

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

आयकर अपील सं./ITA No. 477/JP/2024  
निर्धारण वर्ष / Assessment Years : 2019-20

Mukesh Kumar Saini Prop. Nirankar Motors Agra Road, Tehsil- Sikrai Sikandara, Dausa	बनाम Vs.	The Pr. Commissioner of Income Tax- (Central), Jaipur-05
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BUAPS 7842 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 478/JP/2024  
निर्धारण वर्ष / Assessment Years : 2019-20

Laxmi Narain Saini Agra Road, Village- Sikandra Distt. Dausa, Rajasthan	बनाम Vs.	The Pr. Commissioner of Income Tax- (Central), Jaipur-05
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BTVPS 8190 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 479/JP/2024  
निर्धारण वर्ष / Assessment Years : 2019-20

Prakash Chand Saini, Agra Road, Village Sikandra, District- Dausa, Rajasthan	बनाम Vs.	The Pr. Commissioner of Income Tax- (Central), Jaipur-05
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: BKUPS 1210 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से/ Assessee by : Sh. S. L. Poddar, Adv.  
राजस्व की ओर से/ Revenue by : Sh. Shailendra Sharma, CIT-DR

सुनवाई की तारीख/ Date of Hearing : 30/07/2024  
उदघोषणा की तारीख/ Date of Pronouncement: 01/08/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

Each of the three assesseees named, herein above, were aggrieved by an order of the Principal Commissioner of Income Tax (Central), Jaipur [ for short Id. PCIT ] passed on 20/03/2024, relating to AY 2019-2020. Ld. PCIT passed that order as per provisions of section 263 of the Act while examining the assessment records of the each above named assessee, on the basis of which DCIT, Central Circle, Alwar [ for short "Id. AO" ] on 22/09/2021 & 19/03/2022 passed assessment orders under section 143(3) & 154 r.w.s. 143(3) of the Income Tax Act, [ for short Act ].

2. Since the issues involved in these appeals are almost identical on facts and on common grounds, the three appeals have been heard together with the consent of both the parties, and as such are being disposed off vide this common order.

3. At the outset, Ld. AR for the assessee has submitted that the matter in ITA No. 477/JP/2024 may be taken as a lead case for discussions and disposal of this bunch of appeals, as the issues involved in the lead case are common on similar facts and grounds raised by the assessee.

Ld. DR did not raise any objection to the taking up ITA No.477/JP/2024 as the lead case. Therefore, for the purpose of the present discussions, the case of ITA No. 477/JP/2024 is taken up as the lead case.

4. The grounds of appeal raised by the assessee in the lead case, when reproduced read as under :

*“1. Under the facts and circumstances of the case, the order passed by Id. PCIT (Central) Jaipur u/s 263 of the Income Tax Act, 1961 is void ab-initio and deserve to be quashed.*

*2. The assessee craves your indulgence to add amend or alter all or any grounds of appeal before or at the time of hearing.”*

5. It is seen that the only grievance raised by the assessee is that PCIT erred in holding the order of the assessment as erroneous in so far as prejudicial to the interest of the revenue.

Brief facts related to the issue are culled out are that in this case a Survey action u/s 133A of the Act was carried out on 26.02.2019 at the business premises of the assessee firm M/s Nirankar Tiles and Sanitary

Prop. Shri Mukesh Kumar Saini, Situated at Agra Road, Village Sikandra, Dausa.

5.1 The assessee e-filed return of income u/s. 139 of the Act on 07.01.2020 declaring income of Rs. 19,10,920/-.

The assessee is engaged in the business of Wholesale and retail trading of tiles and sanitary items. The case was selected for compulsory scrutiny, being a survey case, as per prevalent CBDT guidelines for selection of cases under compulsory scrutiny. The assessment proceedings were initiated by issuing notice u/s 143(2) of the Act on 24.09.2020, which was served electronically on the E-mail of the assessee and on subsequent notices issued, the assessee attended and filed requisite details.

5.2 During survey, the assessee surrendered an amount of Rs. 1,14,26,474/- vide reply to question no. 28 of the statement recorded on that day. During assessment proceeding, Ld AO asked the assessee to show as to the head under which the surrendered income was shown in the ITR. The assessee submitted detailed reply.

After considering the reply of the assessee, ld. AO observed as under

:

“The reply of the assessee has been considered carefully. The assessee has submitted a Valuation Report (VR) dated 12.02.2020 as per which the value of

construction of the showroom determined at Rs. 81,41,501/-. On the date of survey the cost of construction was estimated at Rs. 1,14,26,474/- (14580 sq. ft x Rs. 900 per sq. ft.). After discussion with the A/R it is noticed that the area taken during the survey team was just estimated but in the VR actual area is taken as 13,680 sq. ft. The fact is examined and find correct. It was further contended that the value adopted by the survey team is also on estimation basis but the actual rate taken by the registered Valuer. The contention of the assessee was considered. The area of construction taken during the survey is excess by 900 sq. ft. (14580-13680). Also the rate of construction was estimated. Even though the A/R pointed out certain discrepancies in valuation of construction of showroom done during survey, various discrepancies were detected during the course of survey proceedings resulting into the surrender of undisclosed income by the assessee. In view of that, after considering all the material facts a lumpsum addition of Rs. 7,00,000/- is being made on account of showroom construction over and above the amount declared in the return of income.”

5.3 It may be mentioned here that in that survey proceeding, the assessee also surrendered the excess stock of Rs. 7,87,459/-. In this regard also, Id. AO asked how that excess stock was dealt by the assessee while filling the ITR.

The assessee submitted ;

“In this regard, we would like to state that the assessee is doing sanitary and tiles trading business. The survey team ask value of stock to the staff of the assessee who has stated sale price instead of actual cost price. The assessee is maintaining books of accounts on mercantile basis and the method of valuation of stock is adopted as cost or market price which ever is less. Since the assessee is showing GP rate as 15.23% during the year which means the stock was valued at 6,70,761 on this ground. Further it is general practice of each trading business, that there are some scrap/damaged material/defective/out dated material available in stock. The survey team has not considered these facts and valued entire inventory treating the same as good and marketable consideration which is wrong and against the natural justice. The assessee has therefore correctly showing their value of stock Rs. 36,16,750 in his books of

accounts at the time of survey and accordingly there is no excess stock available in the premises of the assessee."

Ld. AO considered the reply but found that same was not acceptable. Ld. AO noted that physical stock found at the time of survey came to Rs. 44,04,209/- being the market value, as claimed by the assessee. The book stock was found at Rs. 36,16,750/- and on that stock the the gross profit @ 15.23 % was added and the market value of the goods as recorded in the books, arrived at Rs. 41,67,581 [ Rs. 36,16,750 + 5,50,831/- (36,16,750 \* 15.23= 550831)]. That market value arrived at Rs. 41,67,581 was compared with the physical stock of Rs. 44,04,209/- and thereby the excess stock of Rs. 2,36,628/- [ 44,04,209 – 41,67,581] was determined and added to the income of the assessee.

5.4 The assessee also surrendered a sum of Rs. 15 lacs against the difference in construction of building.

The assessee had also received a sum of Rs. 1,62,000/- from Nirankar Motors. It was submitted that said amount was included in the amount of Rs. 15 lac that was disclosed. Ld. AO did not find it convincing, and made the addition of Rs. 1,62,000/-.

Based on the adjustment, as noticed, the assessment was completed on 22.09.2021 as per provisions of section 143(3) of the Act assessing the

income at Rs. 30,08,848/- as against the returned income of the assessee of Rs. 19,10,220/-.

6. On culmination of the assessment proceedings, Id. PCIT called for assessment records for examination as per provisions of section 263 of the Act. On verification of the assessment records, it was found that the income offered by the assessee / added in the assessment proceeding representing unaccounted construction expense, excess stock and surrendered of unaccounted receipt were in the nature of 69 and 69A of the Act and should have been brought to tax at special rate specified u/s 115BBE of the Act. Thus, Ld. PCIT held that the assessment was framed u/s 143(3) of the Act without verification with respect to undisclosed income offered by the assessee, covered by the provisions of section 69 & 69A r.w.s. 115BBE of the Act, and as such erroneous and causing prejudice to the interest of revenue. Ld. PCIT while holding so stated :

*"I wish to make it clear that I am not disturbing the assessment that has already been made. I am only passing an order whereas applicability of the provisions of section 69A and 69 are considered. The order of the AO is therefore, liable to revision under the explanation (2) clause (a) of section 263 of the Act. The assessment*

*order is set aside and restored to the file of the assessing officer to verify the applicability of provisions of section 69A and 69 of the Income Tax Act.”*

7. Feeling aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

8. In support of the grounds raised on behalf of the assessee, Id. AR of the assessee has filed a detailed written submission which reads as under:

“The assessee is an individual. A survey u/s 133A was carried out on 26.02.2019 at business premises of the assessee, M/s Nirankar Tiles and Sanitary, Village Sikandra, Dausa. The assessee has filed his return of income on 07.01.2020 on total income at Rs. 19,10,920/- including surrendered income of Rs. 15,00,000/-. The assessment was completed on total income of Rs. 30,08,848/- by making the following additions :-

- (i) Addition of Rs. 7,00,000/- on account of unaccounted expenses in construction ;
- (ii) Addition of Rs. 2,36,628/- on account of excess stock
- (iii) Addition of Rs. 1,62,000/- on account of other cash receipts.

Copy of the assessment order is available on Paper Book Page No. 42-47. Subsequently the Learned Pr. CIT –Central, Jaipur has issued notice u/s 263 on 07.03.2024 which is placed on paper book page no. 28 to 30. The assessee submitted reply under letter dated 18/03/2024, which is available on Paper Book Page No. 31-41, but the Learned Pr. CIT-Central, without considering the reply of the assessee in proper perspective, passed order u/s 263 on 20/03/2024, directing the Learned Assessing Officer to examine and verify applicability of provisions of Sec. 69A and 69 of the Income Tax Act on the following income/additions :-

- (i) Rs. 15,00,000/- surrendered in the return of income

- (ii) Rs.7,00,000/- lump sum addition with reference to construction of show-room ;
- (iii) Rs.2,36,628/- on account of excess stock ;
- (iv) Rs.1,62,000/- on account of unaccounted receipts.

Aggrieved with the order passed u/s 263 by the Learned PCIT(Central), the assessee has preferred appeal before the Hon'ble Tribunal and the grounds of appeal are discussed hereunder :-

Ground No. 1-

Under the facts and circumstances of the case the order passed by Learned PCIT (Central), Jaipur u/s 263 of the Income Tax Act, 1961 is void ab-initio and deserves to be quashed.

Facts of the case –

The assessee is an individual. A survey u/s 133A was carried out on 26.02.2019 at business premises of the assessee. The assessee has filed his return of income on 07.01.2020 on total income at Rs. 19,10,920/- including surrendered income of Rs. 15,00,000/-. The assessment was completed on total income of Rs. 30,08,848/- by making addition of Rs. 7,00,000/- on account of expenses in construction and Rs. 2,36,628/- on account of excess stock and Rs. 1,62,000/- on account of other cash receipts. Subsequently the Learned Pr. CIT –Central, Jaipur has issued notice u/s 263 on 07.03.2024 which placed on paper book page no. 28 to 30. The assessee submitted reply but the Learned Pr. CIT-central, without considering the reply in proper perspective, passed the order u/s 263, directing the AO to examine and verify the applicability of provisions of Sec. 69 A & 69 of the Income Tax Act. It is submitted that there was no case with the Learned PCIT (Central) for setting aside the assessment order just for purposes of verification of applicability of Sec. 69A & 69. The Learned Assessing Officer had passed the assessment order after careful examination of each and every fact. It is submitted that while passing the assessment order, the Learned Assessing Officer had adopted one of the courses permissible under law or where two views were possible, the Assessing Officer has taken one view with which the PCIT does not agree..... this shall not justify invoking provisions of Sec. 263.

- (I) Income surrendered by the assessee in the return of income : Rs. 15,00,000/-

It is submitted that the assessee filed return of income on 07/01/2020 surrendering income of Rs. 15,00,000/-. This income was surrendered with

reference to survey conducted in the case of the assessee. It is submitted that when the assessee has shown income in the return filed by him such income cannot be treated as undisclosed income. It is submitted that the definition of undisclosed income occurs in section 271AAB/271AAC which is reproduced hereunder and the same is with reference to action u/s 132 and 132A. Besides this there is no other definition of undisclosed income.

*"271AAA. Penalty where search has been initiated.—(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.*

*(2) Nothing contained in sub-section (1) shall apply if the assessee,—*

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

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

*(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.*

*(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).*

*(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.*

*Explanation.—For the purposes of this section,—*

*(a) "undisclosed income" means—*

*(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—*

*(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or*

*(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of the search; or*

*(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;*

- (b) "specified previous year" means the previous year—
- (i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or
  - (ii) in which search was conducted.'."

The above definition of undisclosed income has no reference to section 133A. In view of this it is submitted that the assessee is justified in disclosing the income offered during survey. In view of this the provisions of section 115BBE are not attracted even distantly.

The provisions of section 115BBE are discussed below:-

#### b) Provisions of section 115BBE

*The provisions of section 115BBE are quoted below*

*"115BBE. Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.—(1) Where the total income of an 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 the aggregate of—*

*(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of Sixty per cent; and*

*(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a)."*

These provisions are applicable to income referred in section 68, 69, 69A, 69B, 69C 69D which relate to unexplained amounts. It is submitted that in the case of the assessee, the Learned Assessing Officer followed one of the two views available and refrained from invoking provisions of Sec. 68, 69, 69A as the Learned Assessing Officer did not find any element of unexplained income. The survey was conducted at the business spot, where assessee exclusively carries his business only and does nothing else, hence, the course adopted by the Learned Assessing Officer was in accordance with law. The Learned PCIT Central is not justified in directing the Assessing Officer to examine and verify the applicability of provisions of Sec. 69 and 69A.

It is submitted that as stated above there is no provision of treating income offered during survey as undisclosed income under the provisions of section 133A that too when the same has been shown in the Income Tax Return. Therefore the provisions of section 115BBE are not applicable in the case of the assessee. The assessee has correctly and justifiably filed the return of income showing the income offered during survey as business income. It is submitted that the assessee suo motu has shown

income in the return which was disclosed by him during the proceeding under section 133A. The proceedings under section 133A are mainly for verification purposes. It cannot be said on guess work, surmises and conjectures that what was found during survey would not have been disclosed by the assessee in the return of income. The revenue authorities cannot claim that but for the survey such income would have escaped. This will be only a presumption and assumption. It is further submitted that except in the cases where search is conducted income shown in return of income does not attract provisions of section 68/69/69A. In this regard the following case laws is quoted in support.

- a. DCIT Vs Dr Satish B Gupta (2011) 49 DTR 262 Ahmedabad Trib order dated 06.08.20103.

In this case the assessee declared income in the return of income as offered during the course of survey under section 133A - held section 133A is an action for calling of information, in itself it is not a proceeding. There can be no undisclosed income until there is duty to disclose. The duty to disclose income arises only at the time when the assessee furnish return of income. If assessee furnishes return of income including income offered during survey then there remains no undisclosed income

- b. CIT Vs. SAS Pharmaceuticals (2011) 335 ITR 259 (Delhi HC)

*".....We, thus, answer the questions as formulated above, in favour of the assessee and against the Revenue finding no fault with the decisions of the CIT (A) as well as the Tribunal. As a result, this appeal is dismissed"*

*In the aforesaid decisions it has been held that penal provisions are applicable unless otherwise specified w r t return of income. Penal provisions of section 69/115BBE cannot be made applicable on the ground that if there had been no survey the assessee would not have disclosed income or would have succeeded in concealing the income. It has been held in these decisions that assessee cannot be penalized on the basis of guess work conjectures and surmises. In view of this the provisions of section 69/69A/115BBE are not applicable in the case of the assessee and not in the least in respect of income surrendered in the return of income. It is submitted that in the case of the assessee, the source of income was apparent and openly known to the Learned Assessing Officer. Even during the course of survey, no material or evidence was found that except business, the assessee was having any other source of income. "*

- (II) Addition of Rs. 7,00,000/- on account of unaccounted expenses in construction ;  
 (III) Addition of Rs. 2,36,628/- on account of excess stock  
 (IV) Addition of Rs. 1,62,000/- on account of unaccounted receipts.

Excess stock /investment in construction/ unaccounted receipts etc have no independent identity

(a) Excess stock : Rs. 2,36,628/-

In view of the position of facts discussed above, the action of the learned PCIT under section 263 is of no consequence and deserves to be quashed. The learned PCIT failed to appreciate the facts into proper perspective. It was enough that the assessee respected his statement under section 133A and accordingly disclosed income in the return of income, otherwise such statements recorded under section 133A were not enforceable and were in defiance of circular of the board, which make them unlawful. The position being so, the provisions of section 68/69/69A are not applicable even distantly and accordingly provisions of section 115BBE were also not attracted in this case.

It is submitted that in his order under section 263 the learned CIT has observed on page 9 of the order that the learned AO while completing the assessment failed to apply his mind on the material available on record. The learned CIT has held that for accepting the excess stock and unrecorded investment in construction of show-room etc as part of regular business income the learned AO was required first to identify the source and establish that these were not having any independent existence. In this regard it is submitted that the statement of the assessee on the basis of which income was got disclosed, the assessee then and there stated that the only source of income was business. It is submitted that the stock, investment in construction of show-room and unaccounted receipts were not having any independent existence and the same were part and parcel of the business set up. It is not the case of the learned CIT that excess stock was found separately or for that matter excess stock was also found kept separately. The unexplained investment in construction of show-room was also part and parcel of the business structure. None of these were having any separate and independent identity.

Similarly excess stock was also found mingled with regular stock,. It is further submitted that it is not the case that stock was found excess in quantity. The excess stock had been worked out on account of valuation, which is nothing but based on estimate. In view of this, such excess stock is part and parcel of business income and provisions of Sec. 69/69A cannot be invoked.

(b) Investment in construction of show-room  
: Rs. 7,00,000/-

In so far as addition of Rs. 7,00,000/- is concerned on account of investment in construction of show-room, the Learned PCIT Central has observed in the order u/s 263 dated 20/03/2024 as under :-

*" In respect of lump sum addition of Rs. 7,00,000/- on account of construction of show-room, the submissions of the assessee found to be acceptable and require no further discussion".*

In view of this observation, further course of action has been closed and there is no case left for examining and verifying the applicability of Sec. 69/69A. It is further submission in the case of M/s Vinayak Plast Chem Pvt. Ltd (2014) 363 ITR (Rajasthan High Court), the Hon'ble Rajasthan High Court has held that addition on account of estimate basis does not prove or establish whether such investment was actually made or not. Hence, such additions do not call for invocation of Sec. 69. Similar finding has also been given by the Hon'ble Rajasthan High Court in the case of CIT Vs. Pratap Singh Amro Singh etc. (1993) 200 ITR 788 that addition on the basis of valuation are more or less on estimate basis. Such additions do not require applicability of Sec. 69, which requires a definite foundation. In the case of the assessee also, addition of Rs. 7,00,000 has been made by the Learned Assessing Officer on lump sum basis, i.e. purely on estimate basis. Such additions do not have strong foundation and do not call for applicability of Sec. 69/69A.

(c) Unaccounted receipts : Rs. 1,62,000/-

It is submitted that in the assessment order, the addition has been made without a clear finding regarding the nature of entry found noted in Annexure 18. The Learned Assessing Officer has treated the same as unaccounted receipt. It is submitted that the transaction relates and is closely connected with the business of the assessee. The paper was found at the business spot. It was the submission of the assessee that the amount of Rs. 1,62,000/- received from Nirankar Motors was spent in the construction of show-room. It is submitted that when separate addition of Rs. 700000/- has been made on account of investment in construction of show-room, no other addition was required. In fact, it is double addition. In view of this, addition made on account rejection of explanation of the assessee does not attract provisions of Sec. 68, 69 or 69A.

In view of the aforesaid facts, the Learned PCIT Central has erred in passing order u/s 263. The same requires to be quashed.

(V) Order passed by the learned AO is not erroneous nor prejudicial to the interest of the revenue.

It is further submitted that the order passed by the learned AO under section 143(3) cannot be termed as erroneous and prejudicial to the interest of the revenue simply if he has followed one view out of two views available on the same issue and the view followed by him does not agree with the view of the learned CIT. In this regard following decisions are quoted.

(a) Pr. CIT, Alwar Vs. Bajargan Traders Appeal NO. 258 of 2017 (Rajasthan High Court) order dated 12.09.2017

*In this case the Hon,ble Jurisdiction High court has held as under*

*i) In this case unrecorded stock of Rs. 70,04,814/- was found during survey under section 133A. The assessee while filing the return accounted for the same in the books of accounts and disclosed it as business income. The High court has upheld the action of the assessee in regularizing the stock as business income.*

*ii) The ratio of this case is fully applicable to the facts of the case of the assessee. In the case of the assessee excess cash of Rs 7,30,000/- unrecorded debtors of Rs. 11,95,000/- and unrecorded investment in the construction of Godown of Rs. 19,20,000/- found during survey has been regularized by the assessee and shown as business income*

*iii) Once the income offered during survey is disclosed as business income then the same cannot be treated as income from other sources.*

*iv) In the view of the High Court the provisions of section 69 will not be applicable in such case. And the provisions of section 115BBE will not also be attracted*

The case law fully supports the case of the assessee

(b) Lovis Singhal and other Vs ITO ITA No. 142 to 144 ITAT Jodhpur order dated 25.05.2018

In this case the hobble ITAT has followed the decision of the Hon,ble Rajasthan High court in the case of Bajargan Traders cited above. The Hon'ble ITAT has very clearly held that in respect of cash found in excess and surrender made during survey on account of such excess cash and also of stock did not attract section 69 as well as 115BBE of the income tax Act. The ratio of the decision is squarely applicable to the case of the assessee.

(c) DCIT Vs Ram Naraian Birla Bhiwadi ITAT Jaipur 482 Jaipur 2015 order dated 30.09.2016

In this case the Hon'ble ITAT has held that excess stock found during survey of RS. 77.66.887/- in respect of Gold and Silver Jewellery was to be assessed as income from business while doing so the bench has followed the decision in the case of Choki Hiralal Madan lal VS DCIT 131 TTJ (Ahd) 1

(d) DCIT Vs Yamunaji corporation (2020) 424 ITR 369 (Guj)

In this case the Hon'ble Gujrat High Court has held that when the assessee has disclosed the amount during the survey action under section 133A and such amount was also disclosed in the return of income then the question of concealment or undisclosed income would not arise

(e) DCIT Vs Dr Satish B Gupta (2011) 49 DTR 262 Ahmedabad Trib order dated 06.08.2010

In this case the assessee declared income in the return of income as offered during the course of survey under section 133A - held section 133A is an action for calling of information, in itself it is not a proceeding. There can be no undisclosed income until there is duty to disclose. The duty to disclose income arises only at the time when the assessee furnish return of income. If assessee furnishes return of income including income offered during survey then there remains no undisclosed income

(VI) No other source of income during survey.

It is submitted that during the course of survey no other source of income was found except that of running business of tiles, sanitary and fitting etc. The learned AO has also not given any findings that the assessee enjoys any other source(s) of income. When the revenue authorities have conducted survey on the business premises of the assessee and have failed to locate any document/books of accounts or any other material establishing that assessee was enjoying any other source of income in addition to his regular business of sanitary wares pipe fitting than the learned PCIT is precluded in holding that excess stock, investment in construction of show-room etc. were not out of regular business. In these circumstances the natural conclusion is that the excess stock etc were not disclosed in the books of accounts upto the date of survey but were out of disclosed sources of income. i. e. business of the PVC pipe fitting and sanitary fittings. At the stage of survey the assessee failed to account for the aforesaid stock etc. but these were out of disclosed sources of income i e business of sanitary and pipe fittings. In view of this it cannot be held that the excess stock etc. were out of sources of income not disclosed to the department. The same have to be treated as part of disclosed business income. The following case laws are quoted in support.

CIT Vs. Mhaskar General Hospital

ITA No.1474/2009 order dated 9/8/2011

Gujarat High Court

*The Hon'ble Court held that when the assessee's sole business was that of running a hospital and it had no other source of income, treating the undisclosed income from other sources was not justified.*

(VII) Power of revision u/s 263 cannot be exercised to collect more taxes –

A survey operation under Section 133A of the Act was carried out on the business premises of the assessee wherein the assessee admitted undisclosed income and surrendered the same as normal business income in her return of income (ITR).

Thereafter, the case of the assessee was subjected to compulsory scrutiny as per the CBDT guidelines. The AO *inter alia* took note of the additional income included by the assessee in its e-return of income and accepted and also made the addition of Rs. 7,00,000/- on account of expenses in construction and Rs. 2,36,628/- on account of excess stock and Rs. 1,62,000/- on account of other cash receipts after making a brief reference to factum of survey and inclusion of additional income in the Return of income. The revenue never asked from the assessee about source of his undisclosed income neither during the course of survey proceedings, during the course of statement recorded u/s 133A nor during the course of assessment proceedings.

Thereafter, the PCIT in exercise of revisionary powers, issued show cause notice under Section 263 of the Act requiring the assessee to show cause as to why the assessment framed under Section 143(3) should not be suitably amended/modified on the ground that such order is erroneous insofar as it is prejudicial to the interest of the Revenue.

As per the show cause notice, the PCIT observed on the basis of perusal of case record that the additional income offered and additions were in the nature of unexplained income which was liable to be assessed under Section 69/69C of the Act and consequently the tax payable on such undisclosed income was susceptible to enhanced tax rate as per Section 115BBE of the Act.

The PCIT thus alleged that the Assessing Officer had incorrectly adopted the normal rate of taxation at 30% as offered by the assessee overlooking the countervailing provisions of Section 115BBE of the Act.

It is submitted that the income surrendered was clearly attributable to the business operations and therefore the applicability of Section 69/69C of the Act were thus excluded having regard to the nature of income declared and consequently Section 115BBE was not attracted in the facts of the case.

(IX) Case Laws in support quoted by the Learned PCIT Central

It is submitted that in the order passed under section 263 by the learned CIT has quoted certain case laws. It is submitted that the issue involved is such where divergent opinions are available in the decisions of the Hon'ble courts. It is submitted that it is settled position of law that if there are divergent opinions on an issue, one which is favourable to the assessee shall apply. The following case laws are quoted in support

- (i) Vegetable Products 88 ITR 192 (SC)
- (ii) CIT Vs. Straw Board Manufacturing Ltd. 177 ITR 431 (SC)

Ground No. 2 –

The assessee craves your indulgence to add amend or alter all or any grounds of appeal before or at the time of hearing.

Not pressed.

The Hon'ble Tribunal is requested to decide the appeal in favour of the assessee by considering the above submission and oblige.”

9. In support of the contention raised in the written submissions, Id. AR of the assessee filed detailed paper book containing following evidence / records :

Sr. No.	Particulars	Page No.
1.	Copy of acknowledge of income tax return, computation of income along with financials	1-10
2.	Copy of statement of Shri Mukesh Kumar Saini recorded u/s 131 of the Income Tax Act, 1961	11-27
3.	Copy of show cause notice dated 07.03.2024 for proceedings u/s 263	28-30
4.	Copy of reply submitted in response to show cause notice dated 07.03.2024	31-41
5.	Copy of assessment order	42-47
6.	Copies of replies submitted before the Learned Assessing Officer	48-62

10. Learned AR of the assessee contended that the assessment has been framed by the Id. AO after considering the disclosure made by the assessee which is also dealt with by raising the query in the notices issued u/s 142(1) of the Act with respect to the income offered during survey operation, and on each of the aspect of the matter.

The assessee made surrender, paid the tax, filed explanation about the nature of income and its source. Ld. AO accepted the same and assessed the income wherein he has also enhanced the amount of disclosure made by the assessee wherever deem fit. Therefore, Id. AO has duly applied his mind and has modified the figure of surrender by making separate addition. Therefore, Id. AO has in appreciation of material placed before him passed an appropriate order which Id. PCIT again revised as per provisions of section 263 of the Act.

Ld. AO has taken a plausible view of the surrender made by the assessee and further addition was not made under any of the specific provisions of the Act u/s 68, 69 & 69A of the Act and therefore, Ld. AO could not be so directed under the provisions of section 263 of the Act.

Ld. AR of the assessee also relied upon the statement of made by the assessee before survey of team and subsequent statement made before Id. AO wherein nowhere it has been disputed that the income

offered by the assessee has any source out of the business of the assessee and there is no finding in the order of Id. AO that the income so offered by the assessee is undisclosed income chargeable to tax as per provisions of section 68, 69 & 69A of the Act.

To drive home this contention, Ld. AR of the assessee relied upon the decision of Co-ordinate Bench of Delhi ITAT in the case of **Hema Raman vs. PCIT** in ITA No. 1012/DEL/20222 dated 12.05.2023. Besides this, Ld. AR contended that while accepting the income disclosed, surrendered and added in the assessment, Ld AO has not given any finding that the income surrendered or added fell under the provision of section 68, 69 or 69A of the Act.

Once Id. AO did not arrive at the conclusion that income fell within the deeming provision u/s 68, 69 & 69A of the Act, the question of charging the same at the special rate did not arise.

11. On the other hand, Id. DR representing the revenue submitted that the assessee accepted in the statement recorded that the income offered was undisclosed income, not recorded in the regular books of the assessee [ Q.28 page 27 of the paper book], therefore, the same is in the nature covered as per provisions of section 68, 69 & 69A of the Act, subject to

levy of rate of tax as per section 115BBE and that rate of tax being automatic there is an apparent mistake, and the order of Id. AO is erroneous being prejudicial to the interest of the revenue, and that is why, the same is covered under the explanation (ii) clause (b) of section 263 of the Act. In this regard, reliance has been placed on the findings recorded in the order of Id. PCIT.

12. We have heard the rival contentions of both the parties and perused the materials available on record.

In this case, the assessment was framed u/s 143(3) of the Act on 22.09.2021. It has been held to be erroneous in so far prejudicial to the interest of revenue for the reason that the income surrendered during survey operation and the addition made thereupon in the assessment order was not verified as regards the provisions of section 68, 69 & 69A r.w.s. 115BBE of the Act.

The controversy arises whether there was any inquiry conducted by the Id. AO during the assessment proceeding qua the income offered by the assessee during the survey operation. On this aspect, we find that the Assessing Officer had asked the assessee to give details of the disclosure

made by the assessee and get the same verified from the income tax return filed by the assessee.

The Assessing Officer not only verified the details of that amount disclosed by the assessee, but has also went on examining the correctness of the disclosure. There were three disclosure statements made by the assessee.

One is business receipt, regarding which the Id. AO made addition of Rs. 1,62,000/- in addition to the disclosure of Rs. 15 lac made by the assessee.

The assessee made disclosure of construction expenses which were also enhanced by a sum of Rs. 7 lac by the Id. AO.

So far as the excess stock found to the tune of Rs. 7,87,459/-, Id. AO converted it to Rs. 2,36,628/-.

So, exchange of information by the assessee and verified by the Assessing Officer clearly appear in the body of the assessment order. Thus, it transpires that there was application of mind by the AO during the assessment proceedings. Accordingly, it cannot be said that the assessment has been framed by the AO without conducting inquiries.

As such, we hold that the AO framed the assessment after necessary inquiries with respect to the income surrendered by the assessee during the survey operation conducted u/s 133A of the Act.

13. Besides the above, we also note that the assessee in the statement recorded during the survey operation also accepted to have offered additional income for the year under consideration and that he would offer the amount as his income of the year. The survey statement is available at page 11 to 27 of the paper book.

Likewise, Id. AO in the assessment framed u/s 143(3) of the Act, also examined all the aspects of the disclosure, made variations and after examination referred to provisions of section 68, 69 & 69A of the Act, but at the same time, did not levy higher tax as per provision of section 115BBE of the Act.

Since a conjoint reading reveals that there was due application of mind by the AO during the assessment proceedings, the assessment cannot be held as erroneous in so far prejudicial to the interest of revenue on account of levy of higher tax as per provision of section 115BBE of the Act.

14. In the order, Learned PCIT has referred to Explanation 2 to section 263 of the Act, in holding that the necessary inquiries were not carried out by the AO during the assessment proceedings.

However, we find that the Ld. PCIT in the notice issued u/s 263 of the Act [ page 28-30 of paper book ] did not make any reference to the Explanation 2 to section 263 of the Act. Therefore, we hold that the Ld. PCIT erred in holding assessment order as erroneous and prejudicial to the interest of Revenue after referring to Explanation 2 of section 263 of the Act.

15. We further note that the ITAT Chandigarh in the case of Shri Parmod Singla v. ACIT reported in 154 taxmann.com 347 of the Act has observed as under:

**15.** In the instant case, for the deeming provisions of section 69 to be attracted, there has to be a finding that the assessee has made investments during the financial year in the stock and by way of advances, such investments are not recorded in the books of account 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. Similarly, for the deeming provisions of section 69A to be attracted, there has to be a finding that the assessee was found to be owner of cash so found at the time survey, such cash has not been recorded in the books of account so maintained by the assessee, and the assessee offers no explanation about the nature and source of the cash or the explanation so offered is not found satisfactory in the opinion of the AO.

16. From the above, it transpires that to tax any item of income/ expenditure, unaccounted investment at the specific rate r.w.s. 115BBE of the Act, it is necessary to classify the income under the relevant head provision under section 69, 68, 69B etc. as they are penal in nature.

In present case, the income surrendered was to be classified u/s 68, 69 & 69A of the Act. As per the direction of the Ld. PCIT, however, we find that the Ld. PCIT has nowhere pointed out that the income surrendered by the assessee falls within the provision of section 68, 69 & 69A of the Act. As such, the assessee was able to justify the source of income surrendered during survey operation. Therefore we are of the view that the same cannot be treated as deemed income. Once, the income goes out of the preview of the deeming provision, the provision of section 115BBE of the Act cannot be applied.

17. Thus, we note that the AO has taken one of the plausible view by treating the income offered during survey operation as income under the head of business and profession. The similar view has been taken by the co-ordinate bench of Delhi ITAT in the case of Hema Raman vs. PCIT in ITA No. 1012/DEL/20222 dated 12.05.2023. The observation of the bench on the issue, when reproduced, reads as :

“13. On appraisal of facts, we are persuaded by the first limb of the arguments. The determination of true nature and character of income is highly contextual and law has not devised any straight jacket formula in this regard. The classification of income under a particular head of income may significantly vary having regard to the nuanced facts of each case. When seen contextually, the additional income in instant case was conceded by the assessee in the course of survey operations at her business premises. The income surrendered is sort of lumpsum figures offered in the form of excess stock, unaccounted advance to staff, excess cash generated etc. from business operations. Such additional income confessed in survey at business premises gives a facial impression of business attributes. In the light of assertions made in statement in survey and post survey proceedings placed in the paper book, the assessee appears to have made out an arguable case that such income is concomitant of business activities and thus impressed with the character of business income as correctly disclosed in the ROI. The action of AO is not open to attack as erroneous where a view taken is in the realm of a possible view and not found to be wholly incongruous to facts or law. On the face of available facts, one can not say without any reservation that no plurality of opinion can exist on the point and such additional income cannot be treated as business income at all as adjudged by AO. This makes the action of the AO is the league of being plausible. The power of review cannot be exercised to collect more taxes merely owing to the reason that the law now provides for penal and steep rate of taxation by bringing such income within the ambit of S. 68/ 69 etc.

13.1 Significantly, the PCIT, while seeking to set aside the action of AO and remitting the matter back for further enquiries, did not bring any definite material to show any incorrect assumption of such facts on this score. Besides, no observations are found in the impugned revisional order suggesting a course to be adopted towards manner of determining true character of additional income or the nature of enquiries expected from AO.

13.2 In the similar factual circumstances and in the context of section 263, the Hon'ble Andhra Pradesh High Court in the case of PCIT vs. Deccan Jewellera (P) Ltd. ( 2021) 132 taxmann.com 73(AP) held the action of AO cannot be said be marred by any perversity and the revisional order was set aside.

13.2 Taking into account the entire conspectus of the matter, we thus find merit in this plea. The pre-requisites of S. 263 are clearly not found to be fulfilled.

14. We shall now also turn to other argument propelled on behalf of the Assessee that substituted enactment of section 115BBE came into force with assent of President of India w.e.f 15.12.2016 by Taxation Laws (second amendment) Act, 2016 [applicable w.e.f 01.04.2017] and thus income arising to assessee prior to its substitution from 15th Dec. 2016 shall be governed by erstwhile provision of S. 115BBE.xxxx

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17. In conclusion, in the light of discussion in para 13 supra, the approach adopted by the Assessing Officer being plausible, the action of the Assessing Officer cannot be labeled as 'erroneous' although it may be prejudicial to the interest of the revenue. Thus, twin conditions of Section 263 are not simultaneously satisfied in the instant case. The jurisdiction usurped by the Pr.CIT under Section 263 thus fails on this parameter and hence the revisional order cannot be sustained in law. Consequently, the revisional order passed under Section 263 is quashed.

18. So, we are of the considered view that Id. PCIT could not substitute the view taken by Id. AO as per his understanding of facts of the case. In view of the above, and after considering the facts in totality, we hold that the order passed u/s 263 of the Act is not sustainable. Accordingly, we quash the same. Hence, the solitary ground of appeal of the assessee is hereby allowed.

19. In the result, the appeal of the assessee is in ITA no. 477/JP/2024 stands allowed.

20. The facts of the case in ITA Nos. 478 & 479/JP/2024 are similar to the case in ITA No. 477/JP/2024.

We have heard both the parties and perused the materials available on record. The issue raised by the assessee in these appeals No. 478 & 479/JP/2024 is equally similar, on same set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the Bench feels that the decision taken

by us in ITA No. 477/JP/2024 for the Assessment Year 2019-20 shall apply mutatis mutandis in the cases of Laxmi Narayan Saini & Prakash Chand Saini i.e. ITA Nos. 478 & 479/JP/2024 for the Assessment Year 2019-20.

In terms of these observations, three appeals of the assessee are allowed.

Order pronounced in the open court on 01/08/2024.

Sd/-  
(नरेन्द्र कुमार)  
(NARINDER KUMAR)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(राठौड़ कमलेश जयन्तभाई)  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 01/08/2024

\*Ganesh Kumar, Sr. PS

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

1. The Appellant- Mukesh Kumar Saini, Dausa
2. प्रत्यर्थी / The Respondent- PCIT (Central), Jaipur-05
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 477 to 479/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar