

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.219/Ind/2022**  
**(Assessment Year: 2019-20)**

ACIT (Central) Ujjain	vs.	M/s. Italian Edibles Pvt. Ltd. Udhyog Nagar, Palda Indore
(Appellant / Revenue)		(Assessee / Respondent)
<b>PAN: AACCI 2746N</b>		
Revenue by		Ms. Simran Bhullar, CIT-DR
Respondent by		Shri Pankaj Shah & Soumya Bumb ARs
Date of Hearing		12.10.2023
Date of Pronouncement		19.12.2023

**ORDER**

**Per Vijay Pal Rao, JM:**

This appeal by the Revenue is directed against the order dated 02.06.2022 of Commissioner of Income Tax(Appeal), for Assessment Year 2019-20. The assessee has raised following grounds of appeal:

*"1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that additional income offered on account of excess stock at Rs. 1,20,49,234/-, during the course of survey was on account of business income of the assessee and is therefore liable to be taxed under the head of 'income from business & profession' only while the director of the assessee accepted in his statements recorded as the*

*same out of undisclosed income of the company and the same was falling u/s 69B of the I.T. Act as investment was not fully disclosed in books of accounts.*

*2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that provisions of sec. 115BBE of the Act are not applicable as the excess stock of Rs.1,20,49,234/-, does not fall within the provisions of section 69/69B of the Act while on the basis of circumstantial evidences and facts of the case, the excess stock found during the course of survey clearly fall within the ambit of sec. 69B of the I.T. Act as investment was not fully disclosed in the books of account.*

*3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that the provisions u/s 115BBE of the I.T. Act should not have been invoked and the tax be calculated as per normal rate taxing the excess stock as business income. For reaching this decision, he has solely relied on the assessee's version and has never required the assessee to corroborate the excess stock found to be taken as his business income*

*4. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that excess stock is business income since the assessee has incorporated the excess stock so found in his books of accounts, and also that the provisions u / s 115BBE of the I.T. Act should not have been invoked and the tax be calculated as per normal rate while the excess stock so found was entered in books of account only after the survey action and not at its own instance. As such, the provisions of section 69B of the I.T. Act are clearly applicable in the matter.*

*5. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that excess stock is business income and thus ignoring the fact the assessee failed to produce/ file any documents, corroborative evidence to justify its claim for the same being generated out of business in earlier years. The Ld. CIT(A) has completely overlooked that the assessee could not produce a single document in support of its assertion. He has also overlooked that it is well settled by number of court decisions that whoever makes an assertion, must substantiate it.”*

2. The assessee is engaged in the business of manufacturing of confectionery and related items like candies, wafers, jellies etc. The assessee filed its return of income for the year under consideration declaring total income on 30.09.2019 at Rs.2,03,98,550/-. There was a survey u/s 133A of the Act conducted in the case of the

assessee wherein the assessee has declared/surrendered income of Rs.1,20,49,234/- on account of excess stock. The case of the assessee was selected for scrutiny and the AO has involved the provision of section 115BBE in respect of the income offered/surrendered by the assessee of Rs.1,20,49,234/- on account of excess stock as per statement recorded during the course of survey. The AO applied the higher tax on the said income as per provision of section 115BBE. The assessee challenged the action of the AO before Ld. CIT(A). The CIT(A) decided the issue in favour of the assessee and held that the income offered by the assessee on account of excess stock is business income and liable to be taxed under the head income from business or profession only. Thus, the CIT(A) was of the view that the provisions of section 115BBE of the Act are not applicable in the case of the assessee. Aggrieved by the impugned order of the CIT(A) the revenue has filed the present appeal.

3. Before the Tribunal the ld. DR has submitted that the CIT(A) has erred in holding that the additional income offered on account of excess stock during the course of survey was on account of business income of the assessee and is therefore, liable to be taxed under the head of income from business & profession only. He has submitted that the director of the assessee company accepted in his statement recorded during the survey that income offered is out of undisclosed income of the assessee and therefore, the same would fall in the ambit of section 69B of the Act as investment was not

fully disclosed in the books of account. The CIT(A) has accepted the contention of the assessee without examining the facts whether the excess stock found during the survey was sourced from the business income of the assessee or not. She has further submitted that the assessee has accepted that excess stock was not recorded or entered in the books of account and only after survey entries were made in the books of account without explaining the actual source of the investment made in the excess stock therefore, the provision of section 69B is applicable. The assessee has not produced a single document in support of its assertion that investment was made from the business income of the assessee and the CIT(A) has completely overlooked this aspect of the matter. She has referred to the assessment order and submitted that the AO has relied upon the judgment of Hon'ble Madras High Court as well as Hon'ble Rajasthan High Court in case of M/s. SVS Oils Mills vs. ACIT Tax Appeal no.765/2018 and Pr. CIT vs. Bajarang Traders 86 taxmann.com 295 respectively. Therefore, when the assessee has not established any nexus between the business income and unaccounted investment then the same would be assessed as income from other sources and consequently the provision of section 69B/69C are applicable. Ld. CIT-DR has relied upon the order of the AO and submitted that the AO has also relied upon the judgment of Hon'ble Gujarat High court in case of Fakir Mohd Kazi Hasan vs. CIT 247 ITR 290 (Guj) as well as judgment of Hon'ble Kerla High Court in case of CIT vs. Kerala Sponge Ltd. 379 ITR 330.

4. On the other hand, Ld. AR of the assessee has submitted that the assessee has explained the source of the investment in excess stock in the statement recorded during the survey. He has referred to the statement of the director of the assessee and particularly question no.11 and submitted that the assessee has explained the source as the undisclosed income of the assessee company from its business for last 4-5 years is reflected in the excess stock found during the survey. He has relied upon the impugned order of the CIT(A) as well as the decision of this Tribunal dated 17.07.2023 in case of M/s. Brij Mohandas Devi Prasad vs. ACIT/DCIT in ITANo.428/Ind/2022.

5. We have considered the rival submissions as well as relevant material on record. The solitary issue in this case is whether the income declared by the assessee during the course of survey on account of excess stock found would be treated as the business income of the assessee or income from other sources liable to be taxed at a higher rate prescribed u/s 115BBE of the Act. At the outset, we note that in the statement recorded during the survey the director of the assessee in answer to question no.11 has explained source of the excess stock as undisclosed business income of the assessee for last 4-5 years which is reflected in the excess stock found. This explanation of the assessee at the time of survey itself makes it clear that the excess stock represent the undisclosed business income of the assessee for last various years.

By considering this explanation the CIT(A) has decided this issue in favour of the assessee in para 3.1.4 as under:

*“3.1.4. Considering the submission made by the appellant, facts discussed above and decisions of jurisdictional ITAT Indore as referred above, the appellant has recorded excess stock in the regular books of account by passing necessary entries and made available the said stock for future sales and taxation on profit thereon. It is also an undisputed fact that the appellant is having only source of income from manufacturing of confectionary items. Accordingly, nature and source of excess stock has been properly explained by the appellant. The additional income offered on account of excess stock during the course of survey is nothing but the income from business. Ld. AO has placed reliance upon the judgements in the cases of Fakir Mohd, Kazi Hasan vs. CIT (2001) 247 ITR 290 (Guj) and M/s SVS Oils Mills vs ACIT in ITA NO 765 of 2018 for treating the excess stock as deemed income u/s.69B of the Act. Facts of these cases are distinguishable on facts because in these cases unexplained money disclosed during survey was either not recorded in the books of accounts properly or its source was not explained by the assessee. The case before the Gujrat High Court in the case of Fakir Mohd, Kazi Hasan(supra) related to confiscation of Gold from the assessee which was not recorded in the books and no explanation was offered as to source to acquisition hence income assessed was held to be assessable u/s 69 and not as income from business and no deduction is allowable against such income. Similarly, in the case before Madras High Court in the case of M/s SVS Oils Mills the entry for excess stock was made only in stock register and no corresponding entry was made in books of accounts. While deciding the issue of excess stock found in the course of survey, Hon'ble High Court has upheld the view taken by the ITAT that "assessee having not passed any entry in financial books, addition of stock made by it, in its stock register, can only be considered as made out of undisclosed source". Hon'ble ITAT has distinguished the decision of Hon'ble ITAT, Ahmedabad in the case of Choksi Hiralal Maganlal, ITA No. 3281/Ahd/2009 on which the assessee had placed reliance and held that there is a*

clear finding that excess stock found during the survey was not separated or clearly indentified, but, was part of mixed stock which was included in the declared stock, as per books of accounts. Facts here are entirely different. There is no case for the assessee that surplus stock was clearly indentified at the time of survey or entries passed in its cash book, journal or ledger for the value of such stock. In the circumstances, we do not find any reason to interfere with the order of the learned Commissioner of Income Tax (Appeals). Appeal of the assessee stands dismissed." The case of the appellant is squarely covered by the above decision of Choksi Hirala Maganlal (Supra). Hence, the above decision relied upon by the Ld.AO is not applicable to this case. On the other hand the appellant has successfully established that the excess stock is business income. In the case of Kerala Sponge Ltd 379 ITR 330, the assessing officer treated the commodity trading profit shown by the assessee as unexplained cash credit and made addition u/s 68 of the Act. The view taken by the assessing officer has been confirmed by the Hon'ble High Court. This case does not pertain to addition made u/s 69/69A/69B of the Act. Hence, this decision cannot be applied in the case of the appellant. In the case of Kim Pharma Pvt Ltd 216 taxmann 153, Hon'ble Punjab and Haryana High Court has held that surrender on account of excess cash was not reflected in the books of account and no source from where it was derived was declared by the assessee and therefore, such income was held as deemed income u/s 69A of the Act. Hon'ble High Court has further held that another amount of Rs. 10,00,000/- surrendered on account of sundry creditors, repairs to building and advances to staff were related to business carried on by the assessee and upheld this view of the lower authorities. In the case of Famina Nit Fab 176 ITD 246, Hon'ble ITAT Chandigarh has treated unaccounted debtors as business income and therefore, provisions of section 69/69A/69B/69C of the Act could not be applicable. Similarly, these provisions would not be applicable to undisclosed gross profit on sales outside the books of account as it relates to business of the assessee. On other hand, Hon'ble tribunal has treated unaccounted investment in building and surrender made on account of miscellaneous discrepancies

*found in loose papers as deemed income within the meaning of section 69/69 A / 69 B / 69 C and also upheld applicability of provisions of section 115BBE of the Act. Relevant paras of the said decision are reproduced hereunder:-*

*20. Clearly, it is evident from the above that the surrender was on account of debtors/receivables relating to the business of the assessee only. The Revenue has accepted the surrender as such, as being on account of receivables. It follows that the debtors were generated from the sales made by the assessee during the course of carrying on the business of the assessee, which was not recorded in the books of the assessee. Though the said income was not recorded in the books of the assessee but the source of the same stood duly explained by the assessee as being from the business of the assessee. Even otherwise no other source of income of the assessee is there on record either disclosed by the assessee or unearthed by the Revenue. The preponderance of probability therefore is that the debtors were sourced from the business of the assessee. Therefore, there is no question of treating it as deemed income from undisclosed sources u/s 69, 69A, 69B and 69C of the Act and the same is held to be in the nature of Business Income of the assessee. Having held so, the same was assessable under the head business and profession' and as stated above, the benefit of set off of losses both current and brought forward was allowable to the assessee in accordance with law.*

*24. As far as the surrender made on account of investment in Kothi of Rs.60 lacs, neither is the same disclosed in the books of the assessee nor source of the same disclosed. Therefore, the same is to be assessed as deemed income w/s 69 of the Act. The same applies to the surrender of Rs.10 lacs made to cover the miscellaneous discrepancies in loose paper of Rs. 10 lacs. Neither the nature of the discrepancies, nor any source relating to the same has been disclosed and therefore, the same is also to be assessed as deemed income u/ss 69, 69A, 69B and 69C of the Act. 25. As far as the surrender of Rs. 132 lacs made on account of sundry creditors and advances received from customers and Rs.198 lacs on account of gross profit on sale out of the books, both of them clearly are in relation to the business*

*carried on by the assessee and are thus in the nature of business income. Therefore, the set off of business losses, both current and brought forward are to be allowed as per the provisions of law. As far as the income surrendered and to be assessed w/s 69, 69A, 69B and 69C of the Act, as held above before us, the same is to be subjected to tax as per the provisions of section 115BBE of the Act."*

*Therefore, the Ld. AO does not find support from the above decisions Thus, I am of the considered view that the additional income offered was on account of business income of the appellant and is, therefore, liable to be taxed under the head of 'income from business or profession' only. Provisions of section 115BBE of the Act are not applicable as the excess stock, in the facts and circumstances as narrated above, does not fall within the provisions of section 69/69B of the Act.*

*In view of the above discussion, the AO is directed to charge income tax at the rate applicable to the income from business or profession. Accordingly, the grounds of appeal are allowed."*

6. The order of the CIT(A) is now fortified by this Tribunal in case of M/s. Brij Mohandas Devi Prasad vs. ACIT(supra) in para 9 to 11 as under:

*"9. Firstly, we are in agreement with the very first and foremost contention of Ld. AR that in Q.No. 6 and 7 of statement, the survey-officer has nowhere asked the assessee to explain the source of excess-stock/excess-cash; he has simply asked the assessee to explain the difference. Going further to replies, we do not find that the assessee's partner has admitted the same as having been earned from "undisclosed sources"; he has only admitted the same as "additional undeclared income" in addition to regular income. Therefore, from the questions raised and replies given, it is little difficult to deduce that the "additional undeclared income" was earned from undisclosed or unknown sources. Needless to mention that it is also undisputed that the assessee is a partnership firm and its sole source of income for last 30 years is the business of jewellery and no evidence had been found during survey*

*indicating any other source of income and the assessee claims that the excess-stock was outcome of suppressed business income over the years.*

10. *Secondly, it is pertinent to note that during the course of survey what was detected in respect of the stock was that the physical stock found at the business premises of the assessee was excess in comparison to the stock recorded in the books of account. It is not the case of the AO that the excess stock found during the survey was separated from other stock of the assessee but it is one and common nature of stock found during survey except the quantity of the stock on physical verification was found to be excess in comparison to the stock recorded in books of accounts. Thus, there is no separable identifiable stock found during survey then the stock regularly held by assessee in the normal course of business of jewellery. Once the stock found during survey is part of total stock of business, then the said excess stock cannot be given a separate identity than the other stock of assessee. Further, even if excess stock found during survey was not recorded in the books of account but when the survey was conducted before closure of financial year then the assessee was at liberty to incorporate excess stock in books of account at the time of finalizing accounts, which also the present assessee has done which is evident from a separate credit entry made in Profit & Loss A/c. The Hon'ble Rajasthan High Court in case of **Pr. CIT vs. Bajarang Traders (supra)** has upheld the finding of the Tribunal that excess stock found during the survey is not separable and identifiable but it is part of mixed stock found at the premises which including declared stock as per books as computed by the survey team. Therefore, it is held that the provision of section 69B of the Act cannot be made applicable as primary condition for invoking the provision is that asset should be separately identifiable and it should have independent physical existence on its own. Further, the Coordinate Bench of this Tribunal in case of **ACIT vs. Anoop Neema (supra)** has also considered an identical issue as under:*

*“7. We have heard rival contentions and perused the records placed before us. Revenue’s sole grievance is that Ld. CIT(A) erred in not treating the income of Rs. 1,41,75,568/- declared during the course of search carried out on 15.12.2016 as unexplained investment u/s 69 r.w.r.t. 115BBE of the Act. We notice that during the course of search excess stock of gold weighing 6433.812 gms was found amounting to Rs.1,41,75,568/-. Mr. Anoop Neema in his statement recorded on oath on 16.12.2016 u/s 132(4) of the Act accepted the value of excess stock as additional business income for financial year 2016-17. So far as, admission of undisclosed income of Rs.1,41,75,569/- is concerned there is no dispute at the end of both the parties. The bone of contention is that whether the provision of section 115BBE of the Act are applicable on the surrendered income of Rs.1,41,75,568/- we find that Ld. CIT(A) on examination of the fact, settled*

*judicial precedence, also appreciating that the alleged income is business income earned by the assessee during the normal course of its business and was part of the total business stock available at the business premises and also observing that provisions of section 115BBE of the Act are applicable from 01.04.2017 and are thus not applicable on the case of assessee as the search was carried out on 15.12.2016 observing as follows:*

*Ground No 1 to 5:- Through these grounds of appeal, the appellant has challenged the treating of Rs. 1,41,75,568/- declared during search as unexplained investment u/s 69 r.w.s 115BBE of the Act and not as a business income. During the course of search, valuation of stock was taken by registered valuer and net weight of gold was found at 25,857.490 gms valued at Rs. 5,67,73,734/-, however, the value of gold as per books of accounts of the assessee was at 19,423.678 gms valued at Rs. 4,25,98,165/-. Therefore, a difference in stock of 6433.812 gms was found amounting to Rs. 1,41,75,569/-. Statement of Shri Anoop Nema was recorded on oath on 16.12.2016, wherein, he has accepted value of excess stock of gold as additional income for FY 2016-17 (AY 2017-18). The relevant extract of statement is also scanned on page no 4 & 5 in the body of assessment order. The AO during the course of assessment proceedings observed that the assessee has declared excess stock as undisclosed income in return of income for AY 2017-18. However, the AO required the assessee to separately credit the excess stock of Rs. 1,41,75,568/- in P/L account but the same was not done by him. The AO therefore, considering the excess stock as unexplained investment made addition of Rs. 1,41,75,568/- to the income of the appellant u/s 69 r.w.s 115BBE of the Act.*

*4.1.1 The appellant during the course of appellate proceedings has stated that an excess stock of gold was found during the course of search and the same was also not recorded in regular books of accounts, thereby the AO has invoked provisions of section 69, however, no enquiry was made by the AO regarding the source of acquisition of excess stock, therefore, the disallowance made by the AO u/s 69 r.w.s 115BBE is unlawful. Further, the amended provisions of section 115BBE are applicable from 01.04.2017 and not from the date of search.*

*4.1.2 I have considered the entire matrix of the case, various case law cited by the appellant and also perused assessment order. It is undisputed fact that during the course of search excess stock of gold worth Rs. 1,41,75,568/- was found in possession of appellant. Therefore, appellant during search made disclosure of 1,41,75,568/- on account of undisclosed income, however, the appellant while filing return of income has directly credited the same in his capital account and without showing the same as*

additional income. Therefore, the additional income offered was not shown in profit and loss account. Thus, the AO was justified in making addition on account of undisclosed income declared in statement recorded on oath u/s 132(4) during search. Also, the appellant has accepted the addition made by the AO amounting to Rs. 1,41,75,568/- vide written submissions dated 26.07.2019. However, the appellant has objected to the findings of the AO on treating the additional income offered (or say business income) by the appellant as unexplained investment u/s 69 r.w.s 115BBE of the Act. After considering the plea of appellant inter alia facts of the case it can be easily said that the instant case revolves around applicability of two different sections i.e. section 69A and section 115BBE of the IT Act.

(a) Applicability of provisions of section 69A (unexplained investment) of the Act:-

The AO found appellant of guilty of invoking provisions of section 69 of the Act and has re-classified the income of the appellant u/s 69A of the Act. before moving ahead, I find it important to quote relevant provision section 69 of the Income Tax Act which is as under:-

“69. 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.”[emphasis supplied]

Any assessee can be held guilty of invoking provisions of section 69 of the Income Tax Act if, (i) where in any financial year, the assessee is found to have made certain investments; (ii) such investments are not recorded in the books of account, if any, maintained by the assessee; (iii) the assessee offers no explanation about the nature and source of such investments; and finally, (iv) even if any explanation is offered by the assessee, such explanation in the opinion of the Assessing Officer is not satisfactory. Conditions (i) and (ii) are mandatory in nature and out of condition (iii) and (iv) only one or both as the case may be fulfilled. In the instant case condition no (i) and (ii) has been fulfilled by the appellant, however, on perusal of copy of assessment order it has been observed that neither the search party nor the AO has ever enquired about source of acquisition of excess stock. During the course of search statement of appellant was also recorded on oath u/s 132(4) of the Act wherein in reply to Q.No 8 the appellant has specifically and clearly admitted that the undisclosed income has been earned out of business income in the relevant previous year. Thus, condition (iii) or (iv) has not been invoked by the appellant,

therefore, addition u/s 69 alone of this fact is untenable as held by Hon'ble Jurisdictional ITAT, Indore Bench in the case of Mukesh Sangla HUF vs. DCIT (2016) 27 ITJ 172 (Trib.-Indore).

Nonetheless, neither the search party during course of search nor the AO during assessment proceeding found that appellant has been doing business other than manufacturing and trading of gold ornaments or has any other undisclosed source of income. Further the excess stock found in possession of the appellant was not kept separately and was not easily identifiable. The excess stock was part of the mixed lots of stock found at the premises of the appellant which included declared stock as per books of account and also the excess stock as found during the search. Since the excess stock in possession was not clearly identifiable or was not kept at a secret place, therefore, it can be safely held that the same could have been earned/accumulated over the time. However, this presumption of accumulating over a period of time is ruled out with simple stroke of statement of appellant wherein he has admitted that the same has been earned in FY 2016-17 (AY 2017-18). Further, the appellant does not have any income other than manufacturing and trading of gold ornaments, therefore, the excess stock found during search was earned out of business income by the appellant. Hon'ble Ahmadabad ITAT in the case of Chokshi Hiralal Maganlal vs DCIT, (ITA No 3281/Ahd/2009 dated 05.08.2011) has held that "the provisions of section 69A/69B of the IT Act can only be applied the case where the asset is separately applicable and separately identifiable and it should have independent physical existence of its own. Since the excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the investment in the excess stock has to be treated as business income. Similar, view has been taken by Hon'ble jurisdictional Indore tribunal in the case of M/s Shahnai Shriram Market vs ITO 1(1), Ujjain (ITA No 658/Ind/2014 dated 15.05.2015).

(a)(i) It is a settled law that additional income declared on account of excess stock is business income of the assessee. This proposition finds support from the following case laws:-

**(a)** Bajrang Traders Vs. ACIT (Circle)-2, Alwar (ITA No. 137/Jp/17 dated 17.03.2017). In this case, it is held as under:-

2.11 Having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or "income from other sources". In the present case, the assessee is dealing in sale of food grains, rice and oil seeds, and the excess stock which has

*been found during the course of survey is stock of rice. Therefore, the investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. The decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore, the investment in the excess stock has to be brought to tax under the head "business income" and not under the head income from other sources". In the result, ground No.1 of the assessee is allowed.*

**(b)** *DCIT (Central), Ajmer Vs. Ramnarayan Birla (ITA No. 482/Jp/2015 dated 30.09.2016) In this case, it is held as under:-*

*4.3. We have heard rival contentions and perused the material available on record. Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed that the assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs. 77,66,887/- was found in respect of gold and silver jewellery. The Coordinate Bench in the case of Chokshi Hiralal Maganlal vs. DCIT, 131 TTJ (Ahd.) 1 has held that in a cases where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premises that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head. It is observed that there is no conflict with the decision of Hon'ble Gujarat High Court in the case of Fakir Mohd. Haji Hasan (supra) where investment in an asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. Therefore, the Hon'ble Coordinate Bench held that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case the excess stock was part of the stock. The revenue has not pointed out that the excess stock has any nexus with any other receipts. Therefore, we do not find any*

*fault with the decision of the Id. CIT (A) directing the AO to treat the surrendered amount as excess stock qua the excess stock found.*

**(c)** *Fashion World Vs. ACIT (Circle)-12, Ahemdabad (ITA No. 1634/Ahd/2016 dated 12.02.2010) In this case, it is held as under:-*

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

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

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

**(d)** *Chokshi Hiralal Maganlal Vs. DCIT, Ahemadabad (ITA No. 3281/Ahd/2009 dated 05.08.2011) In this case, it is held as under:-*

*9. Since in the present case excess stock found during the survey is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the survey officers, the provisions of section 69B cannot be made applicable as primary condition for invoking the provisions of section 69A, 69B is that the asset should be separately identifiable and it should have independent physical existence of its own. Since excess stock is a result of suppression of profit from business other the years and has not been kept identifiable separately but i.e. the part of overall physical stock found, the investment in the excess stock 'has to be treated as business income as per detailed reasons given in the case of Fashion World (supra). Once excess stock is treated as business income then assessee is entitled for higher remuneration to the partners as per section 40(b). As a result, this ground -of assessee is allowed.*

**(e)** *Shri Lovish Singhal Vs. ITO, Ward-2, Sriganganagar (ITA No. 143/Jodh/2018 dated 25.05.2018) In this case, it is held as under:-*

*I have heard the rival contentions and record perused. I have also carefully gone through the orders of the authorities below. I have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the ld AR during the course of hearing before the ITAT in the context of factual matrix of the case. From 18 ITA 142 to 146/Jodh/2018 Vasu Singhal Vs ITO with 4 Ors. cases the record, I find that during the course of survey, income was surrendered by the assessee on account of stock, excess cash found out of sale of stock and also in respect of incriminating documents. As per judicial pronouncements cited by the ld. AR and also the decision of Hon'ble Rajasthan high court in the case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017 I observe that the Hon'ble High Court in respect of excess stock found during the course of survey and surrender made thereof was found to be taxable under the head 'business and profession'. Similarly in respect of excess cash found out of sale of goods in which the assessee was dealing was also found to be taxable as business income. Applying the proposition of law laid down in the judicial pronouncements as discussed above, I hold that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act. Thus, there is no justification for taxing such income U/s 115BBE of the Act.*

**(f)** *ACIT Vs. Sanjay Bairathi Gems Ltd – 189 TTJ 487/492 (Jp). In this case, it is held as under:-*

*From the above, it is seen that the excess stock found during the search operation is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the authorized officers during the search operation at the premise. Since excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the investment in the excess stock has to be treated as business income. Further, the excess stock so found is part of the regular business, therefore, following decision of Hon'ble Tribunal Bench Jaipur in case of Ramnarayan Birla (cited supra), the same has to be taxed under the business income. Otherwise even if the same is taxed under s. 115BBE of the Act, the provisions of not allowing the set off has come into effect from 1st April, 2017.*

**(g)** *ACIT vs M/s A Star Exports and M/s Asian Star Diamonds International Pvt Ltd (2015) 5 TMI 1312 (ITAT Mumbai) wherein it has been held as under:-*

*“8. We have considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by ld. DR and AR during the course of hearing before us. From the record we found that the assessee a partnership firm is in the business of trading, import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery The main object of the assessee firm is to carrying out the business of import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery. The partnership business was of importers, exporters, manufacturers, processors, investors, wholesalers, distributors, retailers, dealers and indenting agent of diamonds, synthetic stones, gems and jewellery, precious and semi-precious metals and miners and ornaments and article made thereof including jewellery, decorative and precious objects of arts and crafts and to cut, design polish rough diamond, gems and precious stones and that of investment and lending and to do any other business as may be mutually agreed upon by the partners. In the return of income filed for the year under consideration, the assessee has shown income under the head profit and gains of business and profession and other sources. In the search action, three loose papers were found and seized as part of Annx - 5 of the panchnama prepared on 29.10.2011 at the office premises of 114/116, Mittal Court, C-Wing, 11th floor, Nariman Point, Mumbai - 400021. These documents mention the carat value, rate per*

*carat and total value of diamonds. In the course of search proceedings Shri Vipul Shah confirmed that these loose papers were containing stock details of M/s A'Star Exports, M/s. Asian Star Diamond International P. Ltd. and M/s. Rahil Agencies. The stock mentioned in the above referred seized papers was stated as placed in one safe located at the office premises. The stock of diamonds found from the safe was valued by the Govt. Approved valuer appointed by the Income Tax Department at the time of prohibitory order execution and was valued as follows:*

*The statement of Shri Vipul Shah was again recorded on 27/12/2010, wherein he admitted the unaccounted stock of 34,50,00,516/- including unaccounted stock of 13,47,63,640/- pertain to the assessee. The computation of the total income of the assessee had declared undisclosed income of 13,47,63,640/- in the form of stock of polished diamonds under the head "profit and gains of the business and profession". In the course of assessment the assessee submitted its explanation on why the undisclosed stock should be treated as a business income. In this connection it was stated that at the time of search, the investigating officers found unaccounted stock in the business premise of the assessee at 114/116, Mittal Court, 'C' Wing, 11th Floor, Nariman Point, Mumbai - 400021. This stock was valued at 13,47,63,640/- by the income tax valuer. Consequently the assessee declared this amount as stock in trade and this contention of the assessee was accepted by the Investigating officer. Who has released the stock after valuation and not impounded/seized. The statement of Shri Vipul P. Shah Partner of the firm was again recorded on 20.11.2012 wherein in reply to the question no. 22 he has stated that this undisclosed income is generated through unrecorded trading of diamonds. Q.22 Please explain as to how this undisclosed income is generated? Ans: it is through unrecorded trading of diamonds. "*

*It is clear from the above facts that the declaration was related to business stock in trade hence it is evident that the declaration amount is required to be assessed under the head' Income from Business or profession. Thus, the undisclosed income of 13,47,63,640/- declared voluntarily by the assessee for A.Y. 2011-12, is undisclosed stock held under the customary trading of the business and hence should be treated as the business income of the assessee firm and not as undisclosed investment as held by the AO. If all the three conditions of Section 69 exist together, the unrecorded investment or value of assets can be deemed to be assessee's income of the relevant financial year. In the present case all three conditions as required under section 69 are not fulfilled because the appellant has offered explanation and nature of source of acquisition as undisclosed stock received from the unaccounted trading of diamond as source of income. The partner of the firm has time and again stated in his*

*statement that diamond found in the premises during the search is out of unrecorded trading of diamonds hence the third part of section 69 is not satisfied hence the said stock is not taxable under section 69 of the Act.”*

**(h)** *M/s SurekhJewellers vs DCIT ITA No 18/PN/2016 dated 12.06.2016.*

**(i)** *M/s Silver Palace vs DCIT ITA No 893/PUNE/2016 dated 29.06.2018 (ITAT Pune)*

**(j)** *M/s Solanki Jewellers vs DCIT ITA No 858/PN/2016 dated 18.11.2016.*

**(k)** *ITO vs Jmandas Muljibahai (2006) 99 TTJ 197 (ITAT Rajkot).*

**(l)** *M/s Dev Raj Hi Tech Machines vs DCIT ITA No 326 of 2014 dated 07.10.2015 (ITAT Amritsar)*

*(a)(ii) From the above discussion and in view of the plethora of judgments on this settled issue, I am of the considered view that section 69 was clearly not applicable in the case of appellant and the suppressed income found by way of excess stock was business income of the appellant and cannot be treated as unexplained investment u/s 69A of the IT Act.*

*8. We on perusal of the above finding and the various judgments and decisions referred hereinabove by Ld. CIT(A) find that the alleged excess stock was not kept separately at any other place and was part of the total business stock found at the assessee's business premises are sufficient enough to indicate that the alleged investment in excess stock is part of the business income. We also find that alleged excess stock was duly accepted by assessee as part of unaccounted business and source thereof stated during the course of search itself and no other incriminating material was found during search proceedings and therefore is not an undisclosed income as held by the ld. AO. We, therefore, find no infirmity in the finding of Ld. CIT(A) rightly holding that the provision of section 115BBE of the Act are not applicable on the surrendered income on account of excess stock valuing at Rs. 1,41,75,568/-found during the course of search. Thus, grounds no. 1 to 3 raised by the revenue are dismissed.”*

11. *Therefore, once the facts emerging from record shows that the excess stock found during survey was a part of entire lot of stock of assessee, part of which is recorded in books of account and part of the same was not found recorded and therefore, treated as excess stock at the time of survey and consequently surrendered by the assessee and also offered to tax in the*

*return of income then the excess stock cannot be treated as deemed income u/s 69 or 69B of the act in view of the judgment of Hon'ble Rajasthan High Court and Coordinate Bench of this Tribunal cited above. Accordingly, this issue is decided in favour of the assessee and against the revenue. The orders of the authorities below qua this issue is set aside. The assessee succeeds to this extent.*

Accordingly in the facts and circumstances of the case and by following the decision of this tribunal in case of M/s. Brij Mohandas Devi Prasad (supra) we do not find any error or illegality in the impugned order of the CIT(A) same is upheld.

7. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 19 .12.2023.

**Sd/-**  
**(B.M. BIYANI)**  
Accountant Member

**Sd/-**  
**(VIJAY PAL RAO)**  
Judicial Member

**Indore, \_ 19 .12.2023**

**CPU/Sr. PS**

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

*By order*

*Sr. Private Secretary*  
*Income Tax Appellate Tribunal*  
*Indore Bench, Indore*