

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “H”: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 589/DEL/2022
Assessment Year: 2017-18**

Yogesh Kumar, Prop. M/s Mittan Sweets, 212, Ram Nagar, Tehsil Camp, Panipat-132103 PAN- ACEPK7669M	<u>Vs</u>	Principal Commissioner of Income-tax, Rohtak.
APPELLANT		RESPONDENT
Assessee represented by		Dr. Rakesh Gupta, Adv.
Department represented by		Sh. Manvendra Goel, CIT(DR)
Date of hearing		06.06.2023
Date of pronouncement		30.08.2023

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Principal Commissioner of Income-tax, Rohtak, dated 04.03.2022, passed u/s 263 of the Income-tax Act, 1961, hereinafter referred to as the “Act”, pertaining to the assessment year 2017-18. The assessee has raised following grounds of appeal:

“1. That the proceedings have been initiated on wrong assumption that the business income surrendered at the time of survey was liable to be added back under section 68/69/69A/69B/69C of the Act whereas the assessee is not keeping regular account books and is filing income under section 44AD.

2. That the Pr. CIT himself was not confirmed as to which section out of 68/69/69A/69B/69C was applicable as such treating the order passed by the AO is erroneous and prejudicial to the interest of the revenue is wrong, illegal and uncalled for.

3. The surrendered income was business income and had rightly been assessed by the AO. Reference has been made to the following judgments:

Lovish Singhal & Others Vs. ITO & Others (2018) 53 CCH 250 Jodh Trib.

ACIT Vs. One Enclave (2019) 56CCH 326 Indore Trib.”

2. Facts, in brief, are that in this case a survey operation was carried out at the business premises of the assessee on 17.08.2016. During the course of survey the assessee declared additional income of Rs. 30,00,000/-. Thereafter the case was taken up for scrutiny and the assessment was framed u/s 143(3) of the Act vide order dated 16.12.2019. Thereby the Assessing Officer assessed income at Rs. 35,25,470/-. The learned Pr. CIT after examining the records issued a notice u/s 263 of the Act for revising the assessment order dated 16.12.2019. The basis for issuance of notice u/s 263 of the Act was that the tax was required to be paid on the surrendered income @ 60% u/s 115BBE of the Act. In response to the notice, the assessee filed his reply. However, the learned Pr. CIT did not accept the explanation offered by the assessee and treated the assessment order as erroneous

insofar as prejudicial to the interests of the Revenue. The learned Pr. CIT set aside the assessment order and directed the AO to pass assessment order afresh. Aggrieved against this the assessee is in appeal before this Tribunal.

3. Heard the respective learned representatives of the parties at length and perused the material available on record. The basis of revising the assessment order by the learned Pr. CIT u/s 263 of the Act is that the AO failed to apply the provisions of Section 115BBE of the Act. As per learned Pr. CIT the AO should have charged tax at maximum marginal rate of 60% as prescribed u/s 115BBE on the surrendered income. Undisputed facts are that in this case the assessee had surrendered cash of Rs. 30,00,000/- during the course of survey proceedings and offered it for tax as normal business income. The AO did not treat this amount as deemed income under any of sections 68/69/69A/69B/69C and charged tax u/s 115BBE. For the sake of clarity the relevant finding in the assessment order is reproduced hereunder:

“3. A survey operation u/s 133A of the Income Tax Act, 1961 was carried out on the business premises of the assessee on 17-08-2016. During the course of survey proceedings, certain loose documents were found and impounded on the basis of which the assessee declared an additional income of Rs.30,00,000/- during the year under consideration. The assessee has duly reflected the amount of additional income declared in his Income Tax Return for the year under assessment and has paid due tax on this amount.”

4. However, the learned Pr. CIT was not satisfied with this finding of the AO and revised the order by observing as under:

“6.1 However, while filing the return of income the assessee had disclosed this amount as Income from Business & Profession for the A.Y. 2017-18 and had paid taxes as per normal slab rates. It is relevant to mention here that the surrendered income was in the nature of unexplained cash & recoveries and the same was liable to be added u/s 68/69/69A/69B/69C of the Income Tax Act, 1961 and tax was liable to be paid at the rate of 60% u/s 115BBE of the Act. However, the assessee failed to submit any proper reasons/explanations for showing the surrendered income as Income from Business & Profession and paying taxes at normal slab rates. The AO also failed to enquire why the surrendered income was shown as Income from business & Profession and tax was not paid at the rate of 60% u/s 115BBE of the Act in view of amended Finance Act, 2016. In absence of documentary evidence or proper explanation, the AO should have considered the surrendered income as income u/s 68/69/69A/69B/69C of the Act and re-computation of tax was to be made at the rate of 60% u/s 115BBE of the Act, which he failed to do. Therefore, the order of the AO was erroneous and prejudicial to interest of revenue. Consequently, a show-cause notice u/s 263(1) was issued to the assessee.

6.2 In reply to the above show cause notice, the Ld. Counsel of the assessee mainly submitted that during the course of survey, few discrepancies were found in respect of cash & advances to employees and etch which were business assets and the assessee surrendered an amount of income of Rs. 30,00,000/- from business in addition to regular income to buy peace of mind only. The Ld. Counsel of the assessee also submitted that the assessee had disclosed income during survey was from business only and stated that since the assessee was not required to maintain account books as such section 69A was not applicable against the assessee.

6.3 I have considered the reply of the assessee and find the same as devoid of merits. There is no doubt that the surrender income represented the undisclosed income of the assessee which would have never come to light had there been no survey action upon the assessee u/s 133A of the Act. Therefore, this undisclosed income could be treated as normal business

income as contended by the assessee. The Ld. Counsel of the assessee has also contended that he was not required to maintain account books as per Section-69A of the act was not applicable against the assessee. However, as the applicability of Sections-68/69/69A/69B/69C of the Income Tax Act, 1961 are not dependent upon whether the assessee is maintaining books of accounts or not. Since the assessee had offered no explanation for the income surrendered amounting to Rs. 30,00,000/- during survey proceedings and this income comprises of unexplained cash advances & recoveries, the surrendered amount should be considered unexplained income u/s 68/69/69A/69B/69C of the Act and tax is required to be made @60% u/s 115BBE of the Act, in view of the amendment in law with the Finance Act, 2016. By not doing the same, the AO erred in terms of provisions of Section-263 of the Act, as the AO's order is erroneous and prejudicial to the interest of revenue.

6.4 In view of the facts discussed in foregoing paras, it is quite-clear that the assessment order dated 16.12.2019 is erroneous and prejudicial to the interest of revenue, in as much as the A.O. should have conducted detailed enquiries on the above issues, which he clearly failed to do.”

5. From the finding of the learned Pr. CIT it is clear that he also did not specify a specific provision under which the AO should have treated the surrendered amount. In the letter submitted before the AO dated 17.08.2016 it is stated that during the course of survey some documents pertaining to advances and recoveries were found at the business premises. It was stated that at that point of time the assessee was not in a position to explain those entries as he was not keeping books of account. However, to buy peace of mind and to avoid litigation the assessee surrendered an amount of Rs. 30,00,000/- over and above his regular income in the year under appeal. The voluntary surrender was not subject to any penal action

under any direct tax laws. Thus, it is not clear as to what was the nature of this surrendered amount, whether it was out of business income or out of undisclosed sources. The learned Pr. CIT has not given a clear finding about which provision of law the AO ought to have charged the tax which he failed to do so. The learned Pr. CIT has stated that the AO should have considered the surrendered income as income u/s 68/69/69A/69B/69C of the Act. Therefore, in the absence of clear finding by the learned Pr. CIT as to under which provision of law the amount was required to be taxed so as to attract the provisions of section 115BBE by mentioning the multiple provisions does not serve the purpose of law. There has to be clear cut finding by the learned Pr. CIT. Reliance is placed on the decision of the Coordinate Bench of the Tribunal in the case of Balvinder Singh vs. PCIT rendered in ITA no. 570/Del/2022 dated 24.08.2022, wherein in para 13 it has been held as under:

“13. There is, therefore nothing stated in the pre-amended or post amended provisions of section 115BBE of the Act that where the assessee surrenders undisclosed income during search action for the relevant year, the tax rate has to be charged as per provisions of section 115BBE of the Act. Therefore, the applicability of the amended provisions which prompted the PCIT to assume jurisdiction under section 263 of the Act is highly debatable issue, and therefore, in our understanding of the law, the PCIT has wrongly assumed jurisdiction.”

6. Thus, in the light of binding precedents, coupled with the fact that no clear finding has been given by learned Pr. CIT as to under which provision of law the

amount surrendered during the course of survey was required to be taxed, the impugned action cannot be sustained. Hence, the impugned order is set aside and the finding of AO is hereby restored.

7. The grounds raised by the assessee are allowed in the terms indicated hereinbefore. In the result, appeal is allowed.

Order pronounced in open court on 30th August, 2023.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI