

आयकर अपीलिय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: PHYSICAL MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 271/CHD/2023
निर्धारण वर्ष / Assessment Year : 2018-19

Saru Enterprises Private Limited SCF 9, Sagar Complex, Urban Estate, Phase II, Patiala, Punjab, India- 147001	बनाम	The ACIT/DCIT Central Circle, Patiala
स्थायी लेखा सं. / PAN NO: AACCS2138Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Rajiv Saldi, C.A
राजस्व की ओर से/ Revenue by : Shri Dharamvir, JCIT, Sr. D.R

सुनवाई की तारीख/Date of Hearing : 01/02/2024
उद्घोषणा की तारीख/Date of Pronouncement : 23/02/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A)-5, Ludhiana dt. 01/03/2023 pertaining to Assessment Year 2018-19.

2. In the present appeal, the assessee has raised the following grounds of appeal:

1. That CIT(A) has wrongly passed the enhancement order of Rs. 5,00,000/- which is illegal and against the facts on record.
2. That CIT(A) has passed the order of enhancement u/s 68 without providing any opportunity of being heard on the issue because the notice of enhancement as well as the submissions of appellant were based on the provisions of section 69A.
3. That the order of enhancement of income amounting Rs. 5,00,000/- has resulted in double taxation as the appellant has already included the same in the income tax return filed by it.
4. That the order of enhancement of income amounting Rs. 5,00,000/- has resulted in double taxation as the appellant has already included the same in the income tax return filed by it.
5. That CIT(A) wrongly confirmed the applicability of section 69 read with section 115BBE on income of Rs. 10,00,000/- on account of alleged, unexplained excess stock although no survey team

visited the construction sites in Tami Nadu but estimated the same while sitting in head office at Patiala, Punjab, as such addition liable to be deleted.

6. *Without prejudice to above the surrendered stock being a business asset and duly consumed in routine business activities, as such the same is outside the preview of provisions of section 69.*

7. *That despite the written request dated 24/02/2023 for providing a personal hearing the CIT(A) passed the order without providing any such personal hearing.*

8. *That the appellant craves the right to add, delete or amend any ground(s) of appeal before or during the appellate proceedings.*

3. At the outset it is noted that there is a delay in filing the present appeal by two days as pointed out by the Registry. After hearing both the parties and perusing the condonation application alongwith affidavit submitted by the assessee, the delay is hereby condoned and the appeal is admitted for adjudication.

4. Briefly the facts of the case are that the assessee is engaged in the business of undertaking civil projects for Military engineering services under the name and style of M/s Saru Enterprises Pvt. Ltd. and works as a MES contractor. A survey operation under section 133A was conducted at the business premises of the assessee at Sagar Complex, Urban Estate, Patiala on 12/05/2017, wherein the assessee has surrendered a sum of Rs. 15,00,000/- on account of stock at site amounting to Rs. 10,00,000/- and cash in hand amounting to Rs. 5,00,000/-. Subsequently, the assessee filed its return of income on 22/09/2018 wherein the surrendered income was disclosed as part of its P&L Account and duly offered to tax in the return of income.

5. Subsequently, the case of the assessee was selected for scrutiny and notice under section 143(2) and 142(1) were issued. During the course of assessment proceedings, the AO stated that during the course of survey proceedings conducted at the business premises of the assessee on 12/05/2017, the assessee was asked about the difference in stock found at the time of survey and keeping in view his inability to explain the discrepancy, the assessee had voluntarily surrendered a sum of Rs. 10,00,000/- which is in the nature of

unexplained investment within the meaning of Section 69 where by the provision of Section 115BBE of the Act are applicable. The AO thereafter referred to the surrender letter dt. 12/05/2017 and stated that on the perusal of the surrender letter, it is seen that the assessee was not able to furnish any satisfactory explanation regarding the excess stock found from the business premises of the assessee which was noticed during the course of survey and accordingly the additional income of Rs. 10,00,000/- was disclosed by the assessee which is in the nature of unexplained investment falling under the deeming provision Section 69 of the Act. The AO further observed that while filing the return of income at much later date, the assessee has not disclosed such additional income and thereafter, the assessee was issued a show cause dt. 21/05/2021 to show cause as to why the income of Rs. 10,00,000/- on account of excess stock should not be added to the income under section 69 of the Act.

6. In response to the show cause, the assessee filed its submissions dt. 10/06/2021 which was considered but not found acceptable to the AO. As per AO, the assessee has denied the surrender which was found to be an afterthought to safeguard the assessee from tax liability arising out of the discrepancy observed during the survey operation carried by the survey team. Hence the contention advanced by the assessee was not found tenable and amount of Rs. 10,00,000/- was brought to tax under section 69 of the Act r/w section 115BBE of the Act.

7. Subsequently, the assessee moved a rectification application on 20/10/2021 stating that the amount of Rs. 10,00,000/- has been wrongly added to the returned income as the same has already been shown by the assessee in its P&L Account and offered in the return of income which has resulted in double taxation.

8. The contention so advanced by the assessee was found to be correct by the AO and the addition of Rs. 10,00,000/- so made in terms of order passed under section 143(3) was deleted, at the same time, the amount already offered to tax in the return of income as 'business income' was brought to tax separately at the rate prescribed under section 115BBE of the Act.

9. Thereafter the assessee aggrieved with the treatment of the surrendered income being brought to tax under section 69 of the Act r.w.s 115BBE of the Act moved in appeal before the Ld. CIT(A).

10. During the appellate proceedings before the Ld. CIT(A), the assessee submitted that it has maintained its Head Office at Patiala and construction sites during the year under consideration were in Tamil Nadu and the survey operations were carried out at the Head Office on 12/05/2017 and which were continued up to 3 A.M on the next day and the assessee was pressurized overnight and ultimately compelled to surrender the estimated stock lying at site. It was submitted that it is on record that no survey team visited any site of construction. They concluded the survey only after compelling and obtaining the surrender letter. The surrender was merely estimate of stock which in the absence of any corroborating evidence has no value. It was submitted that the said action on the part of the survey team was against the CBDT Circular dt. 10/03/2023 wherein the Board has provided that while recording statement during the course of search & seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. It was submitted that mere recording of statement and without any corroborating evidence, the statement has no value. It was further submitted that mere declaration of stock during the course of survey does not amount to unexplained investment because the alleged difference of stock submitted during the survey relates to its business only. It was submitted that in the instant case, there was no inventory of alleged excess stock much less the total stock. It was submitted that the

consumable stock at the site was only building material like Sand, Cement etc. which is consumed in the construction of building and there is no trading or sale of any stock and no investment made as such. It was accordingly submitted that the AO has wrongly invoked the provision of Section 69 r.w.s 115BBE of the Act. Alternatively it was submitted that even where it is held that there was excess stock which has been found, such alleged excess stock being in the nature of business stock has to be assessed under the head "business income" and reliance was placed on the decision of PCIT Vs. Deccan Jewellers (P) Ltd. 322 CTR 952 wherein it was held that the excess stock which was a result of suppression of profits from business over the years and was a part of the overall stock found and therefore the excess stock could not be treated as undisclosed investment under section 69 but has to be assessed as business income.

11. The submissions so filed by the assessee were considered but not found acceptable to the Ld. CIT(A). As per the Ld. CIT(A), the contention of the assessee that the surrender was not corroborated by any documentary evidence cannot be accepted as the assessee has voluntarily surrendered the said amount in the return of income. It was held by the Ld. CIT(A) that in such a situation, the surrender of Rs. 15,00,000/- become all the more unexplained in absence of any supporting documentary evidence and the onus is on the assessee to link the same with his genuine business income which the assessee has not been able to do so and in view of the same, the action of the AO in applying the provision of Section 69 r.w.s 115BBE was upheld.

12. Separately, the Ld. CIT(A) observed that the assessee had surrendered a sum of Rs. 5,00,000/- on account of cash during the course of survey and report of the AO was called as to why he did not invoke the provision of Section 69A on excess cash surrendered during the course of survey. In response the AO vide his report dt 23/01/2023 referred to the Question No. 16 of the statement of the Shri Ahsok Kumar Goyal, M.D of the assessee company recorded during the

course of survey proceedings under section 133A of the Act and submitted that on analysis of the said statement and the surrender letter, it is observed that no excess cash in hand was found, therefore no addition was made during the assessment proceedings on this account, at the same time, AO stated that if deem fit, the same may be enhanced and taxed accordingly. Basis the said report from the AO, the Ld. CIT(A) issued a show cause dt. 01/02/2023 for enhancement of the income stating that during the course of appellate proceedings, the AO has suggested enhancement of income on account of excess cash surrendered by taxing the same under section 69A and in view of the same, you are required to show cause as to why the income should not be enhanced accordingly.

13. In response, the assessee, referring to the report by the AO, submitted that there was no excess cash so found during the course of survey and secondly, there was no suggestion of enhancement in the report of the AO. It was further submitted that provision of Section 69A are not applicable in the instant case as the said section can only be applied where the assessee was found to be the owner of any money, bullion, jewellery or other valuable/thing and in the instant case, no cash was ever found during the course of survey proceedings and the same can be verified from the survey file and the assessment records of the department. It was submitted that no cash was ever found and counted during the survey proceedings and therefore there was no inventory of cash which was prepared during the course of survey and available on the record. It was submitted that in the instant case, there was no cash found at Head Office of the company when the survey team visited the office and as per the incomplete books of account, the cash in hand was Rs. 19,27,367/- and which was also taken note of by the survey team as evident from Question no. 16 and reply given by the M.D, Shri Ashok Kumar Goel. It was accordingly submitted that the provision of Section 69A cannot be set into motion in the instant case.

14. The submissions so filed by the assessee were considered but again not found acceptable to the Id CIT(A). Referring to the P&L Account where the assessee has credited a sum of Rs. 5,00,000/- in its books of account on account of excess cash, it was held by the Id CIT(A) that in case there was no excess cash found during the course of survey, then the assessee was not required to self introduce the cash credit of Rs. 5,00,000/- in the P&L Account as the assessee has not been able to prove any source for the said credit and the same has to be treated as unexplained credit under section 68 of the Act. Therefore the contention of the assessee that the provision of Section 69A cannot be invoked were accepted but at the same time, the provision of Section 68 were invoked by the Ld. CIT(A) as the amount was found credited in the books of accounts and income of the assessee was enhanced accordingly.

15. Against the said findings and direction of the Ld. CIT(A), the assessee is in appeal before us.

16. During the course of hearing, the Ld. AR submitted that the assessee company is a contractor registered with MES and during the year under appeal, all business receipts are from Military Engineering Services (MES) only. It was submitted that the assessee company maintained its Head Office at Patiala and construction sites during the year in question were in Tamil Nadu. A survey under section 133A was conducted on 12.05.2017 by the Income Tax department at the head office of the Company only, the survey continued upto 3 a.m. of 13.05.2017 and the assessee was pressurized overnight and was compelled to surrender a sum of Rs 5,00,000/- on account of cash and Rs 10,00,000/- on account of stock at site.

17. It was submitted that the undue pressure and threat by department are apparent from the fact that all the construction sites of the company were in Tamil Naidu and still an amount of Rs 10,00,000/- got surrendered against stock

without any visit to the construction site by the department. It was submitted that it is on record that no survey team visited any site of construction. Even no inventory of stock was ever prepared. The survey was concluded only after compelling and obtaining the surrender letter. The surrender was merely estimate of stock which in the absence of any corroborating evidence has no value. It was submitted that the surrender of income by appellant was under undue pressure from the survey team of the department as can be seen from the fact that no business activity was conducted at the place of survey i.e. head office of the appellant, that the appellant proved before the authorities below that its business was that of construction for Government of India Defense Sector (MES) and all the construction activities of Government contracts during the year were in the state of Tamil Naidu, that no survey team visited the construction sites in the state of Tamil Naidu as such no inventory of stocks were ever prepared by the survey team and consequential surrender on the surrender on account of excess inventory was wrongly taken which is clear case of forced surrender under undue pressure and coercion.

18. It was submitted that in spite of the same, the assessee honored the surrender so made and surrendered stock and cash amount was offered in the profit and loss account and the taxes were paid thereon. It was submitted that the AO ignoring the same, made the addition on account of alleged excess stock which amounted to double taxation that too under section 69 read with section 115BBE which is illegal and against the facts of the case. It was submitted that pursuant to rectification order, though the effect of double taxation has been rectified, however, the amount of alleged stock has still be brought to tax under section 69 r/w 115BBE and which has been confirmed by the Id CIT(A).

19. It was further submitted that it is a well settled law that the stock being business asset cannot be treated as undisclosed income under the deeming provision of Section 69 of the Act and in support, reliance was placed on the various Coordinate Bench decisions such as decision of Coordinate Chandigarh Bench in case of M/s Veer Enterprises Vs. DCIT in ITA No. 255/Chd/2023, Gaurish Steels Pvt. Ltd. Vs ACIT 43 ITR (Trib) 414 , Famina Knit Fab v ACIT 176 ITD 246 and M/s Jain Plywood Vs. DCIT in ITA No. 588/CHD/2022.

20. As far as the surrender on account of excess cash was concerned, it was submitted that the same was honoured by the assessee and included in its return of income and no adverse finding was recorded by the AO. However during the course of appellate proceedings, the Ld. CIT(A) invoked the provision of Section 68 and brought the said amount to tax again in the hands of the assessee ignoring the fact that it has already been offered to tax in the return of income which has resulted in double taxation.

21. It was submitted that the Ld. CIT(A) has passed the enhancement order on the issue which was not considered by the AO during the assessment proceedings and as such the Ld. CIT(A) passed the order without jurisdiction, no show cause for enhancement of income under section 68 on account of cash credit was issued to the assessee and thus no opportunity of being heard was provided by the Ld. CIT(A).

22. It was further submitted that during the course of survey, no excess cash was found and therefore, there is no evidence available on the record and inspite of that, the Ld. CIT(A) has gone ahead and passed the enhancement order merely basis the surrender letter which is against the settled law that no addition can be made merely on the basis of the statement of the assessee

without any corroborating evidence. It was accordingly submitted that the order of the AO as well as the Ld. CIT(A) be set aside and necessary relief be provided to the assessee.

23. Per contra, the Ld. DR has relied on the order of the lower authorities. It was submitted that the contention of the Id AR that it was a case of forced surrender cannot be accepted as the assessee has not retracted from the said surrender and infact, went ahead and the included the income so surrendered in its profit/loss account and the offered the same to tax in the return of income.

24. It was submitted that in light of said facts, the limited issue that arise for consideration is whether the assessee was able to provide the necessary explanation regarding the excess stock and cash so found at the time of survey. It was submitted that the matter has been duly examined by the lower authorities and it is clear that the assessee has failed to provide any explanation regarding the nature and source of excess stock and cash so found during the course of survey.

25. It was submitted that for the unaccounted stock found during the survey proceedings, there can be no presumption to treat the value representing such excess stock as application of business income in absence of any evidence of earning that income or details as to when, how and from whom such income was derived which has been invested in stock. It was submitted that the assessee has not been able to establish nexus between the excess stock and normal business income. Further no documentary evidence has been submitted to justify the surrendered income as business income. It was accordingly submitted that the action of the AO in applying the rate as prescribed u/s 115BBE of the Act on the surrendered income included in the tax return and which has been treated by the AO as income under section 69 of the Act is justified and the Ld. CIT(A) has rightly affirmed the order of the AO in treating the

surrender on account of unaccounted stock found during the course of survey as deemed income under section 69 of the Act and which has been brought to tax as per the provisions of Section 115BBE of the Act.

26. It was further submitted that the Id CIT(A) has issued a show-cause during the course of appellate proceedings and excess cash has rightly been brought to tax invoking provisions of section 68 of the Act.

27. It was accordingly submitted that the order so passed by the Ld. CIT(A) be confirmed and the appeal so filed by the Assessee be dismissed.

28. We have heard the rival contentions and perused the material available on record. The genesis of the present dispute has its origin in the survey proceedings conducted at the business premises of the assessee. Therefore, in order to appreciate the respective contentions, we refer to the statement of Shri Ashok Kumar Goyal, the Managing Director of the assessee company recorded during the course of survey on 12/05/17, and the surrender letter of even date submitted by the assessee company. It is relevant to note that these are only two pieces of documents which are available on record as pertaining to survey proceedings and which have been brought to our notice during the course of hearing and are forming part of the assessee's paper book.

29. Firstly we refer to the statement of Shri Ashok Kumar Goyal which was recorded on oath during the course of survey under section 133A conducted at the business premises of the assessee situated at Sagar Complex, Urban Estate, Phase II, Patiala on 12/05/2017. In response to Question no. 3 where he was asked to explain about the nature of work and various projects being undertaken by the assessee company, he submitted that the main nature of work of assessee company was to do work of MES at Thanjavur, Tamil Nadu under Chief Engineer, Air Force, Bangalore. It was stated by him that all the purchases of the material and payment of labour are made by the assessee

company and the cost of the project is Rs. 6,00,00,000/- (approx) and apart from that there is another project going on at Salem, Tamil Nadu at Air Force Station. In Question No. 16, referring to the Trial Balance submitted by the assessee's accountant where cash balance of Rs. 19,27,367/- has been shown as on the date of survey, he was asked about cash in hand and where it was kept. In response, he submitted that there was no cash in hand as on that day i.e; 12/05/2017 and further, the cash book is not updated as some entries are pending to be entered in the books of accounts which are not updated for the last 4 to 5 months and they have also not closed the books as on 31/03/2017. In Question No. 19, the assessee was asked about stock register as to where the same has been kept and to provide a copy thereof and in response, he submitted that no stock register have been maintained at the registered office of the company and the same has been maintained at the project site. In Question No. 21, the assessee was asked to produce the cash book and ledger account for F.Y. 2011-12 onwards and in response, he submitted that cash book and ledger account of F.Y. 2011-12 to 2015-16 are being produced, however the cash book and ledger account for F.Y. 2016-17 are incomplete. Besides that, there were various other questions relating to projects, the agreement of sale of land & related dispute, job work charges, etc. Thereafter, in response to question no 15, he has stated that whatever he has stated was best to his knowledge and belief and without any pressure, force or coercion.

30. In terms of the surrender letter dt. 12/05/2017 which is again signed by the Managing Director of the assessee company and addressed to the Additional Commissioner of Income Tax, Patiala, Range-Patiala, it has been stated by the assessee that during the survey under section 133A at their business premises at SCF-9, Urban Estate-II, Patiala by their officers, some discrepancies were pointed out by them and in view of the discussion, some stock at the site were also discussed to be excess and in view of the same, they have surrendered a sum of

Rs. 10,00,000/- on account of stock at site and Rs. 5,00,000/- on account of cash in hand for the F.Y. 2017-18 relevant to A.Y. 2018-19 and it has been further stated that the surrender is being made voluntarily without force and subject to no penal action and they will make the payment of taxes in due course of time. Thereafter, the assessee filed its return of income on 12/09/2018 wherein the assessee didn't make any retraction and offered the amount so surrendered to tax. Thereafter, the said return of income was processed under section 143(1) on 17/05/2019. Thereafter, the case of the assessee was selected for scrutiny and notice under section 143(2) was issued on 24/09/2019 and various other notices were issued from time to time and only in response to the show cause issued on 21/05/2021 where the AO seek to invoke the provisions of Section 69 in relating to alleged stock, the assessee vide its submission dt. 10/06/2021 submitted that it was forced to make surrender of additional income to conclude the survey and various assertions were made. Even at that time, there was no retraction on part of the assessee rather it was reiterated that it had honoured the surrender by offering the amount in the profit/loss account and thereafter, as part of its return of income.

31. Now, in terms of basis of surrender and whether any corroborative material in terms of excess stock and cash has been found during the course of survey. In this regard, it is manifestly clear that the survey proceedings were conducted at the business premises of the assessee at Sagar Complex, Urban Estate, Phase II, Patiala wherein no physical activity were found to be carried on by the assessee, the two projects were stated to be carried on in Tamil Naidu, no stock has been found at the business premises of the assessee at Patiala, no stock register has been kept and no cash has been found either and lastly, no stock and cash inventory has been prepared and available on record.

32. It is therefore a case where no physical stock was actually found at the time of survey at the premises of the assessee, therefore the question of

determination of excess stock found during the course of survey vis-a-vis stock reflected in the books of account does not arise for consideration and therefore, the very basis of issue of show-cause by the AO during the course of assessment proceedings in terms of invoking the deeming provisions of section 69 is vitiated in absence of any material on record to corroborate the statement so made.

33. Secondly, it is also manifestly clear that at the time of survey, no cash was found or any cash inventory was prepared and available on record which demonstrates that certain excess cash over and above what was reflected in the books of account have been found at the time of survey. Rather from the statement of the Managing Director of the assessee company, we find that cash book was not complete at the time of survey and there were certain entries which were yet to be accounted for. The remand report of the AO corroborates the said fact that no excess cash in hand was found during the course of survey.

34. We therefore agree with the contention of the Ld. AR that there was no physical stock as well as cash which was found at the time of survey which can corroborate the surrender so made by the assessee and in absence thereof, the deeming provisions cannot be invoked.

35. Now, what remains is the surrender letter so submitted by the assessee wherein the assessee has surrendered a sum of Rs 15 lacs and has paid taxes thereon. It is a settled position that the statement of the assessee recorded during the course of the survey on a standalone basis has no evidentiary value, at the same, the said statement can be considered as relevant material, but for that, there has to be further material to corroborate and substantiate the same which is manifestly absent in the instant case. Therefore, basis the statement on a standalone basis, there is no legal basis for taking action against the assessee.

36. At the same time, it is also a matter of record that the assessee has not retracted from the said surrender either as part of filing of the return of income or during the assessment proceedings and even before us, no such prayer has been made. Therefore, the fact that the assessee has honoured the surrender so made inspite of the fact that there is no corroborative material against the assessee, the same can't be held against the assessee and more so, cannot form the basis for invocation of deeming provisions as has been done in the instant case as the conditions stated therein are not satisfied.

37. In light of aforesaid discussions, both the action of the AO in terms of invoking the deeming provisions in relation to so called alleged stock and the action of the Id CIT(A) in sustaining and enhancing the same in relation to alleged cash has no legal basis and the same are set-aside.

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

Order pronounced in the open Court on 23/02/2024

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 23/02/2024

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar