

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री राठौड़ कमलेश जयन्तभाई, लेखा सदस्य एव श्री नरेन्द्र कुमार, न्यायिक सदस्य के समक्ष  
BEFORE: SHRI RATHOD KAMLESH JAYANTBHAI, AM & SHRI NARINDER KUMAR, JM

आयकरअपील सं./ITA No.511/JP/2024  
निर्धारण वर्ष / Assessment Year : 2017-18

Silver Wings Life Spaces Plot No. 3, 4 Commercial Complex, Behind Madhushree Hotel Rajiv Gandhi Nagar, Kota	बनाम Vs.	DCIT Circle-01, Kota
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.:ACSFS 4581 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Shrawan Kumar Gupta, Adv.  
राजस्व की ओर से / Revenue by: Sh. A. S. Nehra(Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 24/07/2024  
उदघोषणा की तारीख / Date of Pronouncement: 31/07/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

Present appeal has been filed because the assessee is feeling aggrieved by an order of National Faceless Appeal Centre, Delhi dated 31/03/2024 [here in after (NFAC)/ Ld. CIT(A)]. It has arisen from the impugned order passed while dismissing first appeal by the assessee before Learned CIT(A), which appeal was filed by the assessee

challenging the assessment order passed by ACIT/DCIT, Circle-1, Kotau/s. 143(3) of the Income Tax Act [ here in after referred as “Act”].

2. Here, the assessee has challenged the impugned order of the NFAC/CIT(A) by raising following grounds of appeal:

“1. The impugned order u/s 143(3) of the I.T. Act, 1961 dated 26.12.2019 as well as the notices issued and action taken and notices issued are illegal, bad in law and on the facts of the case for want of jurisdiction and various other reasons and further contrary to the real facts of the case hence the same may kindly be quashed.

2.1 The Id. AO as well as the Id. CIT(A) have grossly erred in law as well as on the facts of the case in treating the surrendered income on account of sundry debtors and excess cash fund as income undisclosed or unexplained investment or money u/s 69 & 69A in place of “business income” as the same was generated from business or was of business income and also erred in making the addition of Rs.2,06,60,000/- u/s 69 and 69A on account of surrendered income. also erred in making the addition without invoking the provision of sec. 145(3) and without rejecting the books of accounts, also erred in not considering the material and details in their true perspective and sense despite available on record. Which are against the provisions as per law and further contrary to the real facts of the case hence the Id. AO may kindly be directed to treat the surrendered income as business income and the additions may kindly be deleted in full.

2.2 The Id. AO as well as the Id. CIT(A) have also grossly erred in not giving the benefit of deduction, expenses or losses against the surrendered income , hence the m same may kindly be directed to give such benefit.

3.1 The Id. CIT(A) has grossly erred in law as well as on the facts of the case in confirming the action of the Id. AO in invoking the provisions of Sec. 115BBE and also erred in confirming the action of the Id. AO in taxing the income at the higher tax rate of 60%, 25% surcharge, and 3% cess in place of 30% tax rate, also erred in not considering the material and details in their true perspective and sense despite available on record. Hence the higher tax rate so applied or charged by the Id. AO and confirmed by the d. CIT(A) is also contrary to the real facts of the case and not according to the provision of law hence the same is illegal, bad in law, against the principle of natural justice. The same may kindly be deleted in full.

3.2 The Id. CIT(A) has grossly erred in law as well as on the facts of the case in confirming the application of provisions of higher tax rate at the rate of 60%, 25% surcharge, and 3% cess in place of 30% tax rate under the provisions of Sec. 115BBE for the year under consideration with retrospective effects, while the same is not applicable for the year under consideration or applicable from prospective effects. Hence the higher tax rate so applied or charged by the Id. AO and confirmed by the d. CIT(A) in this year are also contrary to the real facts of the case and not according to the provision of law hence the same is illegal, bad in law, against the principle of natural justice. The same may kindly be deleted in full.

4. The Id. AO has grossly erred in law as well as on the facts of the case in charging the interest u/s 234A, B,C and D. The interest so charged is being totally contrary to the provision of law and on facts of the case and hence same may kindly be deleted in full.

5. That the appellant prays your honour indulgences to add, amend or alter or any of the grounds of the appeal on or before the date of hearing.”

3. Brief facts, as emerge from the assessment record, are that the return of income was furnished by the assessee for the A.Y. 2017-18 relevant to financial year 2016-17 on 13.11.2017, by e-filing, thereby declaring total income at Rs. 2,06,60,000/-. However, the case was selected for scrutiny through CASS. Accordingly, a notice u/s 143(2) of the Act was issued to the assessee on 01.09.2018, and duly served upon the assessee through registered e-mail by ITBA on 01.09.2018 and also by registered post.

3.1 Due to change of incumbent, a fresh opportunity of being heard was given by Id. AO u/s 129 of the IT Act, on 05.08.2015. Further, a notice u/s

142(1) of the Act and a questionnaire were issued to the assessee on 21.08.2019 and 15.10.2019, and duly served to the assessee through e-mail. In compliance with the notice issued u/s 142(1), the assessee submitted its reply on e-proceeding module on different dates and same was taken on record by the assessing officer.

3.2 The assessee firm is a partnership firm engaged in the business of real estate as developers and builders. For the year under consideration, the project was in the initial stage and no flat whatsoever was completed or sold by the assessee. After examination of the replies and documents submitted by the assessee, the assessment was concluded by the AO on the returned income.

3.3 But, while doing so, Id. AO noted that a survey u/s 133A was carried out at the business premises of assessee on 04.07.2016, whereupon a diary was found containing particulars of certain unaccounted debtors to the tune of Rs.1,97,34,500/-.

In those survey proceedings, the excess cash of Rs.9,25,000/- was also found from the assessee's premises, which was found to have not been recorded in the books of account.

However, the assessee surrendered both the abovesaid amounts as income for tax purposes for the A.Y. 2017-18 relevant to F.Y. 2016-17. The assessee firm disclosed these surrendered undisclosed debtors and excess cash in the return of income, and paid taxes at normal rate.

3.4 Ld. AO noted that as the assessee had disclosed the income as unexplained investment in form of debtors, same was covered by section 69 of the IT Act & the excess cash was covered u/s 69A of the IT Act. In case of applicability of sections 69 & 69A, rate of tax is higher as per provision of section 115BBE of the IT Act. Therefore, a show cause notice was issued to the assessee on 15.10.2019.

The assessee submitted his reply online on 08.11.2019 on e-proceeding module. Id. AO did not accept the reply, due to the following reasons:

“(i) It is clear that section 115BBE was originally introduced by finance Act in 2012 w.e.f 01.04.2013 and applicable for A.Y 2013-14 and onwards. The main object of introduction of this section was to curbe the practice of laundering of unaccounted money by taking advantage of basis exemption limit. Thus it was proposed to tax the unexplained credits, money, investment, expenditure etc. which had been deemed as Income under section 68, 69, 69A, 69B, 68C and 69D at the rate of 30% (Plus surcharge and cess as applicable)

(ii) The section 115BBE was amended vide taxation laws (second amendment) Act 2016 w.e.f. 01.04.2017 Le. for A.Y. 2017-18 and onwards. In this amendment, the Govt. has only changed the income tax rate from 30% to 60% of the income determined u/s 68, 69, 69A 69B 69C and 69D of the IT Act Surcharge 25% on income tax and applicable cess was also chargeable from the assessee.

(iii) Vide circular No. 3/2017 and 11/2019 the CBDT has cleared the position of applicability of this section in which clearly mentioned that this amendment takes affect from 01.04.2017 and will, accordingly, apply from AY 2017-18 and subsequent assessment years.

(iv) The real purpose of introducing this amendment was only change higher tax in respect of income expenditure investment on the assessee who fails to explain the nature and source of said income/expenditure/investment.

(v) It is clear that the purpose and object of the latest amendment is only to prevent the unaccounted money in system and if found any income under section 68, 69, 69A 69B 69C and 69D tax should be charged @ 60%.

(vi) The plea of the assesses that the amendment to section 1158BE should come into force wef. AY 2018-19 is not acceptable because it is clearly mentioned in the amended section u/s 115BBE that the amendment is applicable for A.Y. 2017-18 and onwards.

(vii) The case laws given by the assessee are not applicable in the case of assessee because facts of cases given by the assessee and this cases are differ.

(viii) The assessee himself admitted in reply filed on 06.11.2019 that unexplained investment in form of sundry debtors are covered u/s 69 & excess cash is covered u/s 69A of the IT Act but the disclosed income u/s 69 & 69A in the hand the assessee has not disclosed such undisclosed sundry debtors u/s 69 & excess cash u/s 69A of IT Act in the IT return but disclosed under income from other sources.

3.5 Based on the provisions of section 69 and 69A of the IT Act for unexplained investment in form of sundry debtors and excess cash, Ld. AO held that the tax should be charged @ 60% of 115BBE of the IT Act on the amount offered in the return of income so filed by the assessee.

4. The assessee challenged the findings so recorded in the order of the assessment by filing appeal before the Id. CIT(A). Apropos of the grounds so

raised by the assessee, for ready reference, the relevant findings of the Id.

CIT(A)/NFACarereproduced. Same read as under:

“Findings/Held

3. There are 11 grounds of appeal in this case. Ground Nos. 2, 8, 9 & 11 are general in nature, hence no specific findings have been given in respect of those grounds. All the other grounds are integrally connected to each other. Hence all of them have been dealt together. The main issue for consideration is that whether section 115BBE of the Act is applicable in the case of the appellant.

3.1 The assessee firm is a partnership firm and is engaged into the business of real estate as developers and builders. The project is still in initial stage and no flat whatsoever has been completed or sold by the assessee during the year. Survey u/s 133A of the was carried out at the business premises of assessee on 04.07.2016 wherefrom a diary was found where in particulars of unaccounted debtors to the tune of Rs. 1,97,34,500/- were found written. The excess cash of Rs.9,25,000/- was also found from the assessee's premises which was not recorded in the books of account. On being confronted, the amount of undisclosed debtors was surrendered for taxation as additional income of the A.Y. 2017-18 relevant to F.Y. 2016-17. The assessee firm has disclosed these surrendered undisclosed debtors and excess cash in the return of income and had paid taxes at normal rate.

3.2 Section 115BBE was originally introduced by finance Act in 2012 w.e.f. 01.04.2013 and applicable for AY 2013-14 and onwards. The main object of introduction of this section was to curbe the practice of laundering of unaccounted money by taking advantage of basis exemption limit. Thus it was proposed to tax the unexplained credits, money, investment, expenditure etc which had been deemed as income under section 68, 69, 69A, 69B, 68C and 69D at the rate of 30%. The section 115BBE was amended vide Taxation Laws (Second Amendment) Act, 2016 w.e.f. 01.04.2017 i.e. for A.Y. 2017-18 and onwards. In this amendment, the Government has only changed the income tax rate from 30% to 60%.

3.3In circular No.3/2017 and 11/2019 of the CBDT it has been clearly mentioned that this amendment takes effect from 01.04.2017 and will, accordingly, apply from A.Y.2017-18 and subsequent assessment years. The real purpose of introducing this amendment was only change higher tax in respect of income/expenditure/investment on the assessee who fails to explain the nature and source of said income/expenditure/investment. It is clear that the purpose and object of the latest amendment is only to prevent the unaccounted money in system and if any income is found under deeming sections tax should be charged at higher rate.

3.4 Circular clarifies the language of amendments in a language easily understandable to normal taxpayers. The plea of the assessee that the amendment to section 115BBE should come into force w.e.f. A.Y. 2018- 19 is not acceptable because it is clearly mentioned in the amended section u/s 115BBE that the amendment is applicable for A.Y. 2017-18 and onwards. Circulars are integral part of the amendment.

4. In view of the above discussion it is held that there is no ambiguity in the language of section 115BBE and its applicability in the case of the appellant. Higher rates have become applicable w.e.f. AY 2017-18. Hence the appellant is obligated to pay tax at the rate of 60 percent. Accordingly, all the grounds of appeal are dismissed.”

5. The Assessee, feeling aggrieved by and dissatisfied with the findings so recorded by Id. CIT(A), has preferred present appeal on the grounds as raised and reproduced in para 2 above. In support of the various grounds so raised by the Id. AR of the assessee, following written submissions have been presented :

“The brief facts of the case are that the appellant assessee is a partnership firm and engaged in the business of real estate as developers and builders. Firm is having income from this business only and filing the I.T. Return regularly. In this case a survey action u/s 133A was carried out at the business premises of the assessee on dated 04.07.2016 where a diary was found in particulars of unaccounted debtors to the tune of Rs.1,97,34,500/- and excess cash of Rs. 9,25,000/- was also found from the premises which was not recorded in the books of accounts. The statement of the partner of the firm Shri Rajat Arora was also recorded u/s 133A. On being asked at question no. 10 and 11 about the excess cash and transaction noted in the diary of the firm. The partner of the firm submitted that the excess cash Rs. 9,25,000/- related to the business is being surrendered as undisclosed income for the current year and entries in diary at page no. 1 and 2 are related to business unrecorded debtors which are not recorded in the books of accounts, the amount of total unrecorded debtors are Rs.1,97,34,500/- which is being surrendered as undisclosed income for the current year. As, at the time of surrender on the date of 05.07.2016 the tax rate was 30%. Thus the assessee firm has made total surrendered of the Rs.2,06,60,000/- on dated 05.07.2016 at the tax rate of 30%.

2. Thereafter, the assessee firm has filed the return of income on dt.13.11.2017 declaring the total income of Rs.2,06,60000/-, which are related to the surrendered amount shown under the head of income from other sources. The Id. AO has issue the notice u/s 143(2) on dt.01.09.2018 and also u/s.142(1). In response thereto the assessee has filed the reply and details. The Id. AO has stated that the assessee firm has not declared such undisclosed debtors u/s 69 of the act in the return of income but disclosed under income from other sources and paid tax at normal rate.

3. The Id. AO has stated that unexplained debtors in the form of debtors are covered u/s 69 and excess cash is covered u/s 69A of the I.T. Act hence tax should be chargeable u/s 115BBE. Hence, the Id. AO has issued the show cause notice on dt.15.10.2019 asking to the assessee why the tax on Rs.2,06,60,000/- should be charged @60%+surcharge @25% and cess 3% u/s 115BBE. In response to the same, the assessee firm has filed his reply on date. 08.11.2019 also reproduced from page No. 2 to 7 of the assessment order.

4. However, the Id. AO did not accept the contention of the assessee firm and stated that section 115BBE was originally introduced by the Finance Act.2012 w.e.f 01.04.2013 applicable for A.Y. 2013-14 and onwards. Sec. 115BBE was amended vide taxation laws. (second amendment) act 2016 w.e.f.01.04.2017 i.e. for A.Y. 2017-18 and onwards in this amendment the Govt. has only changed the tax rate from 30% to 60% and Surcharge @25% of the income determined u/s 68,69,69A,69B and 69D. The Id. AO has further noted that vide circular No. 3/2017 and 11/2019 the CBDT has cleared that the position of the applicability of this section, in which it is clearly mentioned that this amendments take effect from 01.04.2017 and will accordingly apply from A.Y. 2017-18 and subsequent years. The plea of the assessee firm the applicability of provisions of Sec. 115BBE from the A.Y. 2018-19 has also not been accepted by the Id. AO.

Thus the Id. AO has charged the tax on the surrendered income of Rs. 2,06,60,000/- at the rate of 60% and Surcharge @25% +3% cess and raised the extra demand.

5. In first appeal assessee filed the detailed WS and legal position of law. The WS is reproduced from page 3 to 28 of the CIT(A) order. However the Id. CIT(A) has not consider the same I their true perspective and sense. He has not rebutted our WS and legal position. The Id. AO has confirmed the order of the AO only by rely upon on the CBDT circular. The Id. CIT(A) has also not distinguished our case laws. He has not given any adverse finding on our WS and legal position of law. Thus the Id. CIT(A) has summarily dismissed the appeal.

Hence this appeal

SUBMISSIONS:

1. That the case of the assessee has been selected for scrutiny assessment and no issue(s) have been identified for examination.

The requisite detail with evidences has been submitted during the course of assessment proceeding in compliance of notice u/s 143(2) dated 11/08/2018. All the deposit of cash into bank have been made from cash balance in the cash book and the Id. AO has not found any unexplained investment which are not recorded in the books of account maintained by the assessee. No addition will be made for same and created tax demand by invoking of Sec. 69, Sec 69A of the I.T. Act and applied the new provision of Sec. 115BBE of the Income Tax Act, 1961 as amended on 15.12.2016 on disclosed income in survey date 04/07/2016 which is not reason of scrutiny in the case concerned and case is not connected to complete scrutiny as per applicable CBDT guidelines. Therefore, the assessment proceeding u/s 143(3) is bad in law, is null and void and deserves to be quashed and set aside.

In the following orders from various benches of ITAT across country remains at idem on impact of in fraction of scope of CBDT instructions dealing with scope of limited scrutiny assessment and that same would be nullity:-

- i) *Delhi bench ITAT CBS International Project Pvt. Ltd. (order dated 28.02.2019)*
- ii) *Jaipur bench ITAT Lt. Smt. GurbachanKaur (order dated 05.12.2019)*
- iii) *Jaipur Bench ITAT Manju Kaushik (order dated 09.12.2019)*
- iv) *Lucknow bench ITAT Ravi Prakash Khandelwal (order dated 08.11.2019)*
- v) *Mumbai G Bench ITAT order in case of Su-Raj Diamond Dealers Pvt. Ltd. order dated 27.11.2019*
- vi) *Mumbai D bench ITAT order in case of R&H Property Developer Pvt. Ltd. order dated 30.07.2019.*

The Id. CIT(A) has not speak a single word on theses issue and submission, which show he either has satisfied with our plea or he is not having anything to rebut our contention. Hence the assessment order is liable to be quashed on this ground.

2. Wrongly Interpreted that assessee has considered declared income in survey under the head of income from other source whereas it should be considered under the head of income from business:-

2.1. That prior to 1st April 2017 the question whether the declared income sought to be taxed was in the nature of income u/s 68 to 69D or not or the question with regards to nature of activity from which such declared income was derived was not at all relevant as the rate of taxation was same in either case i.e. @ 30% only.

2.2 That survey team has not got any evidence to the contrary, such declared income or assets will have to be considered as derived out the known business activity only, not liable for being taxed at higher rate @ 60% + Surcharge + Cess u/s 115BBE of the Income Tax Act, 1961.

Your honor in the following cases income surrendered/detected during the course of survey was held to be taxable as business income:-

- (i) Construction portal Pvt. Ltd V ITO (ITA No. 1607 & 1608/PUN/2014 A.Y. 2005-06, 2006-07 order dated 06-06-2018.
- (ii) SAB Industries Limited V DCIT (ITA No. 848/CGL/2017) A.Y. 2013-14 order dated 28-03-2018.
- (iii) Gavrish Steels (P) ltd V ACIT (2017) 82 Taxman Com 337 Chandigarh Tribunal.
- (iv) Shri Ram SwarropSignal V ACIT Circle, Shri Ganga Nagar V Income Tax Officer (ITAT Jodhpur) ITA no. 143/Jodh/2018.
- (v) Rajasthan High Court in the case of Bajargan Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017 has held that excess stock found during the course of survey and surrender made thereof in taxable under the head of business and profession.
- (vi) Kindly refer a direct decision on this issue in the case of Sh. Baljinder Kumar v/s DCIT Circle-1 Ludhiana in ITA No.38/Chd/2023 dt. 02.08.2023 where it has been held that

“16. In the instant case, we find that through various questions raised during the course of survey, the assessee has been asked about the nature and source of his income and discrepancies so found during the course of survey. In response, the assessee has stated that he is a partner along with his wife in M/s Supreme Petro Foam Industry, a partnership firm engaged in manufacturing of Foam products and sole proprietor in M/s Shivam Coir Foam Products which is selling Foam products on wholesale and retail basis, and besides that, they have no other source of income/interest in any other business / concern. There were certain discrepancies noticed in respect of M/s Supreme Petro Foam Industry wherein the assessee surrendered a sum of Rs 90 lacs in terms

of discrepancy in stock and construction expenses. Further, in respect of M/s Shivam Coir Foam Products, the assessee was asked about the hand-written particulars in terms of certain names and amounts recorded in a diary found during the course of survey and in response, the assessee has submitted that these entries pertain to his proprietorship concern M/s Shivam Coir Foam products, Khanna. It was further stated that these entries are advances/receivables from various persons in respect of his business dealings and were recorded for the purpose of memory. It was further stated that to buy piece of mind, he offers a sum of Rs 15 lacs as additional income for the current financial year subject to no penal action. The same was subsequently reiterated in the surrender letter dated 5/09/2018 wherein the assessee has stated that he offers the additional income for current financial year at normal rate of tax as the said income has been earned by him out of business transactions in the current year. We therefore find that it is a case where there are unrecorded sales made by the assessee during the current financial year and receivables arising out of such unrecorded sales have been offered to tax as additional business income by the assessee. The source of such unrecorded receivables is thus the unrecorded sales which have been explained by the assessee and thus, the necessary nexus with the business of the assessee has been established. The name of the person, the amount receivables, date, etc has been duly recorded in the diary, thus, the statement of the assessee duly stand corroborated by the contents of the diary so found during the course of survey. No doubts, these transactions were not recorded at the time of survey thus qualify as unrecorded transactions satisfying one of the essential conditions, at the same time, the assessee has provided the necessary explanation about the nature and source of such unrecorded transactions, thus, it cannot be said that these are unexplained transactions thus, doesn't satisfy the second condition for invoking the deeming provisions of section 69 of the Act.

17. In light of aforesaid discussions and in the entirety of facts and circumstances of the case and following the decisions referred supra, the income of Rs 15,00,000/- surrendered during the course of survey cannot be brought to tax under the deeming provisions of section 69 of the Act and the same has been rightly offered to tax under the head "business income" and as a necessary corollary, in absence of deeming provisions, the question of application of section 115BBE doesn't arise for consideration."

- (vii) In the case of Montu Shallu Knitwers vs. DCIT In ITA NO. 21/Chd/2023 December 1, 2023 (2023) 69 CCH 0249 Chd Trib It has been held that

"22. In the instant case as well, there is no physical distinction between the accounted stock and unaccounted stock. No such physical distinction was found by the Revenue either. We

therefore find that the difference in stock so found out by the authorities has no independent identity and is in terms of value terms only and thus part and parcel of entire stock, therefore, it cannot be said that there is an undisclosed asset which existed independently and thus, 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 and the difference should thus be treated as business income.

23. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the income of Rs 50 lacs surrendered during the course of survey cannot be brought to tax under the deeming provisions of section 69B of the Act and the same has to be assessed to tax under the head "business income". In absence of deeming provisions, the question of application of section 115BBE doesn't arise and normal tax rate shall apply. The AO is thus directed to assess the income of Rs 50 lacs under the head "Income from Business/profession" and apply the normal rate of tax.

10. In the aforesaid factual background, it was submitted that the assessee has been engaged in the business of manufacturing of wearing apparels and is not engaged in any other business and neither the assessee has any other source of income. The same fact has been accepted by the department during the course of survey action as well as during the course of assessment proceedings later on wherein, no adverse opinion w.r.t. any other source of income of the assessee. Hence, in the first instance, it is hereby submitted that the assessee is engaged only in the business of manufacturing of wearing apparels and any income which accrues to the assessee or any asset which is in the possession of the assessee are wholly earned from the business income of the assessee. During the course of survey action on 29.08.2018, the Ld. AO conducted the physical verification of the stock and compared the same with the value of stock in the books of account maintained by the assessee which itself justifies that the department itself believes that the stock belongs only to the business of the assessee.

Reliance in this regard is placed on the judgment in the case of Daulat Ram Rawatmull vs. CIT [1967] 64 ITR 593, wherein Calcutta High Court held as under:

*" 59/61. In the instant case the assessee is a firm formed for the purpose of carrying on business. There is nothing on record to show that the firm had any source of income other than business. Therefore, in our opinion, it is not*

*unreasonable to hold that any amount representing secret income arose out of business of the firm.”*

- (viii) Reliance in this regard is placed on the judgment dated 18.02.2021 in the case of Shri Harish Sharma vs. The ITO in ITA No. 327/CHD/2020 wherein it was held that that Section 68 not applies when assessee explained nature & source of Income. Hence, when all the incomes earned by the assessee/ assets in the possession of the assessee are only from the business income of the assessee, there do not arise any question as to application of provisions of section 69B of the Act and hence taxing such income at special rate as per section 115BBE of the Act is invalid. In the case of the assessee also, there has been no other source of income identified, neither during the course of survey action nor during the revision assessment proceedings initiated later on. Hence, the income of the assessee is only on account of the business of the assessee carried on by the assessee since past many years and in these circumstances, the provisions of section 69B of the Act are not applicable.
- (ix) Further, reliance is also placed on the following judgments:

- Hon'ble Chandigarh Bench of ITAT in the case of M/s. Sham Jewellers in ITA No. 375/CHD/2022, wherein, it has been held as under:

*“Ground Nos. 8 & 9 challenge the action of the lower authorities in applying the provisions of section 115BBE and thereby charging tax at the rate of 60%. The main thrust of the arguments of the Ld. AR has been that all the additions made or sustained relate only to the business income of the assessee and that nowhere in the assessment order has it been alleged that some other source of income had been detected which gave rise to additional income. It is seen that during the course of assessment proceedings, the various explanations submitted by the assessee have duly mentioned that the surrendered income was derived from the business. A perusal of the assessment order would also show that nowhere in the body of the assessment order, the AO has even contradicted this explanation of the assessee. The AO has not brought on record any iota of evidence to demonstrate that the assessee had any other source of income except income from business and, therefore, it is our considered view that deeming such income under the provisions of sections 68 or 69 would not hold good. In our view, in such a situation, the AO could not have legally and validly resorted to taxing the income of the assessee at the rate of 60% in terms of provisions of section 115BBE of the Act.”*

- In the case of M/s. Sham Fashion Mall in ITA No. 315/CHD/2022, the Hon'ble Chandigarh Bench of ITAT has held as under:

*“12.0 In ITA No. 315/CHD/2022, in the case of Sham Fashion Mall, the only issue before us is the challenge to the provisions of section 115BBE by the AO and its sustenance by the Ld. CIT-(A). In this case the returned income has been accepted by the AO. We have also gone through the assessment order as well as the order of the Ld. CIT-(A) and it is seen that nowhere in the orders of both the lower authorities is there any fact brought on record or even a whisper of any allegation against the assessee that the assessee had any other source of income except income from business and income from other source. There is no iota of evidence to even suggest that the lower authorities had unearthed any other source of income of the assessee except under the heads of income declared by the assessee in the return of income. Therefore, in absence of any such evidence of any other undisclosed source of income of the assessee having been detected by the tax authorities, we are afraid that the invocation of provisions of section 115BBE will not hold good in the present case as well. The detailed reasons and observations in this regard have already been incorporated in Para 10.17 to 10.23 of this order in the case of M/s Sham Jewellers wherein also we have rejected the action of the Income Tax Authorities in applying the provisions of section 115BBE of the Act. Likewise, on identical facts and on identical reasoning and law, we allow the grounds of the assessee in the present appeal also and hold that the application of provisions of section 115BBE of the Act in the case of M/s Sham Fashion Mall was bad in law and the same cannot be sustained.”*

- Hon'ble Chandigarh Bench of ITAT in the case of Gaurish Steels Pvt. Ltd. as reported in 82 Taxmann.com 337 wherein it has been held as under:

*“It has been held that income surrendered by the assessee during the survey on account of discrepancy in cost of construction of building, discrepancy in stock and discrepancy in advances and receivables would be considered as business income and not as deemed income under section 69.”*

- In the case of Bajaj Sons. Ltd., the Hon'ble Chandigarh Bench of ITAT, ITA No. 1127/CHD/2019, has stated as under:

*“The AO has not pointed out any unexplained credit in the books of account, any unexplained investment, any unexplained money, bullion or jewellery, any unexplained expenditure or any amount of loan repaid in the assessment order in this respect. Therefore, the provisions of Section 68, 69, 69A, 69B, 69C and 69D are not attracted on the surrendered amount of Rs. 15 lacs. The said amount of Rs. 15 lacs was offered in case any discrepancy is found in the books of account. However, in actual neither any unexplained investment nor any unexplained expenditure or otherwise any unexplained asset was found during the search action so far as the*

*aforesaid surrender of Rs. 15 lacs was concerned. In these circumstances, the aforesaid surrender of Rs. 15 lacs can be said to have been offered to cover up the discrepancies in respect of likely disallowances of claims, if any, relating to its business income.*

*9. In view of this, since the aforesaid surrender is not covered under the provisions of Section 68, 69, 69A, 69B, 69C and 69D, the provisions of Section 115BBE are not attracted in this case.*

*10. In view of the above, the action of the lower authorities in invoking provisions of Section 115BBE on the surrender income of Rs. 15 lacs is set aside and the AO is directed to compute the said surrendered income under normal provisions as applicable to the business income of the assessee.*

*11. In the result, appeal of the assessee stands allowed.”*

- The Hon'ble Chandigarh Bench in the case of The DCIT vs M/s Khurana Rolling Mills Pvt. Ltd. as reported in ITA No. 745/CHD/2016:

*“9. In the facts of the present case, it is not disputed that the surrender had been made on account of undisclosed debtors. Since the facts are identical to that in the case of Famina Knit Fabs (supra), and no distinguishing facts have been brought to our notice by the Ld. DR, the decision rendered in that case will also apply to the present case, following which we hold that the Ld. CIT(A) had rightly treated the surrendered income as in the nature of business income of the assessee and accordingly, allowed the benefit of set off of losses against the same. The order of the Ld.CIT(A) is accordingly, upheld. The ground raised by the Revenue is dismissed.”*

- In the case of Prashanti Surya Construction Co. Pvt. Ltd. in ITA No. 315/CHD/2014, the Hon'ble Chandigarh ITAT Bench has held as under:

*“Since the facts of the present case are identical to that in Gaurish Steels Pvt. Ltd. (supra), the surrender having been made by the assessee on account of investment made in the BOT project which was the business of the assessee, the decision rendered by the I.T.A.T. in the said case will squarely apply in the present case, following which we hold that the income surrendered by the assessee of Rs. 1.75 crores is assessable under the head 'income from business and profession”.*

- In the case of M/s. Arora Alloys vs. DCIT in ITA No. 1481/CHD/2017 the Hon'ble Chandigarh Bench has held as under:

*“In the light of the above, let us examine the facts of the present case. The stand of the assessee is that expenditure incurred for construction of building was from the routine business, and such addition of Rs.32 lakhs ought to be treated as business income. We find force in this contention of the Id. counsel for the assessee, because the expenditure incurred for creating a business asset and it must have been generated through the business carried out by the assessee. It is pertinent to bear in mind that expenditure laid out for the purpose of business is to be allowed deduction either as expenditure or to be capitalized on which depreciation will be allowed. The assessee might have earned income from the business which has not been accounted and used for constructing the business asset, though specific details have not been discussed either in the impugned order about the nature of evidence found during the course of survey. We also need not to ponder on this aspect because the assessee has admitted this unexplained expenditure on construction of building. This admission has to be accepted as given by the assessee, wherein it was alleged that it is for the purpose of the business. Therefore, to the extent the expenditure incurred for construction of the building, out of unexplained source is concerned, it is to be construed as earned from the business and it will take character of the business income. Once this income is to be assessed under the “business income”, then all incidental benefits for set off from brought forward loss or any other expenditure is to be given to the assessee.”*

The Id. CIT(A) has not spoken a single word on these issue and submission and no contrary judgments have been brought, which show he either has satisfied with our plea or he is not having anything to rebut our contention. Hence the income so surrendered is to held as business income on which provisions of Sec. 115BBE is not applicable.

3. Wrongly erred in invoking Sec. 69 and Sec. 69A of the Income Tax Act, 1961:

The Id. has wrongly invoked the provisions of Sec.69 and 69A on the income surrendered and declared in the ITR.

3.1 Further during the course of survey action at the business premises of the assessee on 05.07.2016 as well as during the course of assessment proceedings, the Ld. AO has not passed any adverse opinion with respect to any other source of income of the assessee, neither the AO has brought on record any adverse material on record. Hence, the business income is the only source of income of the assessee and moreover, in the case of assessee unrecorded sundry debtors and some amount of excess cash have been found during the course of survey which have been related to business of assessee partnership firm , hence in the first instance, the department itself has accepted that the said sundry debtors was of the business of the assessee and such debtors are not arose in a single day, hence, it means that these sundry debtors are only from

the business income of the assessee. And, hence, all the income earned by the assessee is only on account of such business of the assessee and therefore, needs to be taxed under the business head only. Both the lower authorities have not disputed these contentions nor brought on record to disprove the same.

3.2 Definition of Sec 69 of the Income Tax Act is “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 assessee offers no explanation about the nature and source of the investments may be deemed to be the income of the assessee of such financial year”.

After reading of Sec 69 it was proved that the following condition must be fulfilled for applicability of Sec 69 of I.T. Act 1961.

1. Assessee has made investment in during the A.Y.
2. Such statement is not recorded in the books of accounts, if any maintained by him for any sources of income.
3. Assessee offer no explanation or explanation is found not satisfaction by A.O.

As per language of Section, Sec 69 can be invoked only when the assessee has made investment and not recorded such investment in the books of accounts and offer no explanation or unsatisfactory explanation. Both the condition given in point 2 and 3 are cumulative and satisfaction of either of condition does not automatically triggers rigours of Sec 69.

In other words we can say that when the assessee has recorded such investment in his books of accounts then no explanation is required to be offered for the purpose of Sec 69. The addition u/s 69 can be made only when such investment is not recorded in the books of accounts and not offered satisfactory reply.

On perusal of the provision it is proved that the provision of Sec 69 of the I. T. Act is not applicable on the assessee.

3.3 That during the F.Y. 2016-17, a survey u/s 133A was conducted on the premises of the assessee on dated 04.07.2016. The assessee declared an amount of Rs. 1,97,35,000/- on account of noted in diary found during the course of survey. Since the survey team could not found any investment made by the assessee which were not recorded in the books of account, any documents/information/records which showed that assessee was found to be the owner of any money, bullion, jewellery or any other valuable article which were not recorded in the books of account but which showed that the assessee has incurred any expenditure for which it had offered no explanation about the sources of such expenditure or part thereof. Therefore since no evidence was found to show that declared income represented any undisclosed income, the sources of which had not been disclosed by the assessee so it could not be regarded as deemed income under the provision of Sec.69 of the income Tax

Act, 1961. The same was also decided in the case of DCIT vs. Khurana Rolling Mills (P) Ltd (ITAT Chandigarh).

**3.3** In the above matter there are two issue (i) whether the surrender income fall u/s 68,69 or under the head income from other sources or business income, (ii) whether the tax on the surrender income should be charged at the rate of 30% +cess or the rate of 60% and Surcharge @25% +3% cess.

3.4 As from the surrender, it is cleared that the surrender was made on account of sundry debtors. As during the course of statements the assessee firm in Answer to Question No. 11 has submitted that in the diary there are entries of firm unrecorded debtors which are not recorded in the books of accounts, the amount of total unrecorded debtors are Rs.1,97,34,500/- which is being surrendered as undisclosed income for the current year. As the assessee firm was/is engaged in the business of real estate developers and builders and as the word debtors are used in the firm or business entity as business transaction. For others it is used loan and advances or deposits etc. And the lower authorities have not disputed the same.

3.5 Thus, the surrender was on account of debtors/receivables relating to the business of the assessee firm only and the Id. AO no-where disputed these facts. The Revenue has accepted the surrender as such, as being on account of sundry debtors. It follows that the debtors were generated from the sales/receipts made by the assessee firm during the course of carrying on the business of the assessee firm, which was not recorded in the books of the assessee firm. Though the said income was not recorded in the books of the assessee firm but the source of the same stood duly as being from the business of the assessee firm, the survey team after question 11 no other question has asked from the partner of the firm, to remove any doubt and partner of the firm has signed the statements as recorded in the mental pressure. Even other-wise no other source of income of the assessee firm is found there on record either disclosed by the assessee firm or unearthed by the Revenue. The preponderance of probability therefore is that the debtors were sourced from the business of the assessee firm. 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 firm. Having held so, the same was assessable under the head 'business and profession' and as stated above. The excess cash found of Rs. 9,25,000/- are related to the undisclosed income of the firm as mentioned in the reply of question no. 10 of the statement recorded. And no provisions of 115BBE of the Act is also applicable. On this preposition kindly refer the case of Famina KnitFabsAndAnr. vs. ACIT AND ANR198 TTJ 258 (Chd.).

The survey team at the time of recording the statements has also not referred the provisions of 68/69 and 69A nor stated surrendered income shall be taken u/s 68/69 and 69A. Then how the department can take the same u/s 68/69 and 69A. It was the duty of survey team to bring its intention at the time of taking the surrender from the assessee firm. As it was the duty of department to explain the same to the assessee. A general persons cannot understand the technicalities of the complex law of the income tax . And it is also the settled legal position of the law the Income tax Authorities cannot take advantage of ignorance of assessee toward of law.

It is law principal of law that right income should be taxed in right and right of income. Only for burden of tax on innocent assessee head of income cannot be changed. It is the duty of Income tax authority who know the law to bring the correct facts and correct law and correct head of income before the assessee.

In the case of CIT V/s B.G. Shrik Construction Technology (P) Ltd(Bom.) 395 ITR 371: Claim for deduction not made in the return, Tribunal was justified in holding that the assessee was entitled to make a claim which was not made in the return of income originally filed u/s 153A r/w s143(3) before the Id.AO and also before the appellate authorities .

In the case of Pr. CIT v/s Ankit Metal & Power Ltd 182 DTR 333(Cal ) 09.07.2019 that Tribunal has the power to entertain the claim of deduction not claimed before the AO by filing the revised return and tribunal in exercising of its power u/s 254 justified in accepting this claim though no revised return u/s 139(5) was fled before the AO also refer CIT v/s Britania Industries Ltd 396 ITR 677(Cal.)

*In the case of Suresh Kumar Agarwal vs. JCIT in ITA Nos. 1073 & 1074/JP/2018 Mar 15, 2022 (2022) 64 CCH 0234 Jaipur Trib it has been held Penalty—Penalty for failure to answer question, sign statement, furnish information, returns or statements, allow inspection etc.—Assessee is an individual and having business of Building construction and dealing real estate and after construction completed sold flats as per market price—Assessing Officer initiated penalty proceedings 272A (1)(c)—CIT upheld penalty—Held, there is no finding of AO based on some contradictory evidence to disapprove that explanation offered by assessee was false or assessee was not able to substantiate explanation furnished or fails to prove that such explanation is not bona fide and that all facts relating to same and material to computation of his total income has not been disclosed by him—Ignorance of law is certainly no excuse for a default committed but, at same time, there is no presumption in law that everybody knows law—Application of this rule would differ from case to case and person to person—In a given case, there may be a person who is quite illiterate, living in remote village, rarely coming in touch with law enforcing machinery and not required to discharge any statutory obligations under a particular law—Ignorance of law may be a good excuse in his*

*case—There is no willful failure to comply with summons u/s 131(IA—Therefore order on CIT (A) is accordingly set aside and thus penalty u/s 272A(1)(c) levied by AO is not in accordance with law therefore same is cancelled—Assessee's appeal of allowed.*

- Hon'ble ITAT, Indore Bench in the case of ACIT v. Anoop Neema vide its order in ITA 05/Ind/2020 dated 06.01.2022 has held:

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 or 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 Cha 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:

- Hon'ble ITAT, Rajkot Bench in the case of Uniroyal Sthapatya v. PCIT vide its order in ITA 71/Rjt/2022 dated 20.12.2022 has held:

6. We have heard the rival contentions and perused the material on record. In our considered view, in the instant set of facts, if cannot be held that the order passed by the AO is erroneous and prejudicial to the interests of the Revenue. From the records, it is evident that the AO issued a specific show cause notice seeking explanation from the assessee as to why in the instant set of facts the provisions of section 69A/69C should not be invoked and consequently, why tax should not be imposed under section 115BBE of the Act of the act. Further, the assessee also filed a detailed reply in response to the aforesaid show cause notice and upon consideration of the same, the reply of the assessee was accepted by the AO. Further we observe that the Indore ITAT in the case of DCIT v. Punjab Retail private Ltd. in ITA number 677/Ind/2019 has held that since applicability of section 115BBE of the Act of the Act was amended with effect from 15-12- 2016, it will not apply to search/survey conducted prior to 15- 12-2016. Further, the

Gauhati Tribunal in the case of Abdul Hamid v. ITO 83 ITD 711 (2020) held that assessment order could not be held to be erroneous and prejudicial to the interest of the revenue on account of non-invocation of section 115BBE of the Act. In the case of Balvinder Singh v. PCIT in ITA number 570/Del/2022 dated 22-08-2022, the Delhi ITAT observed as below:

9. And amendment has not brought in section 115BBE of the Act w.e.f. 2017-18 but the same was not therein the Statute on the date of survey. Taking a leaf out of amended provisions, the PCIT was of the opinion that the tax rate should have been 60% instead of 30% because of which the assessment order has become prejudicial to the interest of the revenue.

10. The mode point is whether the amendment is prospective or retrospective, as on the date of survey, the amended provisions were not there in the statute. In our considered opinion, this is a highly debatable issue, which cannot be subject matter of exemption of jurisdiction under section 263 of the act. Moreover, a perusal of the assessment order clearly shows that the assessing Officer has nowhere invoked the provisions of section 68/69 of the act to impute the tax rate of section hundred and 15BBE of the act.

The above matter is directly covered by the recent decision of this Hon'ble bench in the case of DCIT v/s Sh. Ram Narayan Birla in ITA No. 482/Jp/2015 dt. 30.09.2016, where the Hon'ble Bench at page 4 in para 4.3 held that

“Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed 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 v/s DCIT 131 TTJ (Ahd)1 has held that in a case where source of investment/ expenditure is clearly identifiable and alleged undisclosed assets has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first was to be taxed is the undisclosed business receipts invested in unidentifiable unaccounted assets and only on failure it should be considered to be taxed u/s 69 on the premises that such excess investment is not in the books of account and its nature and sources is not identifiable. Once such excess investment is taxed as undeclared business receipts then taxing it further as deemed income u/s 69 would not be necessary. Therefore, the first attempt of the AO 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 receipts under the particular head. It is observed that there is no conflict with the decision of Hon'ble Gujrat

High Court in the case of Fakir Mohd. Hajihasan(Supra) wherein investment in an assets 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 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 stock was part of the stock. The revenue has not pointed out that 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 to the AO to treat the surrendered amount as excess stock qua the excess stock.”

The principal of the above judgment is also applicable in the present case.

- 3.6 Further, in the present case after considering the true and correct fact of the case, the provisions of section 69 and 69A cannot be invoked and the sundry debtors and excess cash have to be treated as business income of the assessee firm. Admittedly, in the present case, no existence of evidence in relation to any unaccounted independent identifiable other investment which was found during the course of survey.

It is also admitted fact the appellant admittedly is engaged in business from past many years. The sundry debtors and excess cash, if any found during the course of survey was of business only and that too on account of the suppressed profits of business over the years. The sundry debtors and excess cash have not been separately identified and the undisclosed income of past years if any was invested in same business in the form of sundry debtors and excess cash. Under such circumstances, the sundry debtors and excess cash if any cannot be separated from the total of business either recorded or not recorded in the books of accounts. So, the investment in sundry debtors is part and parcel of business only. Further in the present case the Id. AO nowhere proved nor placed any material evidence on the records from, which it can be inferred that the sundry debtors found was not part of business but the other known sources. The Id. AO has based his case just on assumptions and presumptions without bringing on records any positive evidence or cogent reason in support of his observations as the sundry debtors was not part of business though found at business premises only. It is also the settled legal position that no addition can be the basis of suspicion, assumptions' and presumption. An allegation remains a mere allegation unless proved. Suspicion may be strong however cannot take the place of reality, are the settled principles kindly refer Dhakeshwari Cotton Mills 26 ITR 775 (SC) also refer

R.B.N.J. Naidu v/s CIT 29 ITR 194 (Nag), Kanpur Steel Co. Ltd. v/s CIT 32 ITR 56 (All). Also refer CIT v/s Kulwant Rai 291 ITR 36 (Del). In CIT v/s Shalimar Buildwell Pvt Ltd 86 CCH 250 (All). And in the present case the Id. AO invoked provision of sec. 115BBE merely on suspicion which was not desirable in the eye of law and invoking provision of section 69 invalid ignoring the true and correct facts of the case. The provision of section 69 cannot be made applicable as primary condition for invoking of the provision is that the assets should be separately identifiable and it should have independent physical existence of its own. Since sundry debtors is a result of suppression of profit from business over the years and has not been kept identifiable separately, the investment in the sundry debtors has to be treated as business income.

Once sundry debtors is treated as business income (although not denied by the AO and no comments thereon) then provision of Sec. 115BE is not applicable. Hence the provisions of Sec. 115BBE so applied by the Ld. AO is not justified hence deserves to be deleted.

4. Alternatively and without prejudice to above it is also submitted as under:

Wrongly applied the provisions of Sec. 115BBE and charging the tax rate at higher side with retrospective effect and others.

4.1 Gross breach of principal of promissory or contract: The survey team has not stated at the time of survey that in future the tax rate shall be at the rate of 60% +25% Surcharges + 3% cess. The assessee firm has surrendered the income on the basis of rate of tax applicable or privileged at that time i.e. on the date of surrender on 05.07.2016. And it was not known by the assessee or by any other person that after the surrender, from the December 2016 the tax rate shall be changed under these circumstances. The surrender made by the assessee firm at rate of tax applicable on the date of surrender on 05.07.2016 as a promise and contract between the assessee firm and department. And the department accordingly had taken the cheques of advance tax from the assessee firm of that tax on surrender amount. Thus the assessee firm has honestly fulfilled his promise while filling the ITR in which firm has paid the entire tax i.e. firm has honoured the surrendered. Firm has not departed from his promise and contract. Now the department has breached from its promise or contract i.e. it is the breach of promissory or contract. The department has back from his stands after 3 years +3 months from surrender and after 2 years from the filling the ROI before the 15.10.2019 the department has not given any notice or his views and kept to the assessee firm in dark by taking misinterpretation of the Second amendment of Sec. 115BBE. While if we look in Section 294 of the I.T. Act as above it is the invalid

illegal action of the Id. AO. It is was the duty of the revenue to inform to the assessee just immediately the amendment in December 2016 by stating that you (assessee) had given the advance tax cheques and made the surrender at the rate of 30 tax + SC but now the law has changed and you (assessee) should give the more cheque of advances tax cheque or return should be filed at the tax rate as per new law. When a party is departing from his contract by one and other reasons then it was the onerous duty of him to give the notice before taking any action by them. As the assessee as per his/it promise has declared the surrender income in the return in the return filled on dt. 13.11.2017, while the amendment act has come in December 2016, if the Revenue had given the notice to the assessee before filling the return of income, the assessee could have not shown this income and he could have also claimed the unrecorded expenses against this unrecorded income and the tax can be charged on the net income. Hence a poor e assessee should not have been suffered.

- 4.2. Clear violation of the Section 294 of the Act is provides as under:-  
Section 294 of the I.T. Act to have effect pending legislative provision for charge of tax If on the 1st day of April in any assessment year provision has not yet been made by a Central Act for the charging of income- tax<sup>1</sup> ] for that assessment year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding assessment year or the provision proposed in the Bill then before Parliament, whichever is more favourable to the assessee, were actually in force.

In the present case on the 1<sup>st</sup> of April 2016 (which is First day of April of A.Y. 2017-18) Amendment provisions of Sec. 115BBE has not been made for A.Y. 2017-18. Hence the amended provision in December 2016 is not applicable for the A.Y. 2017-18 as per clearly provided in the Act itself and still there is no change in the provision. And very important to note that in this provision itself provided whichever is more favourable to the assessee, were actually in force.

Thus the favourable rate of charging the tax was 30% not 60% +25% +cess.

- 4.3 Not applicable retrospective effect: Further, it is submitted that the amendment provisions of section 115BBE of the Act as amended by the Taxation (Second Amendment) Act, 2016 are applicable from 15.12.2016 and are not retrospective in operation and therefore, not applicable to the survey operation conducted in case of the assessee on 4<sup>th</sup> and 5<sup>th</sup> of July, 2016. It is submitted that the tax laws as the Taxation (Second amendment) Act, 2016 was amended on 15.12.2016 and received the ascent of President of India on the said date. It is

submitted that though the amendment was applicable for assessment year 2017-18 but only on income referred to in said section pertaining to the date after 15.12.2016. As in case of the assessee, the unrecorded sundry debtors was found on 4<sup>th</sup> and 5<sup>th</sup> of July, 2016 and accordingly at the material time, old provisions of section 15BBE are applicable. It was accordingly submitted that the amendment provisions are not retrospective in operation and are not applicable in the present case and has been wrongly invoked by the Assessing Officer under proceedings initiated u/s 143(3)/154 of the Act. In support, the reliance was placed on Hon'ble Supreme Court decision in case of Karimtharuvi Tea Estate Ltd. vs. State of Kerala [1966] 60 ITR 262 (SC). Also refer CIT v/s Scindia Steam Navigation Co. Ltd. 42 ITR 589 (SC).

4.4 The same was also decided in favour of assessee in following High Courts and Supreme Court decision.

- (i) The Assessing Officer has failed to appreciate and Consider that it is a settled proposition of law that legislations which modify accrued rights or which impose obligations or imposed new duties or attach a new disability have to be treated as prospective. This is so held by the Hon'ble Supreme Court in case of CIT v. Vatika Township Private Limited (2014) 109 DTR 33 where the Hon'ble Court has given the following finding for deciding whether a provision has prospective operation or retrospective operation:

“39(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject ‘Finance Act, 2002 — Explanatory Notes on provision relating to Direct Taxes’. This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory / retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BBE, would be prospective i.e. it will take effect from 1<sup>st</sup> June, 2002. Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

“Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part iii of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act. ”

“Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part iii of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act. ”

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion at the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

40. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench In Suresh N. Gupta treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. Said judgment is accordingly overruled.”

*(ii) Ansal Housing and Construction Ltd. vs ACIT (2016) 389 ITR 373, Delhi HC.*

*(iii) Vodafone International Holdings v. UOI (2012) 6 SCC 613 (SC)*

*(iv) Sony Ericsson Mobile Communication India Pvt. Ltd. CIT (2015) 374 ITR 118 (Delhi)*

*(v) CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC) vi)*

*(vi) CIT v. Ansal Land Mark Township (P) Ltd. (ITA 160/2015 dated 28.05.2015 Delhi High Court)*

(vii) *CIT v. NGC Network India Pvt. Ltd. (ITA No. 397/2015 dated 29th January 2018)*

(viii) *CIT v. M/s Revathi Equipment Ltd. [2008] 298 ITR 67 (Mad) 4.8.*

That Rajasthan High Court has also decided in the case of Niharika Jain w/o Sh. Andesh Jain vs. Union of India in Sb. Civil Writ Petition No. 2915/2019 and other dt. 12.07.2019 that Benami Amendment Act, 2016 cannot have retrospective effect. It was decided that court has no hesitation to hold that the Benami Amendment Act, 2016 amending the principal Benami Act, 1988 enacted w.e.f. 1st November, 2016 i.e. the date determined by the Central Govt. in its wisdom for its enforcement, cannot have retrospective effect.

In the case of Shri Hari Narain Gattani vs. DCIT in ITA No. 186/JP/2020 9th October, 2020 (2021) 186 ITD 0434 (Jaipur-Trib). It has been held that

“If we look at the provisions of section 115BBE, it provides that where the total income of the assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income tax payable shall be at the rate of 30% on income so referred in said sections. Further, in terms of amended provisions of section 115BBE by the Taxation Laws (Second Amendment Act), 2016, it provides that where the total income of the assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139 or the total income of the assessee determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not reflected in the return of income furnished under section 139 of the Act, the income tax payable shall be at the rate of 60% on income so referred in said sections. Thus, both the pre-amended and post-amended provisions of section 115BBE talk about the income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D. The change which has been brought about in the provisions relates to income so referred in aforesaid provisions so defined which is either reflected in the return of income or determined by the Assessing Officer and in both cases, it will be covered by the provisions of section 115BBE of the Act and rate of taxation has been increased from 30% to 60% on such specified income. There is therefore nothing stated in either the pre-amended or post-amended provisions of section 115BBE that where the assessee surrenders undisclosed income during the search action for the

relevant year, the tax rate has to be charged as per provision of section 115BBE of the Act.

Reliance is also placed on the Judgment of the Hon'ble Income Tax Appellate Tribunal, Jaipur Bench in the case of The Assistant Commissioner of Income Tax, Central Circle-2, Jaipur Vs M/s Sanjay Bairathi Gems Limited in ITA No. 157/JP/2017 wherein their Lordships have held that the excess stock found during the course of survey is a part of the business income and the case laws relied upon by the AO is not applicable and the additional income declared by the assessee is not liable to tax as per the provisions of section 115BBE of the Act. Further the reliance is also placed on the judgment of the Hon'ble Apex Court in the case of CIT Vs M/s Vatika Township Private Limited reported in 367 ITR page 466 wherein it has been held that it is a settled law that any amendment which increases the tax burden of the assessee has to be considered prospective and not retrospective. Also, the legislations which modify accrued rights or which impose obligations or which impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. It further held that "If the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subject as against the revenue, has to be preferred."

Recently the Hon'ble Supreme Court in the case of M.M. AQUA TECHNOLOGIES LTD. VERSUS COMMISSIONER OF INCOME TAX, DELHI-III CIVIL APPEAL NOS.4742-4743 OF 2021 (Arising out of SLP (Civil) Nos. 35883-35884 of 2016) Dated: - 11 August 2021

Held that a retrospective provision in a tax act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in *Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717* as follows:

*As was affirmed by this Court in GoslinoMario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar,*

*(2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.*

*There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word “earned” had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income “arising or accruing in India”. The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, “income payable for service rendered in India”.*

*When the Explanation seeks to give an artificial meaning to “earned in India” and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.*

This being the case, Explanation 3C is clarificatory – it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.

Third, any ambiguity in the language of Explanation 3C shall be resolved in favour of the assessee as per Cape Brandy Syndicate v. Inland Revenue Commissioner (supra) as followed by judgments of this Court – See *Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613* at paras 60 to 70 per Kapadia, C.J. and para 333, 334 per Radhakrishnan, J.

The High Court judgment dated 18th May, 2015, is clearly in error in concluding that ‘interest’, on the facts of this case, has been converted into a loan. There is no basis for this finding - as a matter of fact, it is directly contrary to the finding on facts of the authorities below.

The principal is also applicable in the present case

. Full Bench of Hon’ble Patna High Court in case of Loknath Goenka v. CIT (2019) 417 ITR 521 with reference to insertion of section 64(1)(iii) w.e.f. 01.04.1976 held that the tax liability under the said provision could be charged on the assessee in the assessment in the assessment which was to be made for that accounting year i.e. 1976-77 which would be done in A.Y. 1977-78 as the amending act introducing a new tax liability which came into force w.e.f.

01.04.1976 could not be given a retrospective effect and be made applicable to assessment year 1976-77. The relevant part of the judgment reads as under:

“2. The point for consideration in the reference is whether the Appellant Tribunal was correct in law in holding that the share income of minor sons of the assessee, including the share in interest on capital credited to the minor sons out of the partnership firm was to be computed in the hands of their father under Section 64(1)(iii) in the Assessment year 1976-77. The said provision was introduced in the income Tax Act by the Taxation Law (Amendment) Act 1975 with effect from 1.4.1976, whereas the accounting year of the assessee(s) in the instant case(s) came to an end on 10.08.1975 and on 31.12.1975 in Taxation Case No.126 of 1983 and Taxation Case No.28 of 1986 respectively.

17. Reading the judgment of the Apex Court in the case of Kesoram Industries and Cotton Mills Ltd. as Wealth Tax Commissioner (Central), Calcutta AIR Y966 SC 1370 harmoniously with the Constitution Bench judgment of the Apex Court in the case of Karimtharuvi Tea Estate Ltd AIR 1966 SC 1385, this Court would observe that the argument advanced by Counsel for the assesseees (Amicus Curiae) as well as the Department can be made only in respect of a rate prescribed under a Finance Act or an Act providing a surcharge if the same is brought into force on the 1<sup>st</sup> of April of the assessment year in which assessment for the previous year is being done as the same would only provide for ascertaining the rate, for existing liability under the Income Tax Act. But that is not the case here. Under the new provision, i.e. Section 64(1)(iii) a new liability has been prescribed and not the rate for ascertaining the liability. Such new liability under the Income Tax Act cannot be given a retrospective effect. Such liability can only be fastened on an individual if the same was existing at the time of accrual and not at the time of assessment. The observations of the Apex Court in paragraph 33 of the judgment in the case of Keshoram Industries and cotton mills (supra), clarifies this position.

18. In view of the judgments of the Apex Court in the case of Keshoram Industries (supra) as well as Karimtharuvi Tea Estate Ltd (supra) this Court would have no hesitation in holding that for deciding the liability of a particular provision of the Income Tax Act, the date of accrual of income would be relevant. If the provision comes into force in a particular financial year, it would apply to the assessment for that year but cannot be made applicable in respect of assessment for a previous year.

3. The Assessing Officer has failed to appreciate and consider that Taxation Laws (Second Amendment Act), 2016 also inserted a new sub clause (1A) to section 271AAB whereby the liability of penalty in case of searches was increased. However, this clause was specifically made applicable only where searches has been initiated on or after the date on which the Taxation Laws (Second Amendment Act) Bill, 2016 receives the assent of President and thus this clause was specifically made effective only where the searches took place

on or after 15.12.2016. Section 115BBE inserted by the same Amendment Act is specifically made effective from 01.04.2017. Thus, from the analogy of section 271AAB it is evident that section 115BBE is also applicable where income referred to in that section is assessed on or after 01.04.2017 i.e. AY 2018-19. Hence the substituted section 115BBE is not applicable for AY 2017-2018.

6. Under identical facts various other Tribunals have held that invocation of higher rate of tax is not proper. Reliance is placed upon:

- Hon'ble ITAT, Indore Bench in the case of DCIT v. Punjab Retail Pvt. Ltd. vide its order in ITA 677/Ind/2019 dated 08.10.2021 has held:

14. if is also a fact that the Ld. AO has not brought on record any evidence or material to establish that the assessee was involved in any other activities or having any other source of income. While deleting the addition made by the Ld. AO the Ld. CIT(A) observed as follows:

"First of all let me discuss whether the provisions of section 15BBE are applicable to this case or not. The provision of disallowance of any loss with the income as computed under clause (a) of sub section (1) of section 115BBE came into force w.e.f 01.04.2017. Hon'ble Supreme court in the case of CIT vs Vatika Township Pvt Ltd (2014) 24 ITJ 532 (SC); (2014) 271 CTR 1: (2014) 227 Taxmann 121 has held that

"An amendment made to the taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the department- on the contrary, imposing a retrospective levy on the assessee would have caused undue hardship. Hon'ble ITAT Indore in the case of Priyadharshani Construction vs ITO (2012) 19 ITJ 276 (Trib-Indore) has held that "Substantive law shall be understood to be applicable prospectively unless made specifically retrospective. Thus, it is settled position of law that provision of section 115BBE of the Act is clearly not applicable in case of business income which is taxed under section 28 to 44 of the Income Tax Act. The assessing officer also failed to bring on records any other source of income of the appellant apart from the one that is show<sup>^</sup>i in return of income.

In view of above facts and circumstances of the case it is respectfully prayed that section 69 of the Income Tax Act 1961 read with section 115BBE is not applicable to the facts of the case of the assessee and the disserve to be delete.

- Hon'ble Jodhpur bench of ITAT in the case of Lovish Singhal & Others vs ITO (Appeal No 143/ Jodh/ 2018);
- Hon'ble Jeipur bench of ITAT in the case of DCIT vs Ramnarayan Borla [Appeal No 482/ JP/ 2015 dt 30-09-2016),

- Hon'ble Supreme Court in the case of Lakhmichand Bajinath Vs CIT as reported in 35 ITR 416,'
- Hon'bte Apex Court in the case of Nalini Kant Ambalal Mody vs SAL Narayan Row as reported in 61 ITR 428.

Prayer: In view of the above facts, circumstances of the case and legal position of law the higher rate of tax so charged i.e the excess demand so raised may kindly be deleted, the provisions of sec. 115BBE may kindly be held not to applicable in this case and the assessment order may kindly be quashed and oblige.”

6. To support the contentions so raised in the written submissions, reliance was placed on the following evidence / records / decisions and the compilation of case law filed by the Id. AR of the assessee :

S. No.	Particulars	Page No.
1	Copy of ITR with computation of total income	1-3
2	Copy of Notice u/s 143(2)	4-5
3	Copy of Statement of partner recorded u/s 133A	6-13
4	Copy of WS to CIT(A)	14-29

**Case laws relied upon:**

- **PCIT vs. Bajargan Traders** in D.B. Income Tax Appeal No. 258/2017 (HC)
- **Shri Baljinder Kumar vs. DCIT** in ITA No. 38/Chd/2023 dated 02/08/2023
- **DCIT vs. M/s Punjab Retail Pvt. Ltd.** in ITA No. 677/Ind/2019 dated 08.10.2021
- **Montu Shallu Knitwers vs. DCIT** in ITA No. 21/Chd/2023 dated 01.12.2023

7. In support of the grounds so raised, Id. AR for the assessee vehemently argued that the assessee clearly explained the source of

amounts recorded in the diary and the names of the debtors. These debtors are stated to be as regards the project of the assessee, as clarified by the partner.

As further pointed out, while answering Q No. 11 at the time of survey, he categorically submitted that the list depicted the amounts receivable on account of the business and receipts for the year under consideration. The assessee also stated that he surrendered the undisclosed income as its income for the year under consideration.

The assessee while filing the return of income owned up the disclosure of the income made during the survey and paid the due tax thereon.

It has been submitted on behalf of the assessee that now in the assessment proceedings, there is no deviation as to the returned income of the assessee, and that the only deviation proposed by the Assessing Officer is that of the rate of tax to be levied.

As further submitted on behalf of the assessee, nowhere in the computation of income or in the ITR the assessee claimed that the income falls within the meaning of section 69 or 69A of the Act. Ld. AR of the assessee also submitted that during the assessment proceedings also the assessee submitted that names of the debtors disclosed by the assessee

and thus the source of that debtor arise from the business of the assessee. Thus, the assessee in turn also explained that the source of income offered and in turn deposited in the bank account of the assessee sourced from that amount which was disclosed by the assessee in the course of survey.

Further, it has been submitted that the disclosure of income was made much before the demonetization announced and therefore, the amount which was disclosed sourced from the business of the assessee firm cannot be considered as undisclosed income of the assessee.

Based on the above submissions, Id. AR of the assessee has submitted that the Assessing Officer should not have invoked the provisions of section 68 & 69A of the Act and that too without making any further investigation as to the source of income offered in the ITR so filed.

8. Per contra, Id. DR has relied upon the findings of the Assessing Officer as well as that of Id. CIT(A), and submitted that the income that has been disclosed by the assessee in the ITR is undisclosed income and the same was disclosed only before the survey team.

9. Ld. AR of the assessee, in the rejoinder, has submitted that though the assessee raised ground before Id. CIT(A) that in the case of the

assessee provisions of section 69 & 69A could not be made applicable, but ground No. 4 raised by the assessee, has not been decided by Id. CIT(A). As further submitted, Id. AO as well as Id. CIT(A) could not bring on record anything that the income offered by the assessee is not business income and is undisclosed income as per provisions of section 69 & 69A of the Act.

10. We have considered the rival contentions and perused the material on record.

In this case, the only dispute is whether the income offered by the assessee falls within the meaning of section 69 & 69A of the Act or not, and as to whether the same is to be charged to tax at normal rate or the rate as prescribed u/s. 115BBE of the Act .

While framing the assessment the Id. AO noted in the assessment order :

*“ I am satisfied that the assessee has failed to include unexplained investment in the form of debtors u/s 69 and excess cash u/s. 69A of the IT Act in the return of income hence penalty proceedings u/s. 271AAC of the IT Act is initiated separately.”* He also noted further that *“Assessed u/s. 143(3) of the IT Act at total income of Rs. 2,06,60,000/-. Tax on income determined u/s. 69 & 69A at Rs. 2,06,60,000/- is taxed @ 60 %, surcharge @ 25 % and Cess @ 3 % u/s. 115BBE of the IT Act”*.

As noticed above, the assessee surrendered both the amounts as income for tax purpose for the A.Y. 2017-18 relevant to F.Y. 2016-17 as

income from the project that had just started, and paid the tax as regular income of the assessee.

The assessee objected to the proposal of the Id. AO, as per his letter dated 08.11.2019, to make provisions of section 115BBE of the Act applicable.

Ld. AO did not accept the submission of the assessee and for the following reasons, took the view that the considering the nature of income the provision of section 115BBE would apply to the facts of the case.:

“(i) It is clear that section 115BBE was originally introduced by finance Act in 2012 w.e.f 01.04.2013 and applicable for A.Y 2013-14 and onwards. The main object of introduction of this section was to curbe the practice of laundering of unaccounted money by taking advantage of basis exemption limit. Thus it was proposed to tax the unexplained credits, money, investment, expenditure etc. which had been deemed as Income under section 68, 69, 69A, 69B, 68C and 69D at the rate of 30% (Plus surcharge and cess as applicable)

(ii) The section 115BBE was amended vide taxation laws (second amendment) Act 2016 w.e.f. 01.04.2017 Le. for A.Y. 2017-18 and onwards. In this amendment, the Govt. has only changed the income tax rate from 30% to 60% of the income determined u/s 68, 69, 69A 69B 69C and 69D of the IT Act Surcharge 25% on income tax and applicable cess was also chargeable from the assessee.

(iii) Vide circular No. 3/2017 and 11/2019 the CBDT has cleared the position of applicability of this section in which clearly mentioned that this amendment takes affect from 01.04.2017 and will, accordingly, apply from AY 2017-18 and subsequent assessment years.

(iv) The real purpose of introducing this amendment was only change higher tax in respect of income expenditure investment on the assessee who fails to explain the nature and source of said income/expenditure/investment.

(v) It is clear that the purpose and object of the latest amendment is only to prevent the unaccounted money in system and if found any income under section 68, 69, 69A 69B 69C and 69D tax should be charged @ 60%.

(vi) The plea of the assessee that the amendment to section 1158BE should come into force wef. AY 2018-19 is not acceptable because it is clearly mentioned in the amended section u/s 115BBE that the amendment is applicable for A.Y. 2017-18 and onwards.

(vii) The case laws given by the assessee are not applicable in the case of assessee because facts of cases given by the assessee and these cases are different.

(viii) The assessee himself admitted in reply filed on 06.11.2019 that unexplained investment in form of sundry debtors are covered u/s 69 & excess cash is covered u/s 69A of the IT Act but the disclosed income u/s 69 & 69A in the hand of the assessee has not disclosed such undisclosed sundry debtors u/s 69 & excess cash u/s 69A of IT Act in the IT return, but disclosed under income from other sources.

11. As is evident from the findings recorded by Id. AO, he had discussed the provisions of section 69 & 69A and then proceeded to levy higher tax as per provision of section 115BBE of the Act.

The assessee vide letter dated 06.11.2019, copy made available to us by Learned AR in the course of arguments, claimed that the income so disclosed was of the project, which had just started during the year under consideration and further that the amounts shown to have been received from the various parties as booking money. The facts so presented by the assessee were not further enquired by the Id. AO.

Ld.AO neither examined the list nor raised a single question about the explanation furnished by the assessee as to the details of the source

and nature of income earned. Ld. AO did not dispute the source of such income while also verifying the source of amount deposited into the bank account.

So, once the Revenue accepted the income disclosed in the ITR filed source of which was collection from the sundry debtors of the business of assessee firm and said income stands already taxed accepting the source as income arising out of the project, same could not be considered as unexplained investment.

Section 69 of the Act reads as follows:

**“Unexplained investments.**

**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.”

12. In the given set of facts, it is not a case of investment of the abovesaid amount by the assessee, and rather, as per list prepared by the assessee, a case of receipt of the amounts from the sundry debtors, which was offered for tax as regular income of the assessee firm. Said claim of the assessee was not disputed or challenged, and furthermore, there is no further evidence adverse to said claim raised by the assessee. Therefore, it

cannot be said to be a case where provisions of section 69 come into application.

Similar issue has been decided by the co-ordinate Bench of ITAT, Chandigarh Benches, Chandigarh in the case of **Montu Shallu Knitwars vs. DCIT**, in ITA No. 21/Chd/2023, on December 1, 2023. Therein, it has been held as under:-

“18. We have heard the rival contentions and perused the material available on record. The AO has invoked the deeming provisions of section 69B and brought to tax excess stock found during the course of survey which is under challenge before us. It is a settled legal proposition that there is difference between the undisclosed income and unexplained income and the deeming provisions are attracted in respect of undisclosed income however, the condition before invoking the same is that the assessee has either failed to explain the nature and source of such income or the AO doesn't get satisfied with the explanation so offered by him.

19. In particular, for the deeming provisions of section 69B to be attracted in the instant case, there has to be a finding that the assessee has made investments in the stock during the financial year and such investments are not fully recorded in the books of accounts so maintained by the assessee, and the assessee offers no explanation about the nature and source of the investments or the explanation so offered is not found satisfactory in the opinion of the AO. Therefore, the explanation so offered by the assessee explaining the nature and source of such undisclosed income and the reasonability of the explanation so offered by the assessee needs to be analysed and examined to draw necessary conclusions in this regard.

20. For the purposes, we refer to the statement so recorded of the one of the partners of the assessee firm during the course of survey on 29/08/2018. In Question no. 35, it was stated that during the course of survey proceedings u/s 133A, physical verification of stock lying in the business premises was done with the help of person deputed by the assessee and after physical verification, it comes to Rs 1,94,48,494/- whereas as per provisional trading account submitted by your accountant, the stock as on today is Rs 1,34,48,922/- so there is a difference of Rs 59,99,572/- in the stock and the assessee was asked about the difference in stock found and recorded in the books of accounts. In response, the assessee submitted that purchase bills amounting to Rs 10,04,572/- are yet to be entered in the system against which goods have already been received and for the remaining difference, he sought time to explain after consulting with the

accountant. We find that the stock physically found has been valued and then, compared with the value of stock so recorded in the books of accounts and the difference in the value of the stock so found belonging to the firm has been offered to tax. There is thus no dispute that there is a commonality in the stock so found and as recorded in the books and in absence of which, the comparison would not have been possible and difference would not have been worked out. The Revenue has not pointed out that the excess stock has any nexus with any other receipts other than the business being carried on by the assessee. There is thus a clear nexus of stock physically so found with the stock in which the assessee regularly deals in and recorded in the books of accounts and thus with the business of the assessee and the difference in value of the stock so found is clearly in nature of business income. The statement of the partner of the assessee firm is available on record and related documents so found during the course of survey are stated to be in possession of the Revenue authorities. Apparently, the AO has failed to take into consideration the statement of the assessee recorded during the course of survey holistically, and other documents and findings of the survey team which are very much part of the records. Further, in the surrender letter dated 30/08/2018, the assessee has stated that during the course of survey operations, certain discrepancy out of excess stock of Rs 50 lacs has been found and to purchase piece of mind and to avoid litigation, they offer additional business income of Rs 50 lacs out of excess stock found out of their normal business income for the current financial year 2018-19 over and above normal business income. We therefore find that the nature and source of such unaccounted stock is nothing but arising out of assessee's business operations. No doubt, these transactions were not recorded at the time of survey thus qualify as unrecorded transactions satisfying one of the essential conditions, at the same time, the assessee has provided the necessary explanation about the nature and source of such unrecorded transactions and the necessary nexus with assessee's business has been established, thus, it cannot be said that these are unexplained transactions thus, doesn't satisfy the second condition for invoking the deeming provisions of section 69B of the Act.

21. In case of Fashion Fashion World Vs. ACIT (IT Appeal No. 1634(Ahd.) of 2006, dt. 12/02/2010), the Coordinate Ahmedabad Benches has held as under:

"11. But this does not mean that loss computed under any of the five heads mentioned in section 14 – (i) 'salary', (ii) 'income from house property', (iii) 'profits and gains from business or profession', (iv) 'capital gains' and (v) 'income from other sources' – cannot at all be adjusted against unexplained investment or expenditure. What is necessary as per Hon. Gujarat High Court is that source of acquisition of asset or expenditure should be clearly identifiable. In the case before Hon. Gujarat High Court the source of gold confiscated was not identifiable and hence adjustment was not permitted.

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.

13. Thus in a case 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 only where no nexus is established with any head then it should be considered as deemed income under section 69, 69A, 69B & 69C as the case may be. It is because when assessee fails to explain satisfactorily the source of such investment then it should be taxed under section 69, 69A, 69B & 69C as the case may be. It should not be done at the first instance without giving opportunity to the assessee to establish nexus. Therefore, there is no conflict with the decision of Hon. Gujarat High Court in the case of Fakir Mohmed 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, we hold 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.

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.

22. In the instant case as well, there is no physical distinction between the accounted stock and unaccounted stock. No such physical distinction was found by the Revenue either. We therefore find that the difference in stock so found out by the authorities has no independent identity and is in terms of value terms only and thus part and parcel of entire stock, therefore, it cannot be said that there is an undisclosed asset which existed independently and thus, 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 and the difference should thus be treated as business income.

23. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the income of Rs 50 lacs surrendered during the course of survey cannot be brought to tax under the deeming provisions of section 69B of the Act and the same has to be assessed to tax under the head "business income". In absence of deeming provisions, the question of application of section 115BBE doesn't arise and normal tax rate shall apply. The AO is thus directed to assess the income of Rs 50 lacs under the head "Income from Business/profession" and apply the normal rate of tax.

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

13. For the foregoing reasons and in view of the findings recorded by the co-ordinate Bench, the amounts surrendered by the assessee at the time of survey could not be subjected to tax under the deeming provisions of section 69 & 69A of the Act. When the source and nature of income had already been considered and accepted, the subject amounts were required to be subjected to tax at normal rate.

### Result

14. Resultantly, the appeal filed by the assessee is allowed and the impugned order passed by Learned CIT(A) is hereby set aside.

Order pronounced in the open court on 31/07/2024.

Sd/-

Sd/-

(नरेन्द्र कुमार)

(NARINDER KUMAR)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 31/07/2024

\*Ganesh Kumar, Sr. PS

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Silver Wings Life Spaces, Kota
2. प्रत्यर्थी / The Respondent- DCIT, Circle-01, Kota
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 511/JP/2024)

(राठौड़ कमलेश जयन्तभाई)

(RATHOD KAMLESH JAYANTBHAI)

लेखा सदस्य / Accountant Member

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar