

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
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA No.27/RJT/2020
Assessment Year :2016-17**

Shree Murlidhar Jewellers Chandi Bazar Jamnagar 361 001. PAN : AAIFS 4781 N	Vs.	The Pr.CIT-4 Jamnagar.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/(Respondent)
Assessee by :		Shri D.M. Rindani, AR
Revenue by :		Shri Shramdeep Sinha, Id.CIT-DR

सुनवाई की तारीख/**Date of Hearing** : **17/05/2023**
घोषणा की तारीख /**Date of Pronouncement**: **02/08/2023**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order passed by the Id.Pr.Commissioner of Income-Tax)-4, Jamnagar [hereinafter referred to as "Id.Pr.CIT")"] dated 11.12.2019 in exercise of his revisionary power under section 263 of the Income Tax Act , 1961 ("the Act" for short) over the assessment order passed u/s 143(3) of the Act pertaining to Asst.Year 2016-17.

2. The assessee has raised the following grounds before us:

- i) *The learned Principal Commissioner of Income-tax - 4, Jamnagar erred in assuming jurisdiction u/s 263 of the Act, particularly in the light of reasons stated by him in the show cause notice and in the order passed u/s 263 of the Act and hence the impugned order is bad in law.*

- ii) *The learned Principal Commissioner of Income-tax - 4, Jamnagar erred in directing the assessing officer to make addition of Rs. 70,89,098/- u/s 69 of the Act by failing to appreciate that provisions of section 69 were not attracted in."*

3. We have noted from the order passed by the Id.Pr.CIT under section 263 of the Act that the revisionary jurisdiction was exercised by him finding the assessment order passed in the case of the assessee to be erroneous on account of accepting the excess stock, found during survey conducted on the assessee during the impugned year, to be in the nature of business income and allowing set off expenses against the same, while, as per the Id.Pr.CIT, the same ought to have been treated as unexplained investment and subjected to tax, without setting off any expenses, at the rate prescribed u/s 115BBE of the Act.

4. Para-2 of the Id.Pr.CIT's order reveals the facts relating to the issue as narrated above by us leading to exercise of revisionary jurisdiction by Id.Pr.CIT as under:

5. Accordingly, this office issued show cause notice for rejection of book result and addition u/s.69 of the Act for the A.Y.2016-17 vide letter dated 22.11.2019 by requesting the assessee firm to explain the following.

1. *A survey action u/s. 133A was carried out at your business premise on 07-10-2015. During the course of survey proceedings, you had furnished the position of stock as per books of accounts. However, on physical verification of the stock by the survey team, excess stock of 22 CT gold weighing 2881.747 grams was found. While recording the statement of Shri RajnikantJasrajbhaiPatalia, partner of the firm, on the date of survey, he was confronted the discrepancy in stock and was requested to explain the source of excess stock found. In reply to the question No.10 & 11 of the statement,Shri RajnikantJasrajbhaiPatalia, partner of the firm admitted that the excess stock was purchased from undisclosed income and accordingly the excess stock of 2881.747 grams valued at Rs.70,89,098/- was offered by you as unaccounted income of the firm for A.Y. 2016-17. The excess stock so found was admitted by you as representing your undisclosed income on which you also offered to pay tax. It is a fact that you had acquired stock outside the books and the nature and source of funds utilized in acquiring such stock cannot therefore be explained with reference to the entries in the books of accounts and it is for this reason that such unexplained investment in stock was surrendered as additional income.*

2. *However, on verification, it is found that the income offered at the time of survey at Rs. 70,89,098/- was credited in the profit and loss account and claimed business expenses therefrom to offset the burden of tax on the additional income. You were found to be in possession of unexplained investment in stock and hence the provisions of section 69 are squarely applicable in your case. The additional income offered by you may required to be assessed u/s. 69 of the Act and accordingly taxed as per the provision of section 115BBE of the Act. In view of the fact mentioned above, the book result shown by you is not acceptable and liable to be rejected.*

5. In response to the above show cause notice, due reply was filed by the assessee contending that the stock surrendered relating to the business of the assessee and the partner of the firm admitting to the same being acquired from undisclosed income of the firm, it had been rightly accepted as being in the nature of business income by the AO. The Ld.PCIT however was not convinced with the reply of the assessee and held that in the absence of any explanation of the source of such investment in stock, the surrendered stock could not be treated as part of business but was to be treated as unexplained investment u/s 69 of the Act and further was to be taxed at the rates prescribed u/s 115BBE of the Act. He directed the AO to give effect to his order accordingly. His findings in this regard at para 7.3 -8 of the order is as under:

7.3 The fact that the assessee has acquired stock outside the books cannot be disputed on the facts of the case. The nature and source of funds utilized in acquiring such stock cannot therefore be explained with reference to the entries in the books of accounts. In fact, no such explanation was offered with regard to the nature and source of unexplained investment in stock either at the time of survey or even thereafter and it is for this reason that such unexplained investment was surrendered as additional income. In view of the above, unexplained investment made in the purchase of stock is required to be taxed as per the provisions of section 69 of the Act by applying the provisions of section 115BBE of the Act. Therefore, the objection raised by the assessee regarding non application of provisions of section 69 of the Act in its case is not accepted on the grounds of the discussion made as above.

8. I, therefore, hold that the assessment order dated 21.12.2018 finalized by the Assessing Officer u/s 143(3) of the Income-tax Act, 1961 is erroneous and prejudicial to the interests of revenue within the meaning of section 263 of the Income-tax Act, 1961. After careful consideration of written submission of the assessee and the materials on records and taking into consideration the fact of the case, the unaccounted income declared by the assessee is treated as unexplained investment and accordingly, an amount of Rs.70,89,098 is to be added to the total income of the assessee u/s. 69 of the Act by applying the provisions of section 115BBE of the Act. The AO is, therefore, directed to give effect of this order within the time limit prescribed under section 153(5) of the Act and recompute the profit declared by the assessee accordingly.

6. Before us Ld.Counsel for the assessee contended that the view taken by the AO treating the income surrendered by the assessee on account of excess stock of gold, jewellery found as business income, was a plausible view, and there was no error in the order of the AO. He pointed out that undisputedly the excess stock found during survey was of gold, jewellery etc. in which the assessee dealt with in the course of his business as a jeweler. He pointed out that

courts in several decisions had held that surrender made on account of excess stock of business was to be treated as being in the nature of business income. In this regard, our attention was drawn to the following decisions:

- a. Shivam Developers (2022) 100 ITR (Trib) 0029 (Surat Trib)
- b. Suman Paper & Boards Ltd. – (2009) 314 ITR 119 (Guj)
- c. Mhaskar General Hospital – Tax Appeal No. 1474 of 2009 dated 09-08-2022 (GUJ HC)
- d. Jamnadas Muljibhai (2006) 99 TTJ 197 (Rajkot Trib)
- e. Deccan Jewellera P. Ltd. (2021) 438 ITR 131 (Andhra Pradesh HC)
- f. Fashion World ITA No. 1634/Ahd/2006, A.Y. 2002-03 dated 12-02-2010
- g. Choksi Hiralal Maganlal (2011) 141 TTJ 1 (Ahd Trib)
- h. CIT vs S. K. Srigiri and Bros. (2008) 298 ITR 13
- i. Abdul Hamid (2020) 183 ITD 711 (Gauhati Trib)

7. The ld.counsel for the assessee drew out attention to the decision of ITAT, Ahmedabad Bench in the case of Fashion World, ITA No.1634/Ahd/2006 order dated 12-2-2010 holding that making addition on account of undisclosed source of investment in assets requires existence of a separately identifiable asset and excess stock found during survey being part and parcel of the stock in which the assessee dealt in its business it could not be said to be a separately identifiable asset. That therefore there could not be any addition made on account of undisclosed source of investment in asset on account of excess stock found. That the same only represented undisclosed business income of the assessee. The findings of the ITAT holding so are as under:

12.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.”

Further our attention was also drawn to the decision of Hon’ble Andhra Pradesh High Court in the case of Deccan Jeweller Ltd., 438 ITR 131 (AP) holding as under:

“15. In the present cases, explanations have been offered by the assesseees that excess stock was a result of suppression of profits from business over the years and is a part of the overall stock found. In ITTA Nos.9 & 14 of 2021, the assesseees concerned gave further clarification that the excess stock had been admitted in Schedule 'L' under the heading, 'other operating income' under the head "Profits and Gains of the Business" in Part A of the Return filed for the relevant Assessment Year. Hence, the excess stock could not have been treated as 'undisclosed investment' under section 69 of the Act.

16. Section 69 of the Act reads as follows:

"69. Unexplained investments.—Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

17. The above section provides investments would fall within the definition of 'undisclosed investment' in the event the following conditions are satisfied:

- (a) Such investment is made in the course of the financial year and not reflected in the books of account, if any, maintained by the assessee for any source of income,*
- (b) No explanation is offered by the assessee about the nature and source of investments, and*
- (c) Such explanation is not found to be satisfactory in the opinion of the Assessing Officer.*

18. As explanations pursuant to the Show-cause notices issued by the Assessing Officer had been submitted claiming that the nature and source of the excess stock fell under the heading 'Profits and Gains of the Business' and such stock was not specifically identifiable from the profits which had accumulated from earlier years and such explanations being considered and accepted by the Assessing Officer, which came to be approved by the Joint Commissioner, Income Tax, it cannot be said that the condition precedents for holding that the excess stock as 'undisclosed investment' under section 69 of the Act are satisfied.

19. Relying on the decision of this Court in *Spectra Shares and Spectra Shares & Scrips (P.) Ltd. v. CIT* [2013] 36 taxmann.com 348/219 Taxman 61 (Mag.)/354 ITR 35 the Tribunal held non-recording of reasons cannot be a ground to come to a conclusion that the opinion of the Assessing Officer was erroneous for the purposes of section 263 of the Act. Explanation (2) of section 263 of the Act elucidates cases where the opinion of the Assessing Officer can be treated to be erroneous and prejudicial to the interest of the revenue. Explanation (2) reads as follows:

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

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

20. In the present cases, the Assessing Officer had issued show-cause notices calling for explanations from the assessees whether excess stock be not treated as 'undisclosed investment' under section 69 of the Act. In response to the notices, elaborate explanations were offered by the assessees, which were fortifiable by consistent views by various Benches of the Tribunal as well as the High Courts. The Assessing Officer, upon consideration, accepted the explanation and taxed the additional income as 'business income' @ 30% instead of 60% as per section 115BBE of the Act.

21. No contrary view either of any High Court or the Apex Court has been placed before us to demonstrate that the explanations offered by the assessees in the course of assessment were either perverse or contrary to law. In view of such matter, we are constrained to hold no case of perversity or lack of enquiry on the part of the Assessing Officer is made out so as to render his decision erroneous under Explanation 2 of section 263 of the Act. Thus, the revisional powers under the said provision were illegally invoked

by the Principal Commissioner and his order was rightly set aside by the Tribunal.”

8. He had also pointed out that even in the statement recorded of the assessee firms partner during survey, he had stated the excess stock as relating to the business of the assessee. The ld.counsel for the assessee pointed out the above facts from the statement recorded during the course of survey of the partner of the assessee-firm, Shri Rajnikant Patalia, placed before at paper-book page no.71 to 79. More particularly our attention was drawn to PB Page No.76 pointing out there from that on being asked to explain regarding excess stock found during the course of survey, the partner had stated the same was out of undisclosed income for the assessee's firm i.e. Shree Murlidhar Jewellers.

9. He also contended that the assessee had pointed out to the Ld.PCIT that identical disclosure during the survey of excess stock made in the preceding year i.e. Asst.Year 2011-12 had been treated as undisclosed investment by the AO which matter was carried in appeal before the ld.CIT(A) who had held the same to be in the nature of business income.

For the aforesaid reasons, it was contended that the view taken by the AO was a plausible view and could not be stated to be entirely untenable in law.

10. The Ld.DR however supported the order of the Ld.PCIT contending that in the absence of any explanation of the source of investment in excess stock found during survey, the Ld.PCIT had rightly held the same to be treated as unexplained investment u/s 69 of the Act to be taxed in terms of rates as prescribed u/s 115BBE of the Act. He contended that the Ld.PCIT had rightly pointed out that the partner of the assessee firm had not admitted to the stock

being invested out of undisclosed income of the assessee firm but only out of undisclosed income and had also rightly distinguished the order passed by the Ld.CIT(A) in the preceding year accepting assessee's claim of excess stock as being in the nature of business income, pointing out that in the said year the assessee had admitted so in the statement recorded. He drew our attention to the findings of the Ld.PCIT at para 7-8 of the order as under:

7. A survey action u/s 133A of the Income-tax Act was carried out on 07-10-2015 at the business premises of the assessee during which statement of **Shri Rajnikant Jasrajbhai Patalia, partner of the firm** was recorded. Question No.10 & 11 put to him and the answer given by him read as under:-

"Q-10, During the course of the survey, physical stock of 22 CT gold weighing 33749.950 gms. was found whereas as per books of account the same comes to 30868.203 gms. There is difference of 2881.747 gms only in respect of 22 CT gold. Please explain the difference in stock of 22 CT gold weighing 2881.747 gms.

A-10, Sir, there is excess stock of 22CT gold (2881.747 gms). The excess stock has been purchased from undisclosed income.

"Q-11, Please state the present/market value of the excess stock (2881.747 gms).

A-11, Sir, the rate of 22CT gold as on today is Rs.24,600/- per gram. Accordingly the market/present value of the excess stock found (as on 07-10-2015) come to Rs.70,89,098/-."

7.1 It is apparent from the aforesaid statement that stock physically found at the time of survey was more than that recorded in the books. The difference in quantity was of 2881.747 gms which was valued at Rs.70,89,098/-. As the assessee firm could not reconcile the aforesaid discrepancy in stock, it offered to disclose the same as its income in unaccounted stock. Resultantly the assessee firm credited a sum of Rs. 70,89,098/- to Profit & Loss Account as its income disclosed during the survey operations. Thus, there is no dispute that the said sum of Rs. 70,89,098/- represents income of the assessee firm in unaccounted stock detected at the time of

ASSESSEE OF INCOME

7.2 It was the contention of the assessee that that survey proceedings were conducted in the financial year 2010-11 relevant to the assessment year 2011-12 and the assessing officer had disallowed partly remuneration to partners on a ground similar to the one in the present proceedings. The assessment was carried in appeal and the Hon'ble CIT (A) had held in the appellate order dtd 11/05/2015 that **"the additional income declared during survey is nothing but the business income of the appellant"**. On perusal of the Appellate Order dated 08-05-2015 of the Ld. CIT(A) Jamnagar, it is seen that the assessee firm had admitted the excess stock found as its undisclosed income over and above regular income of the firm. But, fact for the year under consideration differs from the fact for the A.Y. 2011-12 so far as the disclosure is concerned. In the year under consideration i.e. A.Y.2016-17, the assessee firm admitted that the excess stock was purchased from undisclosed income.

7.3 The fact that the assessee has acquired stock outside the books cannot be disputed on the facts of the case. The nature and source of funds utilized in acquiring such stock cannot therefore be explained with reference to the entries in the books of accounts. In fact, no such explanation was offered with regard to the nature and source of unexplained investment in stock either at the time of survey or even thereafter and it is for this reason that such unexplained investment was surrendered as additional income. In view of the above, unexplained investment made in the purchase of stock is required to be taxed as per the provisions of section 69 of the Act by applying the provisions of section 115BBE of the Act. Therefore, the objection raised by the assessee regarding non application of provisions of section 69 of the Act in its case is not accepted on the grounds of the discussion made as above.

8. I, therefore, hold that the assessment order dated 21.12.2018 finalized by the Assessing Officer u/s 143(3) of the Income-tax Act, 1961 is erroneous and prejudicial to the interests of revenue within the meaning of section 263 of the Income-tax Act, 1961. After careful consideration of written submission of the assessee and the materials on records and taking into consideration the fact of the case, the unaccounted income declared by the assessee is treated as unexplained investment and accordingly, an amount of Rs.70,89,098 is to be added to the total income of the assessee u/s. 69 of the Act by applying the provisions of section 115BBE of the Act. The AO is, therefore, directed to give effect of this order within the time limit prescribed under section 153(5) of the Act and recompute the profit declared by the assessee accordingly.

11. We have heard both the parties and gone through orders of authorities below, as also, documents referred to before us during the course of hearing.

12. We are not in agreement with the Id.Pr.CIT and we find that the assessee has made out a good case before us that exercise of revisionary jurisdiction under section 263 of the Act in the present case was not in accordance with law. We agree with the Id.counsel for the assessee that in view of the fact of the case that disclosure was on account of unaccounted stock of business of the assessee and considering various judicial decisions as cited by the Id.counsel for the assessee before us, the view taken by the AO that disclosure represented business income of the assessee undeniably was a plausible view. The Ld.DR was unable to controvert the same before us. Further we find that this position is fortified by the fact that in the preceding year an identical disclosure made on account

of excess stock by the assessee was treated by the Id.CIT(A) to be in the nature of business income. The distinction made by the Id.Pr.CIT that the same had been treated so in the light of the admission of the partner of the assessee-firm in the said year, while admission made in the impugned year is different, we find is not of much consequence. The fact which is relevant, and which we find identical in both the years, admittedly is that there was excess stock of business found during survey. Mere statement by partner that it invested in from undisclosed business income would not suffice to determine its character whether business income or undisclosed investment. The statement therefore is not a determinative factor for determining its character and therefore has been wrongly treated as a distinguishing fact by the Ld.PCIT for holding that the decision of the Ld.CIT(A) in the preceding year was not applicable to the impugned year.

We hold therefore that the view taken by the AO in the impugned year, treating the excess stock surrendered during survey as business income of the assessee, undisputedly is a plausible view and as such there is no error in the order of the AO.

The order passed under section 263 of the Act by the Id.Pr.CIT, we hold, is not sustainable in law in the absence of any error in the order of the AO, and the same is therefore, directed to be set aside. The grounds of appeal raised by the assessee are allowed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 2nd August, 2023 at Ahmedabad.

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 02/08/2023