आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 71/Ind/2022
Assessment Year: 2017-18

MR. Gaurav Ajmera, 38, Ram Mohalla, Ratlam	**बनाम/** Vs.	DCIT, Central Circle 2, Indore.
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AGLPA8863C		
Assessee by	Shri Pawan Ved, Advocate & AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	13.06.2023	
Date of Pronouncement	01.09.2023	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 10.03.2022 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal ["CIT(A)"], which in turn arises out of assessment-order dated 29.12.2018 passed by learned DCIT, Central-2, Indore ["AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2017-18, the assessee has filed this appeal.

2. Heard the learned Representatives of both sides at length and case-records perused.

3. Brief facts leading to present appeal are such that the Income-tax Department received an information from the office of SP, ATS, Jaipur about three persons (including assessee) travelling from Ratlam to Jaipur on

14.11.2016 (shortly after declaration of demonetization on 08.11.2016) carrying cash of approx. Rs. 50,00,000/- (ultimately the exact amount was Rs. 49,99,000/-) in the form of demonetized currency notes of Rs. 500 and 1,000. Acting thereon, the statements of all three persons (including assessee) were recorded u/s 131 on 14.11.2016 wherein all of them (including assessee) admitted that the entire cash belonged to assessee. Accordingly, a requisition dated 14.11.2016 u/s 132A was issued. The statements of assessee were again recorded u/s 132(4) on the very same date i.e. 14.11.2016 wherein the assessee accepted that the impugned cash was not recorded in his books and it was earned from undisclosed sources. All statements are re-produced by AO in assessment-order. The cash was seized. Thereafter, the assessments of past six years from AY 2011-12 to 2016-17 were framed under special provision u/s 153A. For the relevant AY 2017-18 under consideration, which relates to the previous year 2016-17 in which the requisition dated 14.11.2016 was executed, the assessee filed regular return on 09.01.2018 declaring total income of Rs. 54,25,260/-. In the income so declared in return, the assessee included income of Rs. 47,59,000/- out of the admitted undisclosed income of Rs. 49,99,000/-. Finally, the AO completed assessment u/s 143(3) whereby (i) he made a further addition of Rs. 2,40,000/- being the difference of Rs. 49,99,000 surrendered but only Rs. 47,59,000/- declared in return; (ii) invoked higher rate of tax u/s 115BBE to the entire income of Rs. 49,99,000/-; (iii) charged interest u/s 234A, 234B and 234C; and (iv) recorded to initiate penalty proceeding u/s 271AAB. Aggrieved, the assessee carried matter in first-appeal but could not succeed. Now, the assessee has approached us by way of this appeal.

4. The assessee has raised following grounds:

> *"1. That the whole order of assessment is null and void as approval given by Ld. JCIT u/s 153D is without application of mind.*
>
> *2. The Ld. CIT(A) has erred in confirming addition of Rs. 2,40,000/- being the amount of savings of wife of assessee, which is usually permitted as a normal saving.*

3. *The Ld. CIT(A) has erred in confirming levying tax at the rate of 60% u/s 115BBE which was inserted in the statute book after the relevant date when the amount seized was found taxable.*

4. *The Ld. CIT(A) erred in not cancelling interest u/s 234A, 234B and 234C.*

5. *The Ld. CIT(A) has erred in confirming initiation of penalty u/s 271AAB.*

6. *The appellant reserves the right to add, amend or alter any grounds of appeal as above."*

5. At the time of hearing, Ld. AR for assessee did not press/plead Ground No. 1, 5 and 6. Therefore, those grounds are dismissed as non-pressed. We proceed to adjudicate remaining Ground No. 2 to 4 one by one in seriatim.

Ground No. 2:

6. This ground relates to the addition of Rs. 2,40,000/- made by AO. The AO has made this addition for the simple reason that the assessee was found to be owner of currency notes of Rs. 49,99,000/- which he accepted as undisclosed money but in the return of income filed to department, the assessee disclosed income of Rs. 47,59,000/-. Therefore, the AO made addition of the differential sum of Rs. 2,40,000/-.

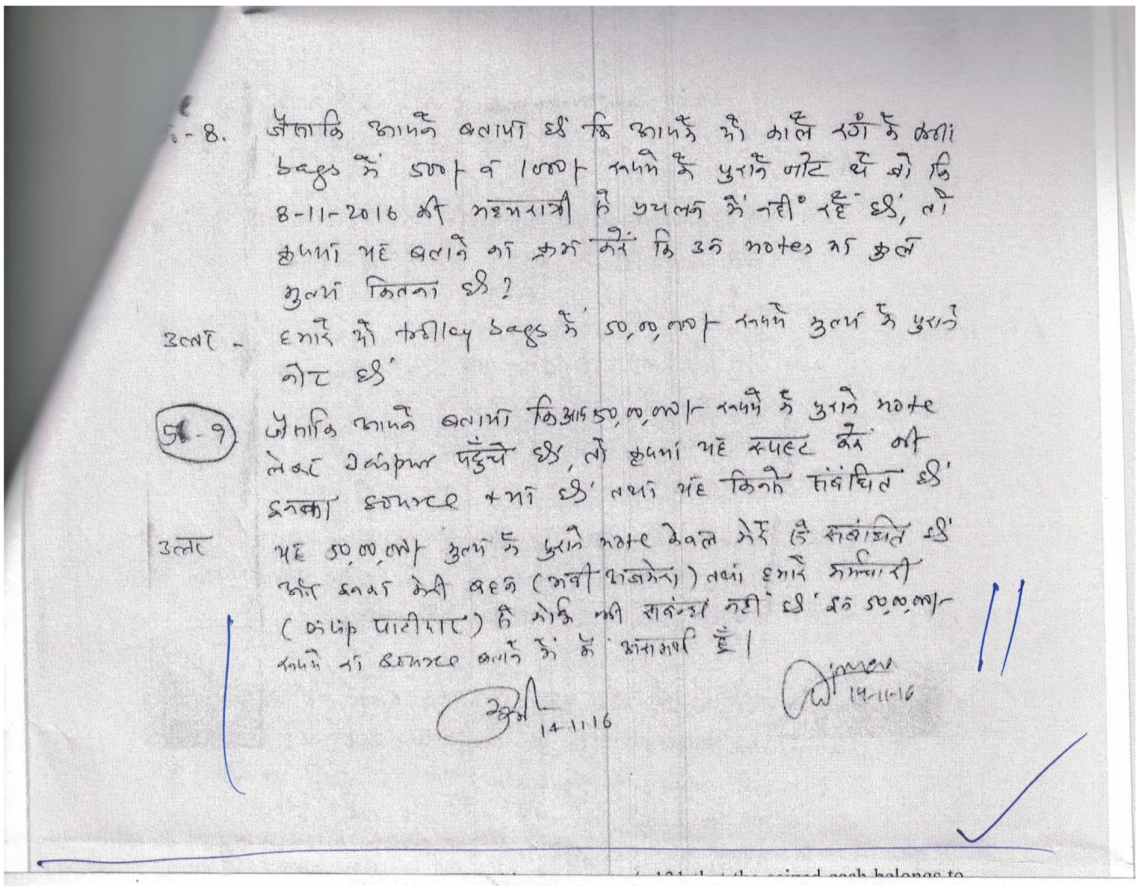
7. Before CIT(A), it was submitted that Rs. 2,40,000/- was the amount of normal household savings which was even allowed by CBDT Press Release/Instruction dated 18.11.2016 and 21.02.2017 to all households at the time of demonetization. It was further submitted that neither assessee nor any of his family members could make any deposit of demonetized notes in bank a/c and the entire cash had been seized. It was also submitted that looking to the financial status of assessee and his family, the small sum of

Rs. 2,40,000/- should be accepted as savings. Reliance was also placed on the decision of **ITAT, Agra in Smt. Uma Agarwal (2021) 127 Taxmann.com 735** where a deposit upto Rs. 2.50 lakh was held to be acceptable for homemakers. However, the CIT(A) was not satisfied with the submission of assessee who held that the cash was found with assessee in Jaipur though the assessee belonged to Ratlam. He also held that the CBDT Press Release/Instruction as well as the decision in **Smt. Uma Agarwal (supra)** was applicable only for depositing demonetized currency in bank a/c but not for carrying such currency from one location to another for unknown purposes. The CIT(A) upheld addition.

8. Before us, both sides put forward their respective contentions for and against the addition, such contentions being on the same line as were made before the lower-authorities.

9. We have considered rival contentions of both sides and perused the facts of case. We find that in the Ground the assessee has mentioned that the cash of Rs. 2,40,000/- was saving of his wife. Before us, the thrust of assessee's AR is on CBDT Press Release/Instruction dated 18.11.2016 and 21.02.2017 issued during demonetization period. Therefore, for arriving at a proper conclusion, we firstly refer the statement of assessee recorded by authorities u/s 131 as well as 132(4) at the time of seizure of cash:

Statement recorded u/s 131:



Q.-8. जैसाकि आपने बताया है कि आपके पास कुल मिलाकर 5 bags में 500/- व 1000/- रुपये के पुराने नोट थे जो कि 8-11-2016 की मध्यरात्रि के उपरान्त में नहीं रहे हैं, तो कृपया यह बताने का कष्ट करें कि उन notes का कुल मूल्य कितना है?

उत्तर - हमारे पास विभिन्न bags में 50,00,000/- रुपये मूल्य के पुराने नोट हैं।

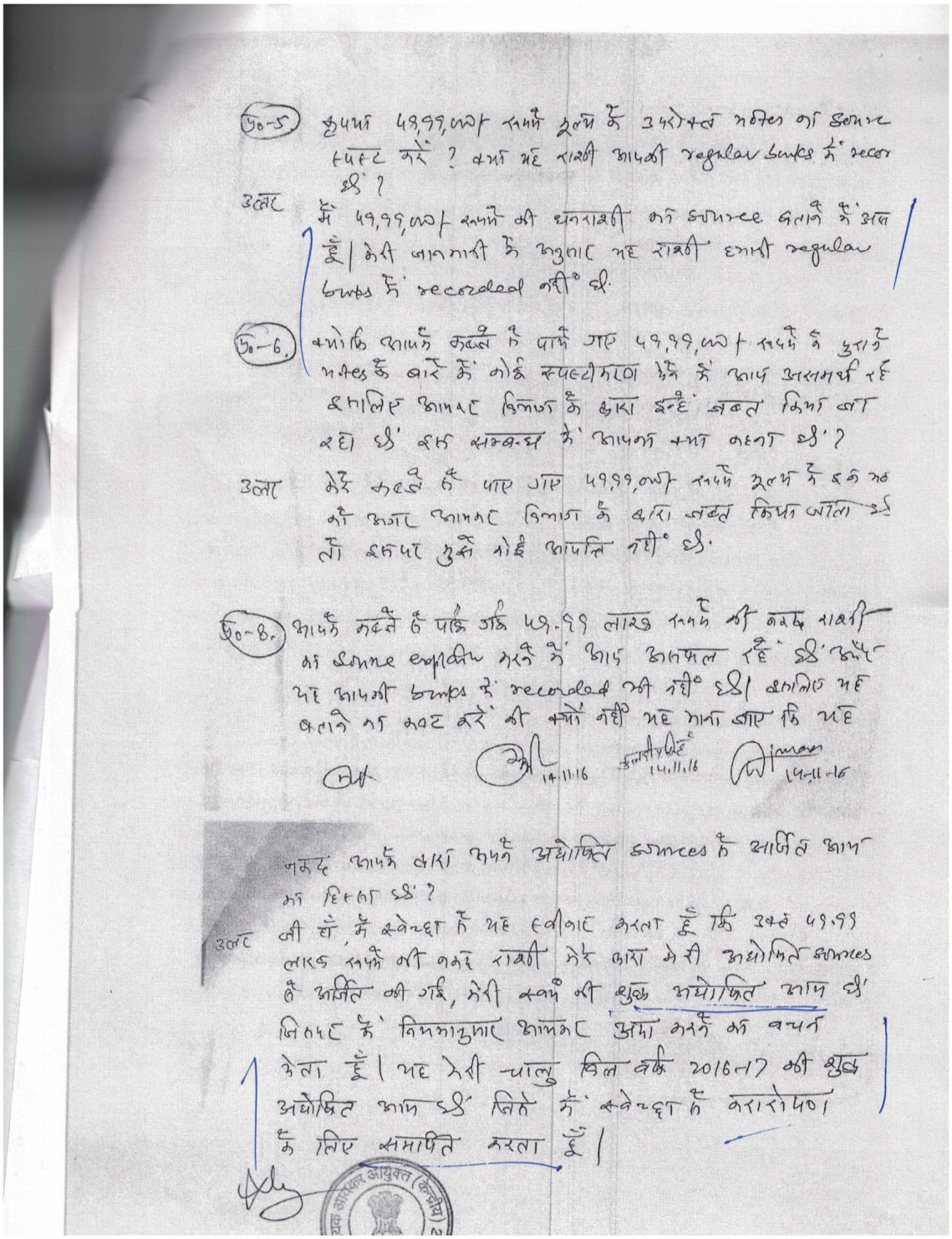
Q.-9 जैसाकि आपने बताया कि आपके 50,00,000/- रुपये के पुराने notes लेकर Jaipur पहुँचे थे, तो कृपया यह स्पष्ट करें की इनका source क्या है तथा यह किनसे संबंधित है।

उत्तर यह 50,00,000/- मूल्य के पुराने notes केवल मेरे से संबंधित हैं और इनका मेरी पत्नी (श्रीमती राजश्री) तथा हमारे कर्मचारी (Dilip पाटीदार) से कोई भी संबंध नहीं है। इन 50,00,000/- रुपये का source बताने में मैं असमर्थ हूँ।

14.11.16

14-11-16

Statement recorded u/s 132(4)



प्र०-5 कृपया 49,99,000/- रुपये मूल्य के उपरोक्त नकदी का Source स्पष्ट करें ? क्या यह राशी आपकी regular books में record है ?

उत्तर मैं 49,99,000/- रुपये की धनराशी का Source बताने में असक्षम हूँ। मेरी जानकारी के अनुसार यह राशी हमारी regular books में recorded नहीं है.

प्र०-6. क्योंकि आपके कब्जे से पाये गए 49,99,000/- रुपये के द्वारा नकदी के बारे में कोई स्पष्टीकरण देने में आप असमर्थ रहे इसलिए आयकर विभाग के द्वारा इन्हें जब्त किया जा रहा है इस सम्बन्ध में आपका क्या कहना है ?

उत्तर मेरे कब्जे से पाए गए 49,99,000/- रुपये मूल्य के नकद की जगह आयकर विभाग के द्वारा जब्त किया जाता है तो इसपर मुझे कोई आपत्ति नहीं है.

प्र०-8. आपके कथनों से यह्कि जब्त 49.99 लाख रुपये की नकद राशी का Source explain करने में आप असफल रहे हैं और यह आयकी books में recorded भी नहीं है। इसलिए यह बताने का कष्ट करें की क्यों नहीं यह माना जाए कि यह

14.11.16 14.11.16 14.11.16

जकद आपके द्वारा अपने अघोषित Sources से अर्जित आय का हिस्सा है ?

उत्तर जी हाँ, मैं स्वेच्छा से यह स्वीकार करता हूँ कि इसमें 49.99 लाख रुपये की नकद राशी मेरे द्वारा मेरी अघोषित Sources से अर्जित की गई, मेरी स्वयं की शुद्ध अघोषित आय है जिसपर मैं निम्नानुसार आयकर जमा करने का वचन देता हूँ। यह मेरी चालु वित्त वर्ष 2016-17 की शुद्ध अघोषित आय है जिसे मैं स्वेच्छा से करारोपण के लिए समर्पित करता हूँ।

10. From these statements, it clearly emerges that cash was seized after declaration of demonetization by Govt. of India while it was being transported in bags in train. Further, the assessee admitted, in reply to Q.No. 9 of statement u/s 131 and Q.No. 5 & 8 of statement u/s 132(4) that he was unable to explain the source of cash; that the impugned cash was not recorded in his books; that he had no objection in seizure of cash by department; that the cash was earned from "undisclosed sources"; that it was his "undisclosed income"; and it was undisclosed income of current financial year 2016-17. Further, the assessee also agreed to pay tax on entire cash of Rs. 49.99 lakh.

11. Now, we refer the relevant portion of Press Release/Instruction issued by CBDT:

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

New Delhi, 18th November, 2016.

PRESS RELEASE

Sub: Demonetisation of Old High Denomination Currency & Cash Deposits in Bank Accounts

It was announced by the Government earlier that small deposits made in the banks by artisans, workers, housewives, etc. would not be questioned by the Income Tax Department in view of the fact that present exemption limit for Income Tax is Rs.2.5 lakh. Reports are being received of instances where people are using other persons' bank accounts to convert their black money into new denomination notes for which reward is also being given to the account holders who agree to allow their accounts to be used. This activity has been reported in case of Jan-Dhan Accounts also.

It is hereby clarified that such tax evasion activities can be made subject to Income Tax and penalty if it is established that the amount deposited in the account was not of the account holder but of somebody else. Also the person who allows his or her account to be misused for this purpose can be prosecuted for abetment under Income Tax Act.

However, genuine persons depositing their own household savings in cash into their bank accounts would not be questioned.

The people are requested not to get lured by black money converters and be a partner in this crime of converting black money into white through this method. Unless all citizens of the country help the Government in curbing black money, this mission of black money will not succeed. Also the people who are against the black money should give information of such illegal activities going on to the Income Tax department so that immediate action can be taken and such illegal transfer of cash can be stopped and seized.

Black money is a crime against humanity. We urge every conscientious citizen to help join the Government in eradicating it.

(Meenakshi J. Goswami)
Commissioner of Income Tax
(Media and Technical Policy)
Official Spokesperson, CBDT.

Instruction No.23/2017

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

North Block, New Delhi
Dated 21st of February, 2017

Subject: - Standard Operating Procedure (SOP) to be followed by the Assessing Officers in verification of Cash transactions relating to demonetisation-regd.-

Post demonetisation of ₹ 500 and ₹1000 notes on November 8, 2016, several malpractices has been noticed. The Income Tax Department is enquiring/seeking information and analysing instances of deposits to identify cases involving risk of tax evasion. Based upon vast amount of information of cash deposits collected and analysed by CBDT, a number of persons have been identified in whose case the cash transactions did not appear to be in line with their profile available with the Income-tax Department ('ITD'). In such cases, it has been decided to undertake on-line verification of select transactions through jurisdictional Assessing Officers ('AOs').

2. OVERVIEW OF ONLINE VERIFICATION

The online verification has been enabled on e-filing portal (for persons under verification) which will be synchronized with the internal verification portal (AIMS module of ITBA) of ITD. The salient features of online verification mechanism are as under:

2.1 ITD has enabled online verification of these transactions to reduce compliance cost for persons under verification while optimizing its resources. The information in respect of these cases has been made available in the e filing window of the PAN holder (after log in) at the portal https://incometaxindiaefiling.gov.in. The PAN holder can view the information using the link 'Cash Transactions 2016' under 'Compliance' section of the portal. The person under verification will be able to submit online explanation without any need to visit Income Tax office.

2.2 Email and SMS were sent to the persons under verification for submitting online response on the e-filing portal. Such persons who are not yet registered on the e-filing portal (at https://incometaxindiaefiling.gov.in) should register immediately by clicking on the 'Register Yourself' link. Registered taxpayers should verify and update their email address and mobile number on the e-filing portal to receive electronic communication.

2.3 The user guide, quick reference guide and frequently asked questions ('FAQs') are available on the portal for assisting the person under verification for submitting online response.

2.4 Cases meeting the low risk criteria will be closed centrally. Cases which are not closed automatically will be pushed in batches to the AO for verification.

12. From a bare reading of Press Release dated 18.11.2016, one can easily find that the CBDT has clarified that the genuine persons depositing their own household savings in cash into the bank accounts would not be questioned. Further, it is also mentioned that the *"Unless all citizens of the country help the Government in curbing black money, this mission of black money will not succeed. Also the people who are against the black money should give information of such illegal activities going on to the Income-tax Department so that immediate action can be taken and* ***such illegal transfer of cash can be stopped and seized****. Black money is a crime against humanity. We urge every conscientious citizen to help join in the Government in eradicating it".* Then, the Instruction dated 21.02.2017 issued by CBDT prescribed a Standard Operating Procedure for on-line verification of cash-transactions. Thus, the Press Release/Instruction do not save the assessee's case of transferring hefty cash of Rs. 49.99 lakh in bags from one place to another. The assessee himself admitted not only the ownership of cash but also to have earned from undisclosed sources of current financial year 2016-17 and it was not even the case of assessee that the impugned cash represented saving of household or past savings or savings of somebody else like his wife. Therefore, we are not convinced by Ld. AR's submission that the assessee's case deserves any relief. Being so, we uphold the addition made/upheld by lower-authorities. This ground is dismissed.

Ground No. 3:

13. This ground challenges the levy of tax by AO u/s 115BBE at a higher rate of 60% on the undisclosed income of Rs. 49,99,000/- (Rs. 47,59,000/- declared by assessee + Rs. 2,40,000/- added by AO).

14. Ld. AR for assessee raised multiple contentions to impress upon us that the impugned income cannot be taxed at a higher rate of 60% u/s 115BBE. We have given a peaceful hearing. The contentions raised by Ld. AR are summed up thus:

(i) The first contention raised by Ld. AR is such that the section 69A itself is not applicable to the impugned income. To show this, Ld. AR contended that the impugned income was not "income from other source" or "Income from undisclosed sources", it was income from business. Ld. AR submitted that in order to understand how the impugned income was business income, one has to draw a proper inference from the facts/ documents of assessee. Then, Ld. AR submitted that the assessee started property business in current year and this was the first year of business, hence the books of account were not maintained. But, referring to Page No. 68 of Paper-Book-1, Ld. AR submitted that the assessee was holding lands purchased in earlier years. Referring to Page No. 69-70 of Paper-Book-1 where a letter dated 20.11.2018 alongwith affidavit dated 17.11.2018 deposed by assessee and filed to AO are placed, Ld. AR tried to demonstrate that the assessee was intending to do property business about 4 years ago and for that purpose met one Shri Aashish Das of JSM Devon Limited,

Indore for the purpose of making a bulk booking of flats to earn profits by re-selling them and the discussions relating to intended bulk-deal were found in assessee's mobile at the time of search but, however, the deal could not be materialized and therefore there was no movement of funds for above deal nor any document was written. Ld. AR submitted that the messages exchanged from assessee' mobiles relating to intended bulk deal of flats are got printed and print version is filed at Page No. 72 to 81 of Paper-Book-1. Our attention is also drawn to another letter (undated) filed to AO apprising the very same facts, copy of the letter placed at Page No. 30-31 of Paper-Book-2. Ld. AR also drew our attention to Page No. 82 of Paper-Book-1 where a copy of letter dated 17.01.2017 filed by assessee to AO is placed in which the assessee requested AO to adjust the seized cash against advance-tax/income-tax on undisclosed income. Ld. AR submitted that in the said letter dated 17.01.2017, the assessee has clearly mentioned that the seized amount was earned during current year itself and the assessee did not have any other money to pay tax. Ld. AR submitted these facts/documents are enough evidences to infer that the impugned cash seized during search represented or sourced from assessee's business income. Therefore, the AO is not justified in treating the impugned cash as deemed income u/s 69A.

(ii) The second contention raised by Ld. AR is such that the AO has imposed penalty u/s 271AAB *qua* the impugned income through Penalty-order dated 26.06.2019, copy of order is re-produced below for an immediate reference:

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Government of India
Ministry of Finance (Department of Revenue)
Office of the Deputy Commissioner of Income Tax (Central)-2,
Room no. 303, 3rd floor, Aaykar Bhawan, Main Building, White Church, Indore

1. Name & Address of the Assessee	:	Shri Gaurav Ajmera, 38, Rajmohalla, Ratlam
2. Permanent Account Number	:	AGLPA8863C
3. Assessment Year	:	2017-18
4. Date of Order	:	26/06/2019

PENALTY ORDER UNDER SECTION 271AAB OF THE INCOME TAX ACT, 1961

In this case, information was received from the office of the SP, ATS, Jaipur about three persons travelling by Mumbai, Jaipur superfast train on 14/11/2016 from Ratlam, Madhya Pradesh to Jaipur carrying cash of approximately Rs 50 Lakhs (Sh Gaurav Ajmera, M/s Bhavi Ajmera and Sh Dilip Patidar). All the three persons were intercepted at the Durgapura Railway Station(at Jaipur) by the ATS team with support of local GRP staff. After preliminary investigation and physical search of their belongings by the police, cash of approximately Rs 50 lakhs was found from their possession and then all the three persons were handed over to GRP, Jaipur by the ATS Jaipur.

2. Since the source of the cash could not be explained by Shri Ajmera, a warrant of Authorization u/s 132A of the Act dated 14/11/2016 was issued by the Principal Director of Income Tax (Investigation), Jaipur,(Rajasthan) and the same was served upon Shri Gaurav Ajmera. Subsequently, the common assessment order was passed u/s 153A r.w.s. 143(3) of the Act on 29/12/2018 for the A.Y. 2011-12 to 2016-17 and u/s 143(3) for A.Y 2017-18 as under:-

A.Y.	Returned	Additions	Assessed

(32)
28/6/19

	income (in Rs.)	made on account of	income
2011-12	4,89,680/-	--	8,23,340/-
2012-13	4,85,650/-	--	18,09,280/-
2013-14	2,46,090/-	--	24,69,900/-
2014-15	1,95,580/-	--	35,14,880/-
2015-16	1,36,630/-	--	45,38,050/-
2016-17	2,83,240/-	--	43,33,5630/-
2017-18	54,25,260/-	2,40,000/-	56,65,260/-

3. During the course of post search enquiry, the assessee submitted a letter dated 16/11/2016 admitting Rs 49,99,000/- as his undisclosed income which was not recorded in his books of account and unable to explain the source of cash. On perusal of return of income filed u/s 139(1) for A.Y 2017-18, it was seen that the income of Rs 47,59,000/- has been shown as unexplained money u/s 69A and is processed u/s 143(1) & taxed in accordance with provisions contained u/s 115BBE of I T Act applicable w.e.f. 01/04/2017. Since it was evident that the seized cash of Rs 49,99,000/- was held to be belonging to the assessee which was treated as unexplained cash in his hands. Hence the total amount of Rs 49,99,000/- was added to the total income for A.Y 2017-18 on account of unexplained cash u/s 69A being undisclosed income seized from him as discussed above. However the assessee had shown the unexplained cash of Rs 47,59,000/- in para 1(f)(iii) of schedule OS in return of income filed for A.Y 2017-18 u/s 139(1). Therefore, the difference amount of Rs 2,40,000/-(Rs 49,99,000/- - Rs 47,59,000/-) was added to his total income for AY 2017-18 treating it as unexplained cash u/s 69A of I T Act and penalty proceedings separately initiated u/s 271AAB for A.Y 2017-18 for concealment of income of Rs 49,99,000/- by the assessee. Showcause notice u/s 271AAB was also issued on 29/12/2018 and 01/05/2019.

3.1 In compliance to the notice u/s 271AAB, the AR of the assessee submitted his reply through mail on 09/01/2019 in which he stated that the assessee has filed an

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appeal against the assessment order and requested to keep the the penalty proceedings in abeyance till the decision of first appeal.

3.2 The reply submitted by the assessee company in this regard, is duly perused and found that there is no any merit in the said reply. The grounds of appeal filed by the assessee before the Ld. CIT(A) are as under:-

(a)The Ld. AO has erred in making addition of Rs 2,40,000/- being the amount of savings, which is usually permitted as a normal saving.

(b) The Ld. AO has erred in levying tax at the rate of 60% u/s 115BBE which was inserted in the statute book after the relevant date when the amount was seized.

(c) The appellant reserves the right to add amends or alter any grounds of appeal as above.

4 In view of the above, it is clear that the assessee filed an appeal only on the issue of addition of Rs 2,40,000/- and tax rate u/s 115BBE although total seized cash of Rs 49,99,000/- was admitted as unexplained money belonging to assessee . Further, the assessee has surrendered of Rs. 47,59,000/- on account of unrecorded cash which was treated as unexplained money u/s 69A against which no appeal has been filed. Therefore , I am satisfied that the assessee is liable to penalty under section 271AAB(a) of the Income Tax Act at the rate of 10% of undisclosed income of Rs 47,59,000/- as the assessee has offered the same amount to tax and shown in the return of income filed for the A.Y 2017-18. Further, the assessee is liable to penalty under section 271AAB(c) of the Income Tax Act at the rate of 60% of undisclosed income of Rs 2,40,000/- as the assessee neither offered the same u/s 132(4) nor shown in its return of income filed u/s 139(1).

(34)

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5. Accordingly, the amount of penalty to be imposed upon the assessee is computed as under: -

Particular	Amount	Penalty rate	Penalty levied
Undisclosed Income declared u/s 132(4)	Rs 47,59,000/-	10%	Rs 4,75,900/-
Undisclosed Income added during assessment Proceeding	Rs 2,40,000/-	60%	Rs 1,44,000/-
	Total Penalty levied		**Rs 6,19,900/-**

6. Therefore, considering the facts and circumstances of the case, a sum of **Rs.6,19,900/- (Rs. Six lakh nineteen thousand nine hundred only)** is hereby imposed as penalty upon the assessee u/s 271AAB after providing due opportunity to the assessee.

7. This order is being passed after obtaining prior approval from the Joint Commissioner of Income Tax (Central), Indore vide his letter F. No. Add.CIT (Cen.)/ Ind./Penalty Approval/2019-20/385 dated 24/06/2019

Issue demand Notice & Challan accordingly.

(Vinita Dubey)
Dy. Commissioner of Income Tax (Central)-2, Indore

Copy to the Assessee

Dy. Commissioner of Income Tax (Central)-2, Indore

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Referring to Para 5, Ld. AR pointed out that the AO has imposed penalty in two parts, namely 10% of the income of Rs. 47,59,000/- admitted by assessee u/s 132(4) and declared in the return of income (+) 60% of the income of Rs. 2,40,000/- not disclosed by assessee but added by AO during assessment-proceeding. Ld. AR instantly carried us to the provision of section 271AAB which prescribes thus:

"Penalty where search has been initiated

271AAB. (1) The Assessing Officer or the Commissioner (Appeals) may, not- withstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012 but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(a) a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) on or before the specified date—

(A) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(B) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(b) a sum computed at the rate of twenty per cent of the undisclosed income of the specified previous year, if such assessee—

(i) in the course of the search, in a statement under sub-section (4) of section 132, does not admit the undisclosed income; and

(ii) on or before the specified date—

(A) declares such income in the return of income furnished for the specified previous year; and

(B) pays the tax, together with interest, if any, in respect of the undisclosed income;

(c) a sum computed at the rate of sixty per cent of the undisclosed income of the specified previous year, if it is not covered by the provisions of clauses (a) and (b)."

[Emphasis supplied]

Ld. AR co-related the quantum of penalty computed by AO in Para No. 5 of penalty-order vis-à-vis the provisions of section 271AAB and submitted that the AO has imposed penalty @ 10% qua the income of Rs. 47,59,000/- u/s 271AAB(1)(a) and not @ 60% u/s 271AAB(1)(c). That means, Ld. AR

contended, the AO is very much satisfied that the assessee fulfilled the conditions prescribed in section 271AAB(1)(a), namely the assessee has specified the manner in which such income had been derived and the assessee has substantiated the manner in which the undisclosed income was derived. Ld. AR submitted that the AO has passed penalty-order with the approval of JCIT. Therefore, according to Ld. AR, it must be a considered view of authorities that the manner/source of income of at least Rs. 47,59,000/- is proved, if not of addition of Rs. 2,40,000/- made by AO for which penalty @ 60% has been imposed. Ld. AR contended that when the AO has accepted the manner/source of income in penalty-proceeding, there is no reason to sustain the applicability of section 69A and for that matter the higher rate of tax u/s 115BBE. To support this submission, Ld. AR relied upon the decision in **Basir Ahmed Sisodia Vs. ITO (2020) 116 taxmann.com 375 (SC)**, para No. 14 to 16, which reads as under:

> *"13. Reverting to the findings and conclusions recorded by the Officer and which commended to the appellate authority, as well as, the High Court, it must follow that the appellant/assessee despite being given sufficient opportunity, failed to prove the correctness and genuineness of his claim in respect of purchases of marbles from unregistered dealers to the extent of Rs.2,26,000/ (Rupees two lakhs twenty six thousand only). Resultantly, the said transactions were assumed as bogus entries (standing to the credit of named dealers who were none existent creditors of the assessee).*
>
> *14. However, it has now come on record that the appellant/assessee in penalty proceedings offered explanation and caused to produce affidavits and record statements of the concerned unregistered dealers and establish their credentials. That explanation has been accepted by the CIT(A) vide order dated 13.1.2011. In paragraph 17 of the said decision reproduced hitherto, it has been noted that the Officer recorded statements of 12 unregistered dealers out of 13 and their identity was also duly established. After analysing the evidence so produced by the appellant/assessee, the appellate authority [(CIT(A)] noted that the Officer had neither doubted the identity of those dealers nor any adverse comments were offered in reference to their version regarding sale of marble slabs by them to the appellant/assessee in the financial year relevant to assessment year 1998-1999 and receipt of payments after two to three years. Further, there was no denial of purchase of marbles worth Rs.4,78,900/ (Rupees four lakhs seventy eight thousand nine hundred only) by the assessee and sale thereof worth Rs.3,57,463/ (Rupees three lakhs fifty seven thousand four hundred sixty three only) with closing stock of Rs.2,92,490/ (Rupees two lakhs ninety two thousand four hundred ninety only), as disclosed in the trading account for the year ended on*

31.3.1998. The appellate authority thus found that without purchases of marbles, there could be no sale and disclosure of closing stock in the trading account. In other words, the materials on record would clearly suggest that the concerned unregistered dealers had sold marble slabs on credit to the appellant/ assessee, as claimed. As a consequence of this finding, the appellate authority concluded that there was neither any concealment of income nor furnishing of inaccurate particulars of income by the assessee. We are conscious of the fact that these observations are made by the competent forum (appellate authority) in penalty proceedings under Section 271 of the 1961 Act in favour of the assessee. However, what needs to be noted is that the stated penalty proceedings were the outcome of the assessment order in question concerning assessment year 1998-1999. Indeed, at the time of assessment, the appellant/assessee had failed to produce any explanation or evidence in support of the entries regarding purchases made from unregistered dealers. In the penalty proceedings, however, the appellant/assessee produced affidavits of 13 unregistered dealers out of whom 12 were examined by the Officer. The Officer recorded their statements and did not find any infirmity therein including about their credentials. The dealers stood by the assertion made by the appellant/assessee about the purchases on credit from them; and which explanation has been accepted by the appellate authority in paragraphs 17 and 19 of the order dated 13.1.2011.

15. To put it differently, the factual basis on which the Officer formed his opinion in the assessment order dated 30.11.2000 (for assessment year 1998-1999), in regard to addition of Rs.2,26,000/ (Rupees two lakhs twenty six thousand only), stands dispelled by the affidavits and statements of the concerned unregistered dealers in penalty proceedings. That evidence fully supports the claim of the appellant/assessee. The appellate authority vide order dated 13.1.2011, had not only accepted the explanation offered by the appellant/assessee but also recorded a clear finding of fact that there was no concealment of income or furnishing of any inaccurate particulars of income by the appellant/assessee for the assessment year 1998-1999. That now being the indisputable position, it must necessarily follow that the addition of amount of Rs.2,26,000/ (Rupees two lakhs twenty six thousand only) cannot be justified, much less, maintained.

16. Accordingly, this appeal ought to succeed on this count alone and it would be unnecessary for us to dilate on other questions/contentions urged by the parties as referred to in the earlier part of this judgment."

Ld. AR submitted that in this decision, the Hon'ble Supreme Court has deleted the addition made in assessment-order on the basis of favourable finding made by authorities in penalty-order. Therefore, the decision of Hon'ble Supreme Court is a clear pointer that the conclusion derived in penalty proceeding is very much relevant to assessment-order. Ld. AR prayed that having regard to this decision, it must be accepted that in the present case of assessee, the AO has, by levying penalty @ 10%, clearly

admitted that the assessee has explained the manner/source of cash of Rs. 47,59,000/-; therefore there is no justification on the part of AO to invoke section 69A read with section 115BBE to that extent.

(iii) The third and last contention raised by Ld. AR is somewhat different. Ld. AR submits that even if section 115BBE is applicable, the amendment in that section prescribing a higher rate of tax @ 60% [plus surcharge and cess] was brought by an amendment brought in statute through "Taxation Laws (Second Amendment) Act, 2016", copy of gazette publication is filed in Paper-Book-1, Page No. 62 to 67. Ld. AR submitted that the said amendment came into effect from 15.12.2016 whereas the requisition in assessee's case was made on 14.11.2016. Ld. AR submitted prior to 15.12.2016, the tax rate was 30% in section 115BBE. He submitted that the higher rate of 60% was applicable prospectively from 15.12.2016 and this view is also held by (i) **ITAT, Indore in DCIT Vs. M/s Punjab Retail Pvt. Ltd, ITA No. 677/Ind/2019 order dated 08.10.2021** and (ii) **ITAT, Jabalpur ACIT Vs. Sandesh Kumar Jain, ITA No. 41/JAB/2020 order dated 31.10.2022**. Further reliance is also placed on **Govind das Vs. ITO (1976) 103 ITR 123 (SC), CIT Vs. Hindustan Electro Graphites Ltd. (2000) 243 ITR 48 (SC) and Piu Ghosh Vs. DCIT (2016) 73 taxmann.com 226 (Calcutta HC)** to support the proposition that any amendment made in statute shall apply prospectively and not retrospectively. At that juncture, the Bench questioned Ld. AR on the later and recent decision of **ITAT, Indore in Narendra Kumar Shantilal Jain HUF Vs. PCIT, ITA No. 124/Ind/2022, order dated 23.12.2022,** wherein the Co-ordinate Bench, following the decision of **Hon'ble Kerala High Court in WA No. 984 of 2019, Maruthi Babu Rao Jadav Vs. The Assistant Commissioner of Income-tax, Central, Circle, Kozhikode, dated 23.09.2020,** has held that the amendment though made on 15.12.2016, would apply to the whole previous year 2016-17, AY 2017-18. In reply, Ld. AR only gained support from following decision of **CIT Vs. Thana Electricity Company (1994) 206**

ITR 727 (Bombay HC) and argued that the said decision of Hon'ble Kerala High Court is not binding upon ITAT, Indore Bench:

> *"21. From the foregoing discussion, the following propositions emerge:*
>
> *(a) to (c) XXX*
>
> *(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction.* ***In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect.*** *By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or Tribunal within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of article 141 of the Constitution."*

15. Per contra, Ld. DR for revenue strongly opposed all three contentions of Ld. AR one by one as under:

(i) Regarding first contention, Ld. DR submitted that it is not an ordinary case of assessee, it is a peculiar case of transportation of demonetized currency in bags to defeat the demonetization declared by Govt. of India for a pious objective which was seized by ATS team of Govt. He submitted that when the assessee was questioned by authorities u/s 131 as well as 132(4), the assessee clearly admitted that he was unable to explain the source and that the impugned cash was his income from undisclosed sources. Thereafter, the assessee himself declared the impugned income as undisclosed money u/s 69A in the return of income filed to department, this fact is clearly mentioned by AO in Para No. 5.2 of assessment-order. Ld. DR contended that the argument of Ld. AR that an inference has to be drawn for ascertaining source is only an effort to get out of section 69A and that too

without any basis. He submitted that it is quite illogical for assessee to submit that he was in the process of starting business of property by entering into certain deal of property which could not be made and that is why the source of cash must be treated as explained from business income. Ld. DR submitted that the mobile messages exchanged by assessee mention only flat Nos. and not amounts. In any case, those messages as claimed by assessee himself were for a proposed source of income and not a real source of income, then by no stretch of imagination they can be taken as something proving the source of impugned cash.

(ii) Regarding second contention, Ld. DR submitted that it is true that in Para No. 5 of penalty-order, the AO has imposed penalty in two parts, partly @ 10% and partly @60%. But on going through Para No. 4, immediately preceding Para No. 5, it is very much clear that the AO has made break-up of 10% and 60% on simpliciter reasoning that the assessee had offered undisclosed income of Rs. 47,59,000/- in the return of income but not disclosed the income of Rs. 2,40,000/- in the return of income. But, however, neither in Para No. 4 nor anywhere else in penalty-order, the AO has whispered that the assessee has specified the manner in which such income was derived and the assessee has substantiated the manner in which the undisclosed income was derived. Therefore, Ld. DR contended, the decision in **Basir Ahmed Sisodia (supra)** is not applicable to assessee.

(iii) Regarding third contention, Ld. DR strongly relied upon the decision of **Hon'ble Kerala High Court in Maruthi Babu Rao Jadav (supra).** He submitted that the said decision is given by Hon'ble High Court which must be followed by ITAT, Indore bench. He submitted that there is no opposite decision of either jurisdictional High Court or even any non-jurisdictional High Court in his knowledge. He submitted that the ITAT, Indore has already followed the decision of Hon'ble Kerala High Court in recent order dated 23.12.2022 in **Narendra Kumar Shantilal Jain HUF (supra).** Therefore, this Bench must follow the same.

16. We have considered rival contentions of both sides and perused the documents including the orders of lower-authorities to which our attention is drawn, in the light of provisions of law and decided rulings cited before us. After a careful consideration, we derive following analysis and conclusions:

(i) The first contention projected by Ld. AR for assessee is such that the section 69A itself is not applicable to assessee's case. To test this contention we look into the material facts. It is an undisputed fact that the assessee was found transporting/transferring cash from one place to another during demonetization period, packed in two bags and in train, which was intercepted by ATS authorities. It is further clear that when the authorities interogeted assessee in the proceeding of section 131 and section 132(4), the assessee categorically accepted that he was unable to explain the source of cash; that the impugned cash was not recorded in his books; that he had no objection in seizure of cash by department; that the cash was earned from "undisclosed sources"; that it was his "undisclosed income"; and it was undisclosed income of current financial year 2016-17. That was the first-stage of proceeding. Then came the 2nd stage of filing return where also the assessee himself disclosed income u/s 69A, this fact is clearly noted by AO in assessment-order and also emphasized by Ld. DR for revenue and cannot be rebutted or controverted by Ld. AR. Thus, the assessee has not only made admission of having earned "income from undisclosed sources" in statement but also declared the income u/s 69A in return of income. Therefore, the pleading made by Ld. AR that the 'source should be inferred', does not deserve any merit in the first instance. Still for the sake of justice, even if we go into the said pleading, then also there is hardly any material to demonstrate that the source of said cash is explained. Ld. AR is simply relying upon land holdings of assessee and certain messages found in the

mobile of assessee, thereby trying to impress upon us that the assessee was in the process of starting business of real estate and therefore the source of impugned cash can be inferred as business income. We hardly find any substance in such pleading. When section 69A talks of source of cash, the source has to be proved and not inferred the way Ld. AR is trying to argue. Even if we assume that the assessee was in the process of starting a business of real estate, we fail to understand how it substantiates the source of impugned cash. We are not in agreement with Ld. AR that the source of cash is explained by assessee. Therefore, the first contention is not acceptable.

(ii) Regarding second contention of Ld. AR, we have perused the decision of Hon'ble Supreme Court in **Basir Ahmed Sisodia (supra)** and find that the ratio taken by Hon'ble Court is such that if the assessee has, by adducing evidences, satisfied authorities even in penalty-proceeding that certain addition was wrongly made, it will assail the addition made in assessment-order itself. There is no quarrel with this proposition. But in the present case, Ld. DR has carried us to penalty-order (also re-produced earlier) and successfully demonstrated that the AO has charged 10% penalty on the simple reasoning that the assessee had offered undisclosed income of Rs. 47,59,000/- in the return of income but nowhere the AO has whispered that the assessee has specified the manner in which such income was derived and the assessee has substantiated the manner in which the undisclosed income was derived. Therefore, without commenting on charging of 10% penalty for the reason that we are not concerned with the penalty-order in this appeal, we suffice only to say the case of assessee is not at parity with the decision **Basir Ahmed Sisodia (supra).** Consequently, we are constrained to rejected second contention.

(iii) Now, comes the last contention made by Ld. AR that the higher rate of 60% tax was brought in section 115BBE by way of amendment effective from 15.12.2016 and since assessee's case was made on 14.11.2016, prior

to 15.12.2016, the higher rate is not applicable to assessee. In this regard, we need not trouble ourselves much because the Hon'ble Kerala High Court has already anlaysed this issue in **Maruthi Babu Rao Jadav (supra)** and came to a conclusion that the said amendment was applicable to entire previous year 2016-17, relevant to AY 2017-18. Moreover, ITAT Indore has already followed this decision in **Narendra Kumar Shantilal Jain HUF (supra) order dated 23.12.2022.** We reproduce below the relevant paras of ITAT, Indore which also includes the aforesaid decision of Hon'ble Kerala High Court:

> *"13. Having said so, we now turn to Ground No. 7 wherein the assessee raises an alternative claim that the present case of Assessment-Year 2017-18 relates to the Previous-Year 2016-17 and the rate of tax u/s 115BBE was 30%+3% Cess as on first day of the Previous-Year i.e. 01.04.2016, therefore the tax-rate of 30%+3% Cess shall apply to the present case and not the higher rate, hence the assessment-order does not cause prejudice to the interest of revenue. The reason of projecting such a claim by assessee is that the higher rate of tax was prescribed in section 115BBE through an amendment made vide Taxation Laws (Second Amendment) Act, 2016 and the said amendment received assent of the President of India on 15.12.2016 and therefore the amendment shall apply prospectively w.e.f. 15.12.2016 and not retrospectively. The assessee claims that survey in assessee's case was conducted on 19.09.2016 which is prior to 15.12.2016 and therefore the higher rate of tax is not applicable to it, the tax-rate of 30%+3% Cess as existing in section 115BBE as on 01.04.2016 shall apply. To resolve this controversy, a lengthy discussion on the scheme of Income-tax Act, 1961; particularly the framework of previous year, assessment-year, the parliamentary system of prescribing tax-rates, etc. is required; but we have the benefit of a direct decision rendered by* ***Hon'ble Kerala High Court in WA No. 984 of 2019 – Maruthi Babu Rao Jadav Vs. The Assistant Commissioner of Income-tax, Central, Circle, Kozhikode, dated 23.09.2020*** *in which the Hon'ble High Court has already analysed such framework at length and was pleased to decide that the higher rate of tax would apply to whole Previous-Year 2016-17 related to Assessment-Year 2017-18. The relevant paragraphs of the decision are reproduced below:*
>
> > *"The writ petition sought for a declaration that the amendments made by the Taxation Laws (Second Amendment) Act, 2016, to Section 115BBE of the Income Tax Act, 1961 enhancing the rate of income tax, for specified incomes which are unexplained, to 60% and the surcharge provided in the Finance Act, 2016 to 25% for income covered under Section 69A, to be prospective. The above referred enactments are herein after referred to as the '2nd Amendment Act', 'IT Act' and the 'Finance Act'. The 2nd Amendment Act was dated 15.12.2016 and the amendment to Section 115BBE was specified to be effective from 01.04.2017. The amendment enhancing the rate of tax was incorporated in the I T Act and that of*

surcharge in the Finance Act. On declaration, consequential relief is sought against Ext.P2 assessment order levying tax at the enhanced rate of 60% and surcharge @25% on the 'advance tax'. The learned Single Judge rejected the writ petition by a cryptic judgment relying on Commissioner of Income Tax v. S.A.Wahab.((1990) 182 ITR 464 (KER)).

2. The learned Counsel Sri.Vishnu S Arikkattil appearing for the appellant would contend that even going by the decision in Karimtharuvi Tea Estate ltd. v. State of Kerala (AIR (1966) SC 1385) an amendment made on the 1st day of April of any financial year would apply to the assessments of that year. That is, if an amendment is brought into force on 01.04.2017, as is the case here, it can only apply to the assessment made in 2018-2019 (Assessment Year) of the income accrued for the previous financial year; which is 2017-2018. The learned Counsel would seek to draw a distinction in so far as a modification of the rate as brought out in the Finance Act and a substantive provision altering accrued rights or creating new liabilities, on the 1st of April of an year. In the former, it could apply to the assessments of the previous year, made in that financial year, but a substantive amendment not relating to the rates, could only be applied to the assessments of that financial year and not of the previous year. Reliance is placed on the Constitution Bench decision of the Hon'ble Supreme Court in C.I.T Vs. Vatika Township Private Ltd. (2015) 1 SCC 1. The learned Counsel would also place before us a number of decisions of the Hon'ble Supreme Court in Kesoram Industries v. Commissioner of Wealth Tax, [AIR 1966 SC 1385], Guffic Chem P. Ltd v. C.I.T [2011(4) SCC 245], C.I.T v. Sarkar Builders [(2015) 375 ITR 392 (SC)], Shiv Raj Gupta v. C.I.T [(2020) 425 ITR 420(SC)] and State of Kerala v. Alex George [(2004) 271 ITR 290(SC), to further buttress his arguments. Reliance is also placed on the Full Bench decision of the Patna High Court in Loknath Goenka v. C.I.T [2019 417 ITR 521(Patna)].

11. Before we look at the amendments carried out, on facts, there were two seizures of cash made on 02.08.2016 and 03.11.2016 respectively of Rs.1,05,03,500/- and Rs.1,24,68,750/- both in the F.Y 2016-2017. The persons from whom the cash was seized as also the appellant herein admitted that it belonged to the appellant who carries on trading in gold bullion. The appellant not having produced any books of accounts or cash flow statements failed to establish the source of the money seized; which was included in the total income under Section 69A of the IT Act. The writ petition or the appeal does not challenge such inclusion. On the said amounts tax was imposed @60% under Section 115BBE and surcharge @25%. The amendments to the Finance Act were by the 2nd Amendment Act dated 15.12.2016. The enhancement of tax under Section 115BBE was made effective only from 01.04.2017; the commencement of the assessment year 2017-2018, in which the assessments of the previous year are carried out.

12. The assessee contends that the seizures were made prior to the amendment. The affidavits admitting the ownership of amounts seized

were also submitted prior to the amendment. The assessee was not aware of the enhanced tax liability when the admissions were made before the authorities. The assessee has also made an attempt to relate the amendments to the demonetization of the specified currencies announced on 08.11.2016 which contention we reject at the outset. The subject amendments which are relevant for our consideration have no direct link with the demonetization introduced or the taxation and investment regime of Pradhaan Mantri Garib Kalyan Yojana 2016 brought in under Chapter IX A of the 2nd amendment Act. The 2nd amendment Act as is clear from the Statements of Objects and Reasons, was to curb, evasion of tax and black money as also plug loopholes in the IT Act and to ensure that defaulting assessees are subjected to higher tax and stringent penalty provision. Both the measures spoken of herein were to further the said objects and there cannot be any nexus assumed nor is it discernible.

13. Section 115BBE was inserted by Finance Act 2012 w.e.f 01.04.2013. As on 01.04.2016 the financial year in which the subject seizures occurred Section 155BBE provided for 30% tax on income referred to in Sections 68, 69, 69A, 69B, 69C and 69D. The same was amended by the 2nd Amendment Act; w.e.f. 01.04.2017, enhancing the rate to 60%. Hence there was no new liability created and the rate of tax merely stood enhanced which is applicable to the assessments carried on in that year. The enhanced rate applies from the commencement of the assessment year, which relates to the previous financial year.

14. Likewise it was by Chapter II with heading 'Rates of Income Tax', as provided in the Finance Act 2016, that a surcharge was introduced by way of the 3rd proviso of Section 2(9) of that Finance Act. This comes into effect from the Financial Year 2016-2017; which is the year in which the subject seizures were occasioned. The proviso refers to various provisions where the advanced tax computed under the first proviso stands increased by a surcharge for the purpose of the Union. Section 115BBE is one of the provisions referred to in the 3rd proviso and in the case of individuals the surcharge was @15% where the total income exceeds one crore, as on 01.04.2016. By the 2nd Amendment Act Section 2 of the Finance Act, 2016 stood amended by which 115BBE was omitted from the 3rd proviso. After the 6th proviso yet another proviso was inserted which provided for the 'advance tax' computed under the first proviso, in respect of any income chargeable to tax under Section 115BBE(1)(i), to be increased by a surcharge for the purposes of the Union, calculated @25%. Hence there is no new liability of surcharge created and it is a mere enhancement of the rate of surcharge.

15. In the financial year 2016-17 itself the tax as provided under section 115BBE and the surcharge on advance tax was available as discernible from the IT Act and Finance Act, 2016 as it stood on 1.4.2016 itself. A major misdemeanor leading to assessment of income as accrued under Section 69A invites the consequences of Section 115BBE and surcharge provided under Section 2(9) of the Finance Act, 2016. When it stands

enhanced from 01.04.2017, for every assessment carried out in that year, related to the previous year, the rates as applicable on 01.04.2017 has to be applied. There being no new liability created or obligation imposed, the arguments raised by the appellant's counsel fails. The appellant cannot have a contention that he committed the misconduct on the expectation that if he were caught he would have to shell out only lesser amounts as tax and surcharge. There is no right accrued on the assessee to commit an offence on the expectation of a lesser penalty.

16. It was also argued that Income Tax at the rate or rates specified, as prescribed in any Central Act to be charged for any assessment year, shall be so charged in respect of the total income of the previous year as per Section 4 of the IT Act. However, there is no such provision to enable a surcharge to be so taxed, on the Finance Act prescribing an enhanced rate at the commencement of an year. The said contention however, cannot be sustained especially looking at the decision of the Hon'ble Supreme Court in CIT Kerala v. K Srinivas. [(1972) 4 SCC 526]. The facts are not relevant to the issue raised here and we need only look at the declaration as to the nature of a surcharge imposed in the Finance Act. The legislative history with respect to the concept of surcharge was traced by the Court, which, for the first time was found to have been recommended, in the report of the Committee on Indian Constitutional Reforms Volume I Part I. The word surcharge was used compendiously for the special addition to taxes on income imposed in September 1931. It was held so in paragraph 7 and 8.

> *7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and super tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income Tax" as used in section 2 includes surcharge.*
>
> *8. According to Article 271 notwithstanding anything in Article 269 and 270 Parliament may at any time increase any of the duties or taxes referred to in those Articles by a surcharge for the purpose of the Union and the whole proceeds of any such surcharge shall form part of the consolidated Fund of India. Article 270 provides for taxes levied and collected by the Union and distributed between the union and these states. Caluse (1)*

> *says that tax on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the states in the manner provided in clause (2). Article 269 deals with taxes levied and collected by the Union but assigned to the States. The provisions of Articles 268 which is the First one under the heading distribution of revenue between the union and the states relate to duties levied by the Union but collected and appropriated by the states. Thus these Articles deal with the levy, collection and distribution of the proceeds of the taxes and duties mentioned therein between the Union and the state. The Legislative power of Parliament to levy taxes and duties is contained in Articles 245 and 246(1) read with the relevant entries in list I of the Seventh Schedule.*
>
> *17. In the instant case surcharge was imposed by Finance Act, 2016 and the rate stood enhances by Finance Act 2017. The Income Tax even as per the Finance Act has to be at the rate specified in Part I of the 1st Schedule which shall be increased by surcharge for purposes of the Union. Surcharge hence partakes the character of Income tax and Article 271 itself empowers the Parliament, at any time to increase any of the duties or taxes by a surcharge for the purpose of the Union and it forms part of the consolidate fund. So when a surcharge is imposed it is in e4ffect an enhancement of the tax or duty. The provisions in the Finance Act also employs the words 'the income tax computed ... shall be increased by a surcharge. Section 4 of the IT Act squarely applied to the surcharge imposed.*
>
> *The judgement of the Learned Single judge is affirmed for the reasoning herein above and the writ appeal would stand dismissed without any order as to costs."*
>
> *14. We are consciously aware of the judicial hierarchy and discipline according to which the Hon'ble High Court of Kerala, though non-jurisdictional, is higher than ITAT. Hence, respectfully following the aforesaid decision of Hon'ble Kerala High Court, we are inclined to hold that the higher rate of tax prescribed in section 115BBE is applicable to the whole previous year 2016-17 relevant to assessment-year 2017-18 and there is no merit in the contention raised by assessee."*

Thus, the ITAT Indore has already taken a conscious decision to follow the decision of Hon'ble High Court of Kerala. Notably, the Ld. AR as well Ld. DR, both sides agrees that there is no decision of jurisdictional High Court till now on this issue. Further, they are not able to show any contrary decision of non-jurisdictional High Court also. That means, the only decision available before us is the decision of Kerala High Court which is against assessee. Ld.

AR has submitted that in **Thana Electricity Company (supra), the Hon'ble Mumbai High Court** has held that the decision of a high court is binding in its over territory and not upon the higher courts or even lower courts working outside territory. While arguing this, Ld. AR seems to have missed the point that the Hon'ble Mumbai High Court has also held that *"In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect."* Therefore, the decision of Hon'ble Kerala High Court is certainly having a persuasive effect, if not binding nature. On perusal of decision of Hon'ble Kerala High Court, we find that the Hon'ble High Court has extensively dealt the scheme of Income-tax Act, 1961, Finance Act, Amendment Act, Section 115BBE and the previous decisions of Hon'ble Supreme Court and thereafter came to a conclusion that the amendment in section 115BBE, made on15.12.2016 via Amendment Act, would apply to entire previous year 2016-17. As already stated, the ITAT, Indore has already taken a decision in **Narendra Kumar Shantilal Jain HUF (supra) order dated 23.12.2022** to follow the decision of Kerala High Court and this Bench must observe the consistency. At this stage, we would also like to take cognizance of the two decisions quoted by Ld. AR in favour of assessee for the proposition that the amendment was applicable from 15.12.2016 and not prior to that, namely (i) **ITAT, Indore in DCIT Vs. M/s Punjab Retail Pvt. Ltd, ITA No. 677/Ind/2019 order dated 08.10.2021** and (ii) **ITAT, Jabalpur ACIT Vs. Sandesh Kumar Jain, ITA No. 41/JAB/2020 order dated 31.10.2022**. We have carefully gone through orders of those decisions and find that in none of them, the decision of Hon'ble Kerala High Court was brought to the notice of ITAT by either side. Therefore, those

decisions are not acceptable/applicable. With this discussion, the third contention of Ld. AR is also rejected.

17. In view of above discussions and for the reasons stated therein, all contentions raised by Ld. AR are hereby rejected. Consequently, we hold that the AO has rightly assessed the income u/s 69A alongwith higher rate of tax u/s 115BBE. This ground of assessee is dismissed.

Ground No. 4:

18. This ground challenges the levy of interest u/s 234A, 234B and 234C.

19. Ld. AR for assessee submitted that the entire cash of Rs. 49,99,000/- was seized by Income-tax Department and it remained in possession of Income-tax Department, which is an undisputed fact. Then, Ld. AR carried us to Paper-Book-1 Page No. 82 where a letter dated 07.01.2017 filed by assessee to the AO is placed. In the said letter, the assessee made a specific request to AO that he does not have any other money to pay advance-tax and the seized amount may be deposited to Govt. A/c for payment of advance-tax and copy of challan be given to assessee. But the AO has not acted upon the request of assessee. Ld. AR then placed reliance on the decision in **CIT Vs. Ashok Kumar (2012) 20 taxmann.com 432 (P&H HC) dated 30.09.2010 for AY 1990-91** where it was held that if the assessee has made request for adjustment of seized amount against advance-tax liability, the assessee was entitled to adjustment of said amount and therefore interest u/s 234A and 234B cannot be charged. At that juncture, the Bench invited attention of Ld. AR to the following Explanation inserted in section "132B. Application of seized or requisitioned assets" from 01.06.2013 which prohibits the adjustment of seized/requisitioned asset against advance-tax liability:

> *"Explanation 2.- For the removal of doubts, it is hereby declared that the "existing liability" does not include advance-tax payable in accordance with the provisions of Part C of Chapter XVII".*

It was further pointed out to Ld. AR that the decision in **Ashok Kumar (supra)** was prior to introduction of this Explanation in section 132B and therefore not applicable. Hence, the adjustment of seized-cash is not allowable against advance-tax liability. Still the Ld. AR prayed to allow the benefit of adjustment on the ground of 'equity' in view of the fact that the assessee was not having any money except the seized cash and the assessee made a specific request to AO to adjust the seized cash against advance-tax liability. Thereafter, some more discussion took place wherein it emerged that the assessee deserves some relief in the matter of calculation of interest u/s 234B for the reason that the newly inserted Explanation does not restrict adjustment against 'self-assessment liability'.

20. In a recent decision in **CIT Vs. Arun Bansal, ITA No. 2615/Del/202 order dated 29.05.2023, the Delhi Bench of ITAT** has resolved identical issue as under:

> *"7. Undisputedly, the cash seized was in the possession of the department from the date of search itself, i.e., 01.12.2018. It is a fact that the assessee has also requested the Assessing Officer to adjust the self assessment tax liability on the income declared of Rs.1,07,00,000/- from the seized amount. However, assessee's request was never accepted. On a reading of section 132B of the Act, though it transpires that the assets seized can be adjusted against any existing liability under the Act and advance tax may not be an existing liability, however, in our view, self assessment tax is certainly an existing liability created on 1st April once the financial year ends. Therefore, the Assessing Officer should have adjusted the tax liability relating to the undisclosed income declared by the assessee by way of self assessment tax on 1st April, 2019. In that eventuality, there could not have been levy of interest u/s. 234B of the Act, as interest u/s. 234B of the Act has to be computed from first day of April following the financial year, for which, advance tax was required to be paid. At this stage, we must observe, in a dispute of identical nature arising in case of assessee's brother, the Tribunal while deciding the issue in ITA No. 300 & 2748/Del/2022 dated 11.01.2023 has deleted levy of interest u/s. 234B of the Act by observing that the cash seized should have been adjusted against self assessment tax payable with the return of income. Thus, considering the totality of facts and circumstances of the case, we hold that interest charged u/s. 234B of the Act in the peculiar*

facts and circumstances of the present case, deserves to be deleted. We, accordingly, delete the addition."

This decision, although not brought to our knowledge by either side during hearing, is exactly on the same line of discussion as made during hearing of present-appeal noted by us in preceding paragraph. Therefore, we remit this ground back to AO with a direction that the AO shall give benefit of the decision to assessee in calculation of interest and re-compute interest accordingly. Thus, this ground is allowed partly for statistical purpose.

21. Resultantly, this appeal of assessee is allowed partly for statistical purpose.

Order pronounced in the open court on 01.09.2023.

Sd/-	sd/-
(VIJAY PAL RAO)	(B.M. BIYANI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 01.09.2023
Patel/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore