PCIT is set aside.

Accordingly, the order u/s 263 is liable to be quashed.

7. In the result, appeal of the assessee **ITA No. 53/ASR/2023** is allowed.

**Order pronounced in the open court on 18.07.2023**

Sd/-

**(Dr. M. L. Meena)**  
**Accountant Member**

Sd/-

**(ANIKESH BANERJEE)**  
**Judicial Member**

AKV

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy  
By order