

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE "B" BENCH : PUNE

BEFORE SHRI RAMA KANTA PANDA, VICE PRESIDENT
AND
SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER

I.T.A. No.634/PUN/2024 [E-APPEAL]
Assessment Year 2019-2020

The DCIT, Aayakar Bhawan, Near Holy Cross English School, Cantonment, AURANGABAD PIN – 431 001. Maharashtra.	vs	Vaishali Agro Soya Products, S.No.54/3, Nalegaon Road, UDGIR. PIN – 413 517. PAN AAKFV1115F Maharashtra.
(Appellant)		(Respondent)

For Assessee :	Shri Shubham Rathi
For Revenue :	Shri Ajay Kumar Keshari

Date of Hearing :	09.09.2024
Date of Pronouncement :	11.09.2024

ORDER

PER SATBEER SINGH GODARA, J.M.

This assessee's appeal, arises against the order of the learned CIT(A), Pune-12, Pune's DIN & Order no.ITBA APL /S/250/2023-24/1059775422(1) dated 16.01.2024 in proceedings u/sec.143(3) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. The Revenue pleads the following substantive grounds in the instant appeal :

1. *“Whether on the facts and in the circumstances of the case, the Ld. CIT (A) has erred in law and in facts by deleting the tax calculated on special rates as per provisions of section 69B r.w.s.115BBE of the I. T. Act on declaration made of Rs.7,00,00,100/- on account of excess stock found.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in law and in facts by not appreciating the facts that the main reason for excess stock found was because of unrecorded purchases.*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in law and in facts by not appreciating the facts that the assessee has failed to explain the nature and source of income utilized for unrecorded purchases which resulted into excess stock found and failed to produce supporting purchase bill or other relevant documentary evidences.*
4. *The appellant craves leave to add, alter, modify, delete and amend any of the grounds, as per the circumstances of the case.”*

3. Both the learned representatives next invited our attention to the CIT(A)-NFAC's impugned lower appellate discussion reversing the assessment findings assessing the assessee's sec.69B unaccounted stock amount of

Rs.7,00,00,100/- in higher rate u/sec.115BBE of the Act as follows :

3.2 I have gone through the assessment order and the submission filed by the appellant. In this case, the appellant has filed a detailed written submission. Vide the said submission the appellant has submitted that a survey action was conducted at the business premises of the appellant on 26.03.2019. During the course of survey proceedings, unaccounted excess stock was found. The appellant submitted that the only source of income it has is the business income. Excess stock found during the survey proceedings was nothing but the discrepancies arising due to non-maintenance of exact stock details giving effect to correct yields from year to year and also on account of valuation. The appellant further submitted that no incriminating evidences were found by the survey team in the form of unrecorded sales, purchase invoices, cash payments etc. However, in order to buy peace of mind, the appellant declared an amount of Rs. 7,00,01,100/- on account of deemed income. After the survey, the appellant filed return of income on 25.09.2019 by declaring total income at Rs. 9,49,31,020/-(including declared income of Rs. 7,00,01,100/-). The said case was selected for scrutiny and during the assessment proceedings the entire information asked by the assessing officer was furnished by the appellant.

3.3 I have considered the facts of the case and the submissions made by the appellant. The issue involved in this appeal is that when there is a survey or search action wherein certain undisclosed income is found, under which head it can be brought to tax and at what rate the tax should be charged. This issue has been discussed by various High Courts and Tribunals from time to time and depending on the facts of the case, it was decided as to whether such income was taxable as 'business income' or 'deemed income assessable u/s 68, 69 or 69A to 69D of the Act. Some of these decisions are discussed as under.

Decisions where it was held that the surrendered income is taxable under the provisions of section 68, 69, 69A to 69D of the Act:

3.4 The Hon'ble Gujarat High Court in case of **Fakir Mohmed Haji Hasanvs CIT 120 TAXMAN 11 (Gujarat)** had to decide question whether value of gold found during search is to be included in income where no explanation about source of investment made is provided. The Hon'ble High Court was also concerned with the question whether any deduction in relation to confiscated gold is to be given. The relevant assessment year was AY 1984-85 (i.e. prior to introduction of section 115BBE in the Act). The facts disclosed in customs proceedings, which were relied on in the income tax proceedings were that

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

specific information was received by the Customs Department indicating that the taxpayer would bring imported gold in his car and would make delivery thereof. The car was seized and at that time during search gold bars of foreign markings were recovered. A bag containing currency notes was also recovered. The statements which were recorded under section 108 of the Customs Act were considered in the adjudication proceedings. The Hon'ble High Court upheld the decision of Tribunal that the value of gold was liable to be included in the income of the assessee as the source of investment in the gold or of its acquisition was not explained and that the assessee was not entitled to claim that the value of the gold should be allowed as a deduction from his income. The relevant portion of the judgement is as under.

"6. Under section 4 of the Act, income-tax is to be charged in accordance with the provisions of the Act in respect of the total income of the previous year of every person. As provided by section 5 of the Act, total income of any previous year of a person would, inter alia, include all income from whatever source derived which is received or is deemed to be received by such person, subject to the provisions of the Act. It will be seen from section 69A that where the bullion, jewellery or other valuable article is not recorded in the books of account and there is no explanation about the nature and source of its acquisition, or the explanation is not satisfactory, the value thereof may be deemed to be the income of the assessee of the financial year immediately preceding the assessment year in which the assessee is found to be the owner of such bullion, etc.

6.1 The scheme of sections 69, 69A, 69B and 69C of the Act would show that in cases where the nature and source of investments made by the assessee or the nature and source of acquisition of money, bullion, etc., owned by the assessee or the source of expenditure incurred by the assessee are not explained at all, or not satisfactorily explained, then the value of such investments and money, or value of articles not recorded in the books of account or the unexplained expenditure may be deemed to be the income of such assessee. It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will, therefore, be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act. However, when these provisions apply because

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

no source is disclosed at all on the basis of which the income can be classified under one of the heads of income under section 14 of the Act, it would not be possible to classify such deemed income under any of these heads including "Income from other sources" which have to be sources known or explained. When the income cannot be so classified under any one of the heads of income under section 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. If it is possible to peg the income under any one of those heads by virtue of a satisfactory explanation being given, then these provisions of sections 69, 69A, 69B and 69C will not apply, in which event the provisions regarding deductions, etc., applicable to the relevant head of income under which such income falls will automatically be attracted.

6.2 The opening words of section 14 'Save as otherwise provided by this Act' clearly leave scope for 'deemed income' of the nature covered under the scheme of sections 69, 69A, 69B and 69C being treated separately, because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from 'other sources' because the provisions of sections 69, 69A, 69B, and 69C treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head, 'Income from other sources'. Therefore, the corresponding deductions, which are applicable to the incomes under any of these various heads, will not be attracted in case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B and 69C in view of the scheme of those provisions.

7. It is, therefore, clear that, when the investment in or acquisition of gold, which was recovered from the assessee was not recorded in the books of account and the assessee offered no explanation about the nature and source of such investment or acquisition and the value of such gold was not recorded in the books of account, nor the nature and source of its acquisition explained, there could arise no question of treating the value of such gold, which was deemed to be the income of the assessee, as a deductible trading loss on its confiscation, because such deemed income did not fall under the head of income 'Profits and gains of business or profession'.

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

8. *In our opinion, therefore, the Tribunal was perfectly right in holding that the value of the gold was liable to be included in the income of the assessee as the source of investment in the gold or of its acquisition was not explained and that the assessee was not entitled to claim that the value of the gold should be allowed as a deduction from his income."*

3.5 The Hon'ble Punjab and Haryana High Court in case of **Kim Pharma Pvt Ltd vs. CIT [2013] 216 Taxman 153 (P&H)**, has held that where amount surrendered during survey was not reflected in books of account and no source of income from where it was derived declared by the taxpayer then it was assessable as deemed income of the assessee u/s 69A of the Act and not as business income.

3.6 The Hon'ble Madras HC in case of **M/s. SVS Oils Mills vs. ACIT [2020] 113 taxmann.com 388 (Madras)**, has held that where there was a clear admission by assessee firm that excess stock found during survey was added in its stock register but no corresponding entry was passed in books of account, it could be considered that investment in such stock was made out of undisclosed source. Thus, addition was to be made under section 69B in respect of such excess stock.

Decisions where it was held that sections 68, 69, 69A to 69D are not applicable:

3.7 On the other hand, in following decisions, it was held that sources of surrendered/ undisclosed income are explained, deemed income provisions under sections 68, 69, 69A to 69D are not applicable and consequently, tax rate u/s 115BBE is also not applicable:

3.8 The Hon'ble Rajasthan High Court in case of **CIT vsBajargan Traders [2017] 86 taxmann.com 295 (Rajasthan)** has held that when the assessee is

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources.

3.9 In case of **Shri LovishSinghalvs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25 May 2018)**, the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the **Bajargan Traders (supra)**, held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income U/s 115BBE of the Act.

3.10 In case of **Oberoi Motors vs ACIT [ITA No. 3512/Del/2018 AY 2012-13 dated 16 July 2021]**, the taxpayer had declared surrendered income after set-off of business loss. The lower authorities did not accept the above treatment and held that the surrendered amount is deemed income and does not fall under any of the head of income and therefore no set off of business losses could be allowed. The Hon'ble Tribunal held that as the assessee had already introduced the transactions in books of accounts, it would not be reasonable to say that such income does not fall under any of the head of income or that such deemed income does not allow any set off of business losses. Accordingly, the Tribunal accepted that the surrendered income amounts to business income.

3.11 In case of **DCIT vs Ram Narayan Birla (ITA No. 482/JPR/2015 for AY 2011-12 dated 30 September 2019)**, also on the surrendered stock during search or survey action, it was held that the Revenue had not pointed out that the excess stock had any nexus with any other receipts found. Hence, the surrendered excess stock considered at par with the other business stock

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

3.12 It can be seen from the above judicial precedents that whether the undisclosed income found during the survey action is taxable under any of the five heads of income as specified in section 14 of the Act or it is to be taxed as 'deemed income taxable under section 68 to 69D of the Act', is essentially a question of fact and it entirely depends on whether the assessee has been able to satisfactorily explain the source of such undisclosed income or not. If, a satisfactory explanation is provided about the nature and the source, in that case the source would stand explained and therefore, the income would be computed under the appropriate head of income as per the provisions of the Act. However, when no source is explained based on which the income can be classified under any of the heads of income specified under section 14, then it would be classified as deemed income and shall be taxed as per the rates provided under section 115BBE of the Act.

3.13 It is also important to mention here that the Hon'ble Supreme Court in case of **Kale Khan Mohammad Hanif vs CIT [1963] 50 ITR 1 (SC)** held that onus of proving the source of a sum of money found to have been received by the assessee is on him. However, if the taxpayer disputes the levy of tax on the same then it is up to him to show either the receipt is not income, or it is exempt from taxation under the provisions of the Act. In the absence of proof, the tax officer is entitled to treat the same as taxable income. Thus, the onus of explaining the source of undisclosed income found during search or survey is on the assessee and not the other way. In other way, the onus of proving that the income detected is not taxable under sections 68, 69, 69A to 69D read with section 115BBE is on the assessee.

3.14 To sum up, before assessing the surrendered income under sections 68, 69, 69A to 69D and levy of higher rate of tax u/s 115BBE, following factors are required to be considered—

- Whether nature of income is clearly explained during the survey or during assessment proceedings
- Whether income can be classified under a particular head of income based on nature so as to demonstrate that it is flowing from one of the specific sources of income of the assessee
- Whether supporting evidences for the above are available because the onus to

AAKFV1115F- VAISHALI AGRO SOYA PRODUCTS
A.Y. 2019-20
ITBA/APL/S/250/2023-24/1059775422(1)

satisfactorily explain the nature and source is on the assessee

3.15 The facts of the present case suggest that at the time of the survey operation the appellant firm has offered additional income under the excess stock is part of the business activities and no other activity is carried out by the appellant firm and in this respect entry was also made in the books of account during the financial year 2018-19 relevant to assessment year 2019-20 and said additional income in the form of excess stock was offered for taxation under the head of 'business income'.

3.16 Further, at the time of the survey operation the books of accounts of the appellant were neither finalised nor the due date of filing the return of income was surpassed. To cover up the discrepancies and to buy peace of mind, the appellant made certain disclosure as additional income. However, the AO has presumed that if the survey would have not been conducted then the appellant would have not disclosed that income while filing the Return of Income. The presumption is not correct as when the survey happened, the books of accounts of the appellant were neither finalized nor the due date for filing the Return was from the disclosed sources of income i.e. income from business.

3.17 Furthermore, no specific question was asked during the statement recorded to substantiate the manner in which the income was derived. No question was asked during the survey by the authorized officer or during the assessment proceedings by the AO regarding the manner in which additional income was derived. Thus, in view of the binding judicial pronouncements relied upon by the appellant, the AO's action of taxing the income declared during survey u/s 69B r.w.s. 115BBE is, therefore, not found to be right.

3.18 Therefore, by applying the ratio of the decisions relied upon by the appellant, it is held that the impugned amount of Rs. 7,00,00,100/- cannot be taxed as deemed income u/s 69B of the Act as done by the assessing officer. Accordingly, the provisions of section 155BBE cannot be made applicable to income of Rs. 7,00,00,100/-. The grounds no. 1 to 5 are accordingly **allowed**.

Ground No. 6 :

4. Learned CIT-DR vehemently argues in support of the assessment findings that the Assessing Officer had rightly invoked the impugned sec.115BBE higher rate of taxation regarding the assessee's unaccounted stock conducted during the course of survey as per M/s. SVS Oil Mills vs. ACIT [2020] 113 taxmann.com 388 (Madras). His further case is that once the assessee failed to attribute the impugned unaccounted stock to have been derived from regular business activity(ies); it deserves to be assessed u/sec.115BBE higher rate of taxation only.

5. We find no merit in the Revenue's instant sole substantive grievance as this tribunal's recent coordinate bench's order in Ashok Kumar Kesherchand Pande vs. ACIT ITA.No.389/PUN./2023 decided on 31.07.2023 has considered the Revenue's foregoing case law thereby rejecting its very stand as under :

“5. The ld. AR submits that the income offered during the course of survey proceedings was also offered to tax by crediting the same to the Trading Account and Profit & Loss Account respectively. He submits that the Assessing Officer assessed the said income under the head “Income from business”. Therefore, he submits that having assessed the additional income under the head “Income from business”, he cannot subject such income to tax u/s

115BBE of the Act. He also placed reliance on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. Bajargan Traders, 86 taxmann.com 295 (Rajasthan).

6. On the other hand, ld. Sr. DR placed reliance on the orders of the lower authorities.

7. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to the applicability of provisions of section 115BBE of the Act in respect of income declared during the course of survey proceedings and offered to tax in the return of income. There is no dispute about the amount of addition to be made nor was there any dispute regarding the head of income under which the same was assessed to tax. The dispute is only with regard to the applicability of provisions of section 115BBE of the Act. Admittedly, the income offered during the course of survey proceedings was credited to Profit & Loss Account and the additional income offered on account of deficit in the physical stock was credited to Trading Account. The income offered on account of alleged expenditure incurred on construction of the commercial building was offered to tax by crediting the same amount to the Profit & Loss Account. Thus, the income was offered to tax under the head "Income from business", the Assessing Officer also assessed the same

under the head “Income from business”. Therefore, the presumption is to be drawn that the additional income was derived from the business. Thus, it cannot be said that the source for the additional income remain unexplained and, therefore, the provisions of section 115BBE have no application to the present case. The ratio of the decision of the Hon’ble Rajasthan High Court in the case of Bajargan Traders (supra) is squarely applicable to the facts of the present case. The reliance placed by the ld. CIT(A) on the decision of the Hon’ble Madras High Court in the case of M/s. SVS Oils Mills (supra) have no application to the facts of the present case, inasmuch as, in the said case, no explanation as to the source of excess stock was offered, whereas, in the present case, it is undisputed fact that the additional income was derived from business. Therefore, the orders of the Assessing Officer as well as the ld. CIT(A) are reversed and direct the Assessing Officer not to tax the additional income under the provisions of section 115BBE of the Act. The Assessing Officer shall tax the additional income under the normal rate of income tax. Accordingly, the grounds of appeal filed by the assessee stand allowed.”

6. This is indeed coupled with the fact that the assessee's survey statement dated 26.03.2019 [in question no.13] had also explained the reasons of stock deficiency of non-maintenance proper book results in regular business only. We thus adopt the above detailed reasoning mutatis mutandis to uphold the learned CIT(A)'s detailed discussion reversing Assessing Officer's action assessing the assessee's entire stock of Rs.7,00,00,100/- u/sec.115BBE of the Act. Ordered accordingly.

7. This Revenue's appeal is dismissed in above terms.

Order pronounced in the open Court on 11.09.2024.

Sd/-
(RAMA KANTA PANDA)
VICE PRESIDENT

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune, Dated 11th September, 2024

VBP/-

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. DR, ITAT, "B" Bench, Pune.
5. Guard File.

BY ORDER,

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.