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

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 169/JP/2024
निर्धारण वर्ष/Assessment Year : 2015-16

| | | |
|---|---|---|
| Shri Ganga Four Wheels Pvt Ltd.<br>Ward-17, Near Circuit House,Kheecharo Ka Bas, Jaipur Road, Sikar 332001 | बनाम<br>Vs. | The ITO<br>Ward-1<br>Sikar |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAVCS 1215 R | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/Assessee by : Shri Praveen Saraswat, CA
राजस्व की ओर से/Revenue by: Mrs. Monisha Choudhary, Addl. CIT-DR

सुनवाई की तारीख/Date of Hearing : 10/09/2024
उदघोषणा की तारीख/Date of Pronouncement: 04 /10/2024

आदेश/ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the ld. Addl. CIT(A)-1, Coimbatore dated 19-12-2023 for the assessment year 2015-16 raising therein following grounds of appeal.

> ''1. That the Ld. CIT(A) has wrongly upheld the invocation of Section 69B of the Income Tax Act, 1961 as there was no unexplained investment made over and above the amount recorded and disclosed in the books of accounts. Ld. Assessing Officer has assumed the total consideration of Rs. 2,27,71,000/-on an imaginative basis, without having any cogent evidence, as against the actual consideration of Rs. 2,10,00,000/- paid, recorded and duly confirmed by the recipient of the payment. The addition based on suspicion and surmises, without looking into the facts should be held as a nullity in law.

2. That the Ld. CIT(A) and AO have grossly misunderstood the transaction and accounting thereof. The lower authorities have assumed that assessee has paid Rs. 60 Lacs on 03/02/2015 thru the bank to Bhagwati but recorded Rs. 42.29 Lacs only in books of account and therefore difference Rs. 17.71 Lacs is unexplained investment u/s 69B. These authorities have miserably failed to understand that alleged Rs. 60 Lacs payment duly recorded in books is also part of the total consideration of Rs. 210 Lacs.

3. That the Ld. CIT(A) and AO have grossly failed in discharging the onus of proving the payment of Rs. 17.71 Lacs over and above the recorded amount of Rs. 42.29 Lack, by bringing cogent and reliable evidence on record. The only evidence with the authorities is a cancelled agreement which was void and ineffective due to non payment of consideration. This agreement was supplied by the assessee himself.

5. That the section 69B casts a heavy burden on the shoulders of the AO. He has not only to conclusively find that there is some unexplained investment done by the appellant which exceeds the amount recorded in books but also the appellant offers no explanation about it. Both the conditions with due respect have not been fulfilled by the AO. The addition so confirmed by learned CIT(A) being illegal and wrong is liable to be set aside.

5. That the addition u/s 69B is violative of the Principles of Natural justice as the AO did not issue any show cause notice seeking explanation of the assessee to the proposed addition, nor sought the explanation of the assessee about the 'so called excess amount incurred out of books Assessee came to know about such addition from the assessment order only.

6. That the both of the authorities have ignored the fact that assessee company was incorporated on 13/09/2014 (AY 2015-16) and had not started the business activity during the AY 2015-16. In absence of any income since incorporation of company, the question of making "Unexplained Investment' of Rs. 1771000/- u/s 69B does not arise.

7. That the Ld. AO had erred by estimating the under valuation of investment himself despite being a non-technical person. Ld. AO could have referred the matter u/s 142A to the DVO for ascertaining the cost of structure and furnishing if he had doubts about the value of investment recorded by assessee.''

2.1 Brief facts of the case are that the order of assessment in the case of the assessee was passed on 29-12-2017 thereby making an addition of Rs.17.71 lacs u/s 69B of the Act on account of unexplained investment. The narration as made by the AO in his order is reproduced as under:-

> ''Hence, as the assessee failed to establish genuineness of investment mad by him on account of such assets, it is clear that different amount of Rs.s17,71,000/- is paid / invested by the assessee out of books and the same is to be considered as unexplained investment of the assessee as per Section 69B of the Income Tax Act, 1961. Accordingly, an amount of Rs.17,71,000/- is hereby added back to the total income of the assessee on account of unexplained investment for the assessment year under consideration.''

2.2 In first appeal, the ld. CIT(A) has dismissed the appeal of the assesss by observing as under:-

> ''5.5 The appellant and seller are filing self-declarations that amount was not paid and they agreed for a lower amount later but this is not supported by any written agreement. The written agreement and transfer of amount on the same date confirms that the agreement is valid and is executed. The finding of the AO is correct and the appellant has not filed any document or third party evidence to disprove it. The grounds raised by the appellant are dismissed and the assessment is upheld.
>
> 5.6 In the result, the appeal is dismissed.''

2.3. In this appeal, the grounds raised by the assessee are interrelated and interconnected and relate to challenge the order of the ld CIT(A) in upholding the

addition of Rs.17.71 lacs u/s 69B of the Act without providing sufficient opportunity of hearing to the assessee. In this regard, the ld. AR of the assessee relied upon the written submission in support of his arguments which are reproduced as under:-

''Submissions

**GROUND NO. 1:**

*That the Ld. CIT(A) has wrongly upheld the invocation of Section 69B of the Income Tax Act, 1961 as there was no unexplained investment made over and above the amount recorded and disclosed in the books of accounts. Ld. Assessing Officer has assumed the total consideration of Rs. 2,27,71,000/- on an imaginative basis, without having any cogent evidence, against the actual consideration of Rs. 2,10,00,000/- paid, recorded and duly confirmed by the recipient of the payment. The addition based on suspicion and surmises without looking into the facts should be considered as a nullity in law.*

**GROUND NO. 2:**

*That the Ld. JCIT(A) and AO have grossly misunderstood the transaction and accounting thereof. The lower authorities have assumed that assessee has paid Rs. 60 Lacs on 03/02/2015 thru the bank to Bhagwati but recorded Rs. 42.29 Lacs only in books of account and therefore difference Rs. 17.71 Lacs is unexplained investment u/s 69B. These authorities have miserably failed to understand that Rs. 60 Lacs which was paid by assessee is also part of the total consideration of Rs. 210 Lacs*

**GROUND NO. 3:**

*That Ld. CIT(A) and AO have grossly failed to discharge the onus of proving the payment of Rs. 17.71 Lacs over and above the recorded amount of Rs. 42.29 Lacs, by bringing cogent and reliable evidence on record. The only evidence with the authorities is a cancelled agreement which was void and ineffective due to non-payment of consideration. This agreement was supplied by the assessee himself.*

**GROUND NO. 4:**

*That the section 69B casts a heavy burden on the shoulders of the AO. He has not only to conclusively find that there is some unexplained investment done by the appellant which exceeds the amount recorded in books but*

*also the appellant offers no explanation about it. Both the conditions with due respect have not been fulfilled by the AO. The addition so confirmed by learned CIT(A) being illegal and wrong is liable to be set aside.*

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**Submissions: Assessment Proceedings**

1.1 Assessee purchased the business of `Sale and Service of Tata Commercial vehicles' at Sikar from `Bhagwati Autowheels Pvt. Ltd, Jaipur' for a total consideration of Rs. 2,10,00,000/- which was paid in the following instalments:

| ***Payments made to seller*** | | | | |
|---|---|---|---|---|
| | **Paying Bank of assessee** | **NEFT / heque No.** | **ted** | **Amount** |
| | Bank of India A/c No. 61239262031 | R08330812 | /2014 | 4500000/- |
| | -do- | R08330833 | /2014 | 1500000/- |
| | -do- | R08466430 | /2014 | 2500000/- |
| | -do- | 10534 | /2015 | 5400000/- |
| | *Bank of India Loan A/c No.61250157687* | sfer by Bank | /2015 | 600000/- |
| | State Bank of India - Demand Draft | ank Loan | /2015 | 500000/- |
| | *State Bank of India A/c No. 61239262031* | *-434080* | */2015* | *6000000/-* |
| | *Bank of A/c No. 61239262031* | *-434080* | */2015* | *6000000/-) Cheque returned* |
| | -do- | N31645070 | /2015 | 4500000/- |
| | -do- | N31645109 | /2015 | 1500000/- |
| | | | | **,10,00,000/-** |

1.2 AO has wrongly taken the `Purchase Consideration' of Assets at Rs. 2,27,71,000/-, instead of actual consideration of Rs. 2,10,00,000/- paid to `Bhagwati'.

Break-up of cost, as considered by AO, appearing on page No. 2 of the assessment order, is being reproduced as under:-

| | **e** | **Details of the assets** | **Total Purchase Consideration as per AO (Rs.)** | **Actual Purchase Consideration (Rs.)** |
|---|---|---|---|---|
| | | (b) | (c) | (d) |
| | /15 | Scrap of – AC, Computer Equipments, Electrical Equipments, Furniture, Diesel Generator, Office Equipments, Special Tools, Workshop Equipments | 98,59,500/- | 98,59,500/- |

| | | | | |
|---|---|---|---|---|
| | /15 | Spare parts of TATA Motors Passenger Vehicles | 69,11,500/- | 69,11,500/- |
| | /15 | *Part of structure of Land & Building situated at Khicharo ka Bas, Ward-17, Sikar* | **60,00,000/-** | **42,29,000/-** |
| 1 | Value of assets acquired from Bhagwati | | **2,27,71,000/-** | **2,10,00,000/-** |

Thus the AO has wrongly substituted the amount of Rs. 60,00,000/- for the `Part of the structure of Land & Building situated at Khicharo ka Bas, Ward-17, Sikar, instead of the actual consideration paid i.e. Rs. 42,29,000/- .

1.3 Ld. AO had observed, while making the addition of Rs. 17,71,000/-, on Page No. 3 of the assessment order:

*'With regards to assets as discussed in column (c), the assessee has produced **a sale agreement dated 07.01.2015**, wherein the total consideration of purchase amounting to Rs. **6000000/- was paid by the assessee vide cheque No. 434080 dated 30.01.2015.** However, the assessee has declared only Rs. 42,29,000/- in his Balance Sheet as well as ledger account of Bhagwati Autowheel for the period under consideration.*

*In view of this, it is apparent that the assessee has made total investment of Rs. 60,00,000/- on purchase of part of structure of land and building situated at Khicharo Ka Bas, Ward-17, Sikar whereas amount of Rs. 42,29,000/- was recorded in books of account. Further, the assessee has furnished no explanation regarding the difference amount of Rs. 17,71,000/- arising out on account of actual purchase as per sale agreement of Rs. 60,00,000/- and declared investment of Rs. 42,29,000/- in the books of accounts of the assessee for the period under consideration.*

*Hence, as the assessee failed to establish the genuineness of investment made by him on account of such assets, it is clear that the difference amount of Rs. 17,71,000/- is paid **invested by the assessee out of books** and the same is to be considered as un-explained investment of the assessee as per section 69B of the Income Tax Act, 1961……"*

1.4 The conclusions arrived at by AO are self-contradictory and defies the very logic of accounting. When he is admitting that Rs. 60 Lacs been paid from the bank account but value of asset recorded is Rs. 42.29 Lacs only, then as per accounting concepts, it is impossible that Rs. 17.71 Lacs would had not been recorded in the books of accounts which are based on `Double Entry System' of accounting. If recorded, then addition u/s 69B can not survive.

1.5 If the only basis for making addition u/s 69B is the inference of AO that the assessee has paid Rs. 1771000/- `Out of Books' and paid Rs. 21000000/- from 'the Books', then also the case does not have its legs as the AO does not have any evidence of `Out of Books' payment.

1.6 Sale Agreement dated 07/01/2015 has ceased to exist and was never implemented and the Cheque No. 434080 dated 30/01/2015 drawn on State Bank of India, Sikar, was returned unpaid *(Please see Bank Statement at PB No. 31 )* by the banker of the assessee, but the AO has not cared to verify the bank statement and mentions the cheque as `paid' in the assessment order.

**Submissions: First Appeal Proceedings**

1.7 Ld. JCIT(A), while agreeing with the non-payment of cheque No. 434080 for Rs. 60 Lacs, has justified the addition by mentioning that subsequent payments of 15 Lacs + 45 Lacs were made in substitution of the returned cheque of Rs. 60 Lacs in para No. 5.4 of the Page No. 12 of the Appellate order:

*".....The cheque is not bounced but is returned in clearing as it has certain corrections. The appellant has immediately on the same day 03-02-2015 transferred Rs. 60 Lakhs to "Bhagwati Autowheel" by transfer INB NEFT of Rs. 4500028/- and Rs. 1500028/- respectively. Thus, the appellant has honored the clause as per agreement on the same date itself although the cheque is returned stating some mistake. Hence, the claim of the appellant that the agreement was cancelled due to dishonour of cheque No. 434080 is not valid."*

Thus, the Ld. JCIT(A) has unilaterally assumed that the cheque of Rs. 60 Lacs was returned unpaid because it needed some corrections but the same was honoured by making payment of Rs.60 Lacs (Rs.45 Lacs + Rs.15 Lacs) through NEFT on the same day, and therefore assessee has made unexplained investment u/s 69B.

1.8 Ld. JCIT(A) appears to be twisting the facts so as to suit his own whims and fancies in order to uphold the addition. Ld. JCIT(A) who treated the two payments thru NEFT amounting Rs. 60 Lacs (15 L and 45 L) in lieu of the returned cheque of Rs. 60 Lacs, is an example of pure conjectures and surmises of the appellate authority.

**Submissions: Legal**

1.9 Assessee has to submit that correct recording and disclosure of payments made to Bhagwati Autowheels Pvt. Ltd. (Rs. 2.10 Crore) have been made in the books of account which are proved from following evidences:

a) Duly confirmed Ledger Account of Bhagwati Autowheels Pvt. Ltd. is being attached *(Please see the PB No.37).* Ledger Account shows the total credit of Rs. 2,10,00,000/- which includes Furnishing and Finishing Cost of Rs. 42,29,000/-, besides the payment for Stock-in-Trade/Consumables and Plant and Machinery.

b) Copies of the ledger of assets accounts in the books of assessee. *(Please see the PB No.34-36)*

1.10 However, the Ld. JCIT(A) and AO have alleged that Rs.1771000/- has been expended by the appellant over and above the amount recorded in the books of accounts, which is an unexplained investment. The onus to prove that some extra consideration had changed hands at the time of purchase of furnishing/finishing investment was upon the Revenue. Both Ld. JCIT(A) and AO had vast statutory powers to make inquiries from the seller of the assets or from other persons, but instead of making any inquiry or bringing any positive evidence against the assessee, they built the whole story founded on surmises and conjectures.

1.11 The law laid down by the **Hon'ble Supreme Court in the case of K.P. Varghese v. ITO [1981] 131 ITR 597/7 Taxman 13** to the effect that the burden is on the Revenue to prove that actual consideration was more than that was disclosed by the assessee.

1.12 Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that the purchaser of the property must have paid more than what was recorded in his books of account for the simple reason that such an inference could be very subjective and could involve the dangerous consequence of a fictional income being brought to tax which is contrary to the strict provision of Article 265 of the Constitution of India and Entry 82 in List 1 of the Seventh Schedule thereto, which deals with *"Taxes on income other than agricultural income."*

1.13 AO has invoked Section 69B without satisfying the essential requirements, as revealed from the following analysis:

| . | **Provisions of Section 69B** | **Status** |
|---|---|---|
| 1 | It is found that the Assessee has made investment or the assessee is found to be the owner of any bullion, jewellery or other valuable article. | Conditions met as assessee is the owner of investment in Finishing and Furnishing. |
| | It is found that the amount expended on making such investment or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in that behalf in the books of account maintained by the | Amount expended does not exceed the amount recorded in books of accounts. Total amount paid Rs.210/- Lacs has been recorded and break-up of assets purchases is also Rs.210/- Lacs |

| | | |
|---|---|---|
| | Assessee | |
| | Either the Assessee offers no explanation about such excess amount, or the explanation offered by him is not satisfactory. | **No Show Cause Notice or letter was issued nor any verbal inquiry was made by AO about such amount.** |

It should be noted that the legal fiction enacted in Section 69B comes into play only when all the above three circumstances do factually exist. In the case under appeal, the conditions precedent to the invocation of Section 69B are not met.

***GROUND NO. 5:***

***That the addition u/s 69B is violative of the Principles of Natural justice as the AO did not issue any show cause notice seeking explanation of assessee to the proposed addition, nor sought the explanation of the assessee about the `so called excess amount incurred out of books'. Assessee came to know about such addition from the assessment order only.***

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***Submissions:***

5.1 No opportunity by way of `Show Cause Notice' / letter was given to the assessee and the AO never confronted the doubt in his mind on this aspect.

The first requisite for making addition u/s 69B is seeking explanation of assessee by way of issuing SCN, which in this case remains unfulfilled.

5.2 It is settled and there are several judicial pronouncements on this point, yet it will be sufficient to refer to Sec.142(3) of the Act itself which provides that the material collected by the AO must be confronted to the assessee before making any addition.

Section 142(3) reads as under:

*"The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under sub-section (2) and proposed to be utilised for the purposes of the assessment"*

5.3 Interestingly, the AO is completely silent as to what happened in the case of `Bhagwati'. **If `Bhagwati' was the recipient of alleged `Undisclosed Payment/Investment' from assessee, then the department must have collected tax from 'Bhagwati' as well.** In the

absence of such an investigation, no valid conclusion could be reached in this case.

Appellant makes humble submission to drop the unjustified addition of Rs. 1771000/- made by the AO and confirmed by Ld. JCIT(A). ‘’

It was reiterated by the ld. AR that the addition made by the Revenue Authority is without any basis. Therefore, the same needs to be set aside and quash it.

2.4 On the contrary, the ld. DR apart from relying upon the orders of the Revenue Authorities submitted that the addition made by the Revenue Authorities are well founded and based upon proper documents and opportunity of hearing was provided to the assessee at every state of proceedings. Therefore, the ld. DR requested for dismissal of the appeal filed by the assesee.

2.5 After having gone through the facts of the present facts of the case and evaluating the documents placed on record, judgement cited before me and also after having gone through the orders passed by the Revenue Authorities as well as oral submissions made by the parties. From the records, I noticed that the assessee is a Private Limited Company and is indulged in acquiring ‘’Automobile Business’’ from Bhagwati Autowheels Pvt. Ltd., Jaipur and for that purpose entered into an agreement of assets of Bhagwati Autowheels Pvt. Ltd (hereinafter

in short referred as ''Bhagwati''. The nature of assets agreed to be purchased by the assessee and value agreed between the parties is being reproduced below.

| **S. No** | **Nature of Asset** | **Amount** (Rs.) |
|---|---|---|
| | Computer Equipment, Electrical Equipment, Furniture, Diesel Generator, Office Equipment, Special Tools, Workshop Equipment, Air-Conditioner = Total Value Rs. 9503000 + VAT @ 5% on Capital Goods Rs. 356500/-) | 98,59,500/- |
| | Inventory of Spare Parts (Cost Rs. 6010000/- + VAT @ 15% Rs. 901500/-) | 69,11,500/- |
| | *Part of Furniture and Fixture structure of Land & Building situated at Khicharo ka Bas, Ward-17, Sikar* | 60,00,000/- |
| | **Total** | **2,27,71,000/-** |

I noticed that for the assets at Serial No. 1 & 2 where VAT invoices were issued by the selling party and for Serial No. 3 an agreement darted 07-01-2015 was entered between the two parties for an amount of Rs.60.00 lacs and the said agreement has been placed on record at PB Page 28 to 30 but as per submission of the assessee, the said agreement was never implemented because of dispute with regard to the valuation and therefore, both parties mutually treated the said agreement dated 7-01-2015 as cancelled and the cheque mentioned in the agreement was returned unpaid by the assessee's banker. Thereafter, renegotiations with regard to value of the assets mentioned at Serial No. 3 of the above table i.e. furniture and fixture and, therefore, new agreed values of these assets were again decided at Rs.42.29 lacs instead of Rs.60.00 lacs. Therefore, in this way, the final consideration worked out by the parties was at Rs.2.10 crores and all the assets mentioned in the above

table at Serial No. 1,2 and 3 after appreciating all the documents placed before me, I found that the point of contention for making addition of Rs.17.70 in the case of the assessee under the head unexplained investment is the calculation adopted by the AO. In my view the AO has made calculation on the basis of initial agreed prices of Rs.60.00 lacs for purchase of assets mentioned at Serial No. 3 above whereas in fact the said price was renegotiated and initial agreement dated 07-01-2015 was cancelled and subsequently renegotiated price was agreed at Rs.42.29 lacs and it is the said amount which has been paid to the Seller i.e Bhagwati and was recorded in his books of account. Since this very aspect was not believed by the AO, therefore, the AO treated the difference amount of Rs.17.71 lacs as unexplained investment u/s 69B of the Act. Now after scrutinizing the evaluating all the documents put forth on the case file, I noticed that the basis of adopting the value of assets at Serial No. 3 of the above table at Rs.60 lacs by the AO is without any basis or foundation more particularly in the circumstances when the assessee has categorically mentioned that initial agreement dated 7-01-2015 wherein the amount was fixed at Rs.60 lacs was cancelled and was never acted upon and renegotiated amount was agreed at Rs.42.29 lacs and the said amount was paid to the seller i.e. Bhagwati, is recorded and entered in the books of account maintained by the assessee. The AO has not brought on record any evidence to prove that the difference amount of Rs.17.71 lacs was paid by the assessee outside

the books. Since in my view the said sale agreement dated 7-01-2015 had already been ceased to exist and was never implemented, therefore, Cheque No. 434080 dated 30-01-2015 drawn on State Bank of India, Sikar was returned unpaid by the Banker of the assessee and the same is reflected in the bank statement placed on record at PB page 31. This fact was not confronted or verified by the AO whereas the AO has factually recorded wrong findings by mentioning in his assessment that the aforementioned cheque stands paid by the assessee to ‘’Bhagwati’’. However, in this regard, no evidence that any amount has been expended by the assessee over and above the amount recorded in the books of account has *been led* by the AO. I am of the considered view that onus to prove that some extra consideration had changed the hands at the time of purchase of assets mentioned at Serial No. 3 was upon the Revenue but even in spite of the fact that ld. CIT(A) and AO after having vast statutory powers to make enquiries from the seller of the assets had not made any statutory enquiries but instead of bringing any positive evidence against the assesee, the Revenue Authorities built the whole story founded on surmises and conjectures. It is settled law that it is the duty of the AO to collect entire material during the investigation by confronting to the assesee before making any addition but interestingly as per the facts of the present case the AO completely remained silent and has not even uttered a word in his entire order as to what has happened in the case of Bhagwati. In my view if Bhagwati was the recipient of alleged

undisclosed payment then in that eventuality the Department must have collected tax from Bhagwati as well. However, in the absence of any such material on record, I am not in a position to uphold the addition made by the AO in the case of the assesee as the AO has placed nothing on record to substantiate that any amount over and above the amount of Rs.42.29 lacs was paid by the assessee to the seller Bhagwati out of books of account and in this regard, I also rely on the decision of Hon'ble Supreme Court in the case of K.P. Verghese vs ITO (1981) 131 ITR 597 (SC) wherein it has been categorically held that burden is on the Revenue to prove that actual consideration was more than that was disclosed by the assesee. It is noted in the present case that the AO has not brought on record that actual consideration was more than that was disclosed in the books of account. Therefore while relying upon the decisions, documents placed on record, judgement of Hon'ble Supreme Court and also discussion made by me above, I am of the view that no addition in the hands of the assessee is sustainable under the above facts. Even otherwise Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that purchaser of the party must have paid more than what was recorded in his books of account for the simple reason that the such an inference could be very subjective and could involve the dangerous consequence of a fictional income being brought to tax which according to my view is contrary to the strict provision of Article 265 of the Constitution of

India. After appreciating the entire facts of the case, I have also come across that no opportunity by way of show cause notice was given to the assessee before making addition of Rs.17.71 lacs whereas Section 142(3) of the Act itself provides that material collected by the AO must be confronted to the assessee before making any addition. Therefore, as per language as mentioned above, the Act clearly requires the assessee to be afforded reasonable opportunity to explain. As such even if Revenue was of the opinion that in this case Section 69B of the Act ought to be invoked then in that eventuality in my view the Revenue Authorities before passing assessment order ought to have at least provided opportunity to the assessee to explain as to why the sum of Rs.17.71 lacs should not be added back to the income of the assessee as unexplained investment u/s 69B of the Act. In this regard, no such notice has been placed on record which derives me to reach to the conclusion. In the absence of notice, the assessee was obviously taken by surprise and was denied the opportunity to appropriately explain. In my considered view, the petitioner may or may not have any explanation to offer but the same is not for this Court to decide nor could the Revenue Authorities pre-judge the same. I find that the Hon'ble Supreme Court in the case of New Delhi Television Ltd. vs DCIT [2020] 116 taxmann.com 151 / 424 ITR 607 (SC) in somewhat similar set of facts was of the view that the assessee must be put to on notice before making final assessment and the assessee cannot be taken by surprise. To appreciate the

observation made by Hon'ble Supreme Court, the relevant paragraphs from the aforesaid judgments are extracted herein below:

> "41. In our view this is not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assesseer should have been informed that the revenue relied upon the second proviso. The assessee must be put to notice of all the provisions on which the Revenue relies upon. At the risk of repetition, we reiterate that we are not going into the meritss of the case but in case the revenue had Issued a notice to the assessee stating that it relies upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign assets or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee cannot be deprived of this chance while replying to the notice
>
> 42. Therefore, even if we do not fall back on the mason given by the High Court that the revenue cannot take fresh ground, we are clearly of the view that the notice and masons given thereafter do not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the revenue
>
> 43. If the revenue is to rely upon the second proviso and wanted to urge that the limitation of 16 years would apply, then in our opinion in the notice or at least in the reasons in support of the notice, the anessee should have been put to notice that the revenue relies upon the second proviso. The assessee could not be taken by surprise at the stage of rejection of its objections or at the sure of proceedings before the High Court that the notice is to be treated as a notice invoking provisions of the second proviso of Section 147 of the Act. Accordingly, we answer the third question by holding that the notice issued to the assessee and the supporting reasons did not invoke provisions of the second proviso of section 147 of the Act and therefore at this stage the revenue cannot be permitted to take benefit of the second proviso
>
> 44. We accordingly allow the appeal by holding that the notice issued to the assessee shows sufficient reasons to believe on the part of the assessing officer to reopen the assessment but since the revenue has failed to show non-disclosure of facts that notice having been issued after a period of

4 years is required to be quashed. Having held so, we make it clear that we have not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law. We make it clear that both the parties shall be at liberty to raise all contentions with regard to the validity of such notice"

Considering the totality facts and circumstances of the case and the case discussed hereinabove in detail, the Bench does not concur with the findings of the ld. CIT(A) and in this view of the matter, the appeal of the assessee is allowed.

3.0 In the result, the appeal of the assessee is allowed with no orders to cost.

Order pronounced in the open court on 04 /10/2024.

Sd/-
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 04 /10/2024
*Mishra

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

1. The Appellant- Shri Ganga Four Wheels Pvt Ltd. Sikar
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1,Sikar
3. आयकर आयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No. 169/JP/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar