आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: PHYSICAL MODE

श्री विक्रम सिंह यादव, लेखा सदस्य एवं श्री परेश म. जोशी, न्यायिक सदस्य

BEFORE: SHRI. VIKRAM SINGH YADAV, AM & SHRI. PARESH M. JOSHI, JM

आयकर अपील सं. / ITA NO. 355/Chd/2024

निर्धारण वर्ष / Assessment Year : 2017-18

The ITO Parwanoo Himachal Pradesh-173220	बनाम	Deepak Kumar, C/o Khindri jewellers, Chotta Chowk, Nahan, Sirmaur-173001 (H.P)
स्थायी लेखा सं. /PAN NO: AJDPK7511L		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Ashray Sarna, C.A

राजस्व की ओर से/ Revenue by : Shri Vivek Vardhan, JCIT, Sr. DR

सुनवाई की तारीख/Date of Hearing : 16/12/2024

उदघोषणा की तारीख/Date of Pronouncement : 23.12.2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Revenue against the order of the Ld. CIT(A)/NFAC, Delhi pertaining to Assessment Year 2017-18.

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

1. *"Whether on the facts and in law, the Ld. CIT(A)/NFAC has erred in treating normal income amounting to Rs. 2,61,69,869/- in place of special income requiring to be taxed at special rate @60% and surcharge @ 25% u/s 115BBE of the Income Tax Act, 1961.*
2. *It is prayed that the order of the CIT(A)/NFAC be revoked and that of the Assessing Officer may be restored.*
3. *The appellate craves to add, to alter, or amend any grounds of the appeal raised above at the time of hearing."*

3. Briefly the facts of the case are that a survey operation was carried out at the business premises of the Assessee under section 133A on 22/09/2017. During

the course of survey, the assessee declared additional income of Rs. 2,61,69,869/- on account of discrepancy in stock inventory for the F.Y. 2016-17 relevant to impugned A.Y. 2017-18. Thereafter, assessee filed its return of income on 03/11/2017 declaring total income of Rs. 2,76,14,540/- including the surrendered income. The case of the assessee was subsequently selected for scrutiny and after calling for necessary information/ documentation, assessment was completed under section 143(3) dt. 11/12/2019 wherein the returned income was accepted.

4. Subsequently, on perusal of the assessment records, the AO noticed that in respect of income of Rs. 2,61,69,869 surrendered during the course of survey, the tax has to be levied as per the provisions of Section 115BBE instead of normal rate of tax as applied and the same been a mistake apparent from the record, notice under section 154/155 dt. 24/02/2021 was issued to the assessee as to why the mistake so apparent from the record should not be rectified.

5. In response to the notice, the assessee submitted that the assessee declared additional income during the course of survey as business income on account of difference of stock as pointed out by the survey team and the same was accepted by the AO during the course of assessment proceedings. It was further submitted that the provisions of Section 115BBE can be attracted only where the addition is made under section 68, 69, 69A, 69B. 69C or 69D of the Act, whereas in this case, the AO has not made any addition under the deeming provisions nor has invoked the deeming provision while completing the assessment proceeding.

6. The submissions so filed by the assessee were considered but not found acceptable to the AO. The AO referred to the provisions of Section 154 of the Act and thereafter held that the income of Rs. 2,61,69,869/- assessed under Section 68 of the Act is duly covered under the provisions of Section 115BBE of

the Act and the mistake being apparent from the record was thereafter rectified vide order dt. 15/03/2021 passed under section 154 r.w.s 143(3) of the Act wherein total tax payable was determined at a figure of Rs. 1,47,17,937/-.

7. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). It was submitted that during the course of survey proceedings, the assessee surrendered additional business income of Rs. 2,61,69,869/- and same was accepted by the Survey party and later on, the assessee fled its return of income disclosing the surrendered income as business income which was accepted by the AO and he did not invoke the provisions of Section 68/69 of the Act and the tax was charged at normal rate of taxation and therefore there is no mistake which is apparent from record as so held by the AO.

8. It was further submitted that the AO has erred in holding that while completing the assessment, he has invoked the provision of Section 68 of the Act. In this regard, reference was drawn to the assessment order so passed under section 144(3) wherein the returned income has been accepted without invocation of provisions of Section 68 in respect of the income so surrendered as business income. It was further submitted that the provisions of Section 115BBE cannot straight be applied and only in a situation where the AO has invoked the deeming provision, the rate of tax has to be determined as per the provisions of Section 115BBE of the Act. Further, reliance was placed on the decision of Coordinate Bench, Jaipur in case of Hari Narain Gattani Vs. DCIT *(ITA No. 186/JP/2020 dt. 09/10/2020)* and ACIT Vs. Sudesh Kumar Gupta (2020) 206 TTJ (JP)1019.

9. The submissions so filed by the assessee were considered and following the decision of Coordinate Jaipur Benched in case of Hari Narain and Sudesh Kumar Gupta, the Ld. CIT(A) held that the assessee claim that the order under section 154 r.w.s 143(3) was passed without complying with mandatory

conditions as emphasized under section 154 is agreed to and the appeal of the assessee was allowed and the rectification order passed under section 154 r.w.s. 143(3) was quashed. Against the said findings, the Revenue is in appeal before us.

10. During the course of hearing, the Ld. DR submitted that the Ld. CIT(A) has erred in treating the income of Rs. 2,61,69,869/- surrendered by the assessee during the course of survey as normal business income in place of special income and the same is required to be taxed as per the provisions of Section 115BBE of the Act instead of normal rate of tax. It was submitted that the AO has rightly invoked his jurisdiction u/s 154, being a mistake apparent from record and the ld CIT(A) has erred in setting aside the AO's order so passed. He supported the order so passed by the AO and submitted that the order so passed by the ld CIT(A) be set-aside and that of the AO be sustained.

11. Per contra, the Ld. AR supported the order and the findings of the Ld. CIT(A) and reiterated the submissions made before the Ld. CIT(A). It was submitted that the ld CIT(A) has rightly set-aside the order so passed by the AO u/s 154 as there was no mistake in the original order passed u/s 143(3) where the income surrendered during the course of survey has been assessed as business income and deeming provisions have not been invoked and in absence of deeming provisions being invoked, the provisions of section 155BBE have rightly not being invoked by the AO. Further, our reference was drawn to the decision of Coordinate Jaipur Benches in case of Hari Narain Gattani *(Supra)* wherein, under similar facts and circumstances of the case, invocation of jurisdiction u/s 154 has been held as bad in law and was set-aside and the relevant findings read as under:

> *"10. We have heard the rival contentions and perused the material available on record. We refer to the order passed by the AO under s. 154 and the findings of the AO therein read as under:*

> *"In this case the assessment under s. 143(3) r/w s. 153A of the IT Act, 1961, for the asst. yr. 2017-18, was completed on 6th Dec, 2018, at assessed income of Rs. 41,78,390. As this is a search assessment case and assessee surrendered of Rs. 22,19,590 during the search action as an undisclosed income for the year under consideration, on which tax rate was to be charged as per provision of s. 115BBE of the IT Act. However during the assessment proceedings the tax rate on surrendered income under s. 115BBE of the IT Act, charged @ 30 per cent whereas as per second amendment in provision of s. 115BBE of the IT Act (w.e.f. 1st April, 2017, the tax rate should have been charged @ 60 per cent on the above surrendered amount, in addition to this 25 per cent surcharge on such tax and 3 per cent education cess of tax and surcharge. There is a mistake apparent from records and the same is required to be rectified under s. 154 of the IT Act.*
>
> *Further, in the above matter an opportunity to being heard has been provided to assessee on 27th Dec, 2018. In response to the same assessee has submitted his written reply on dt. 10th Jan., 2019. The reply of the assessee has been considered on merits however, the same was not found tenable. In view of discussion held in above para(s) the revised tax calculation is being issued with this order which shall be part of this order accordingly. The assessed income of Rs. 41,78,390 will remain unchanged."*

11. We find that the reasoning adopted by the AO for invoking provisions of s. 154 is as follows Firstly, he stated that this is a search assessment case and assessee surrendered a sum of Rs. 22.19,590 during the search action as an undisclosed income for the year under consideration, on which tax rate was to be charged as per provision of s. 115BBE of the IT Act. Secondly, he has stated that during the assessment proceedings, the tax rate on surrendered income under s. 11588E of the Act has been charged 30 per cent. And thirdly, as per amended provisions of s 115BBE of the Act as applicable in the instant case, the tax rate should have been charged 60 per cent on the above surrendered amount

12. If we look at the provisions of s 1158BE, it provides that where the total income of the assessee includes any income referred to in s. 68. s. 69, s. 694, s. 698, s. 69C or s. 69D, the income-tax payable shall be @ 30 per cent on income so referred in said sections Further, in terms of amended provisions of s. 1158BE by the Taxation Laws (Second Amendment Act), 2016, it provides that where the total income of the assessee includes any income referred to in s. 68, s. 69, s. 69A, s. 698, s. 69C or s. 69D and reflected in the return of income furnished under s 139 or the total income of the assessee determined by the AO includes any income referred to in s. 68, s. 69. s 69A. s. 698. s. 69C or s 69D, if such income is not reflected in the return of income furnished under s 139 of the Act the income-tax payable shall be 60 per cent on income so referred in said sections. Thus, both the pre- amended and post-amended provisions of s. 115BBE talk about the income referred to in s. 68, s. 69, s. 69A. s 698, s 690 or s 690. The change which has been brought about in the provisions relates to income so referred in aforesaid provisions so defined which is either reflected in the return of income or determined by the AO and in both cases, it will be covered by the provisions of section 115BBE of the Act and rate of taxation has been increased from 30 per cent to 60 per cent on such specified

income. There is therefore, nothing stated in either the pre amended or post-amended provisions of section 115BBE that where the assessee surrenders undisclosed income during the search action for the relevant year, the tax rate has to be charged as per provision of section 115BBE of the Act. Therefore, without dwelling further on the applicability of the amended provisions of s. 115BBE for the impugned assessment year, the reasoning so adopted by the AO in terms of applicability of section 115BBE by default in search cases cannot be accepted and in any case, the same is clearly not a mistake which is apparent from the plain reading of the provisions of section 115BBE of the Act.

13. Coming to the other contention raised by the AO wherein he has stated that during the assessment proceedings, the tax rate has been charged @ 30 per cent on surrendered income under s. 115BBE of the Act and which is now sought to be rectified in terms of impugned order. In this regard, we have gone through the return of income as well as the assessment order so passed by the AO under s. 143(3) and find that in the return of income tax liability on the undisclosed income has been determined as per slab rate of taxation applicable to an individual and not @ 30 per cent as per 115BBE of the Act. Similarly, in the assessment order passed under s 143(3), we find that firstly, there is no finding by the AO that the income so surrendered has been determined as income referred to in s. 68. s. 69, s. 69A, s. 698, s. 69C or s. 69D and secondly, in the computation of tax liability, the tax liability on the undisclosed income has been determined as per slab rate of taxation applicable to an individual and not@ 30 per cent as specified in s. 115BBE. Thus, both the income so offered by the assessee as well as rate of taxation has been accepted by the AO and in fact, we find that there is a specific finding by the AO in the assessment order that the assessee has also paid all due tax with interest in respect of the undisclosed income There is thus, no finding that any of the aforesaid provisions so referred in s. 115BBE has been invoked by AO during the assessment proceedings and therefore, we find that the contention of the AO that during the assessment proceedings, the tax rate has been charged @ 30 per cent on surrendered income under s 115BBE of the Act is not factually correct as not borne out of assessment records and thus, the action of the AO in rectifying and increasing the rate of taxation from 30 per cent to 60 per cent and surcharge and cess on such undisclosed income does not come within the purview of s 154 of the Act.

14. In light of aforesaid discussions and in the facts and circumstances of the present case, we are of the considered view that the action of the AO in invoking his jurisdiction under s. 154 is not legally tenable as beyond the scope and powers under s. 154 of the Act and the order so passed as confirmed by the learned CIT(A) is hereby set-aside."

12. It was further submitted that the said decision has since been followed by the Coordinate Hyderabad Benches in case of Anjanee Vijetha Kasturi Vs. ACIT *(ITA No. 196/Hyd/2023 dt. 09/05/2023*) wherein the relevant findings read as under:

"9. I have gone through the record in the light of the submissions made on either side. Coming to the admitted facts, there was a survey in the business premises of

the assessee on 19/02/2015. In the statement recorded under section 131 of the Act, one Shri Kasturi Skanda Kumar offered an additional income of Rs. 20 lakhs in the hands of the assessee for the assessment year 2015-16. Subsequently, when the assessee filed the return of income for the assessment year 2015-16 on 30/12/2015, such declared additional income was incorporated therein. Learned Assessing Officer by order dated 07/09/2017 considered this fact in the light of the impounded material, books impounded in relation to survey and other documents produced, during the scrutiny, accepted the return of income. Learned Assessing Officer did not invoke the provisions of section 115BBE of the Act nor did he levy the tax at 30% thereunder. He only adopted slab rates. He, however, invoked the provisions of section 115BBE of the Act through an order dated 09/04/2019, proposing to rectify the mistake apparent from record under section 154 of the Act, which the assessee is challenging in this appeal.

10. Assessee submits that when once the learned Assessing Officer does not invoke section 115BBE of the Act in the assessment order passed under section 143(3) of the Act and simply accepted the additional income offered, there is no mistake apparent from record in respect of the rates of tax. Such a thing will be available to the learned Assessing Officer if he invokes the provisions of section 115BBE of the Act, but levies the tax at a different rate by mistake. For this, he relied on the decisions cited above.

11. In the cases of Hari Narain Gattani vs. DCIT (supra), ACIT vs. Shri Sudesh Kumar Gupta (supra) and M/s. Kothari and Brothers vs. ITO (supra), the facts are that there was a survey, recording of statement, wherein the additional income was declared, such an additional income declared was incorporated in the return of income that was filed and the learned Assessing Officer accepting the same without invoking the provisions of section 115BBE of the Act. In all these cases, the learned Assessing Officer invoked section 115BBE of the Act in exercise of powers under section 154 of the Act to rectify the mistake apparent from record. The judicial opinion in all these cases is unequivocal and unanimous that if the learned Assessing Officer accepted the return of income and levied the tax on the undisclosed income as per the slab rates taxation, and without determining such income as the income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act in the order passed under section 143(3) of the Act, then subsequent exercise of powers under section 154 of the Act to invoke section 115BBE of the Act for rectification of the so-called mistake is bad under law. It is further held that the provisions of section 115BBE of the Act are contingent on the decision of the learned Assessing Officer as to the requirement of sections mentioned in section 115BBE of the Act and, therefore, without recording such a satisfaction in the assessment order, the learned Assessing Officer cannot say that there was error apparent on record and has to be rectified under section 154 of the Act to invoke section 115BBE of the Act. In all these decisions, the decisions of Co-ordinate Benches of this Tribunal and the decisions of higher fora are noticed.

12. A perusal of section 115BBE of the Act clearly contemplates that it is only when the total income of the assessee includes any income referred to in sections 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act or so determined by the Assessing Officer, then income tax has to be calculated under such section. A reading of section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act shows that for invoking such

provisions, the learned Assessing Officer shall reach a conclusion that the assessee has not offered any explanation about the nature and source of the unexplained money or the explanation offered by him is not to his satisfaction. Therefore, it is only when the learned Assessing Officer requires and records that the explanation is either not offered or even if offered it is not to his satisfaction then only the provisions under section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act could be invoked in determination of income.

13. In the case on hand, there is no specific allegation of the learned Assessing Officer that he sought any explanation from the assessee and the assessee did not offer any explanation or that the explanation if any, offered by the assessee is not to his satisfaction. In the absence of such a satisfaction, if an order under section 143(3) of the Act is passed accepting the return of income, then it is difficult to presume that such an order was passed in respect of any income determined under section 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act or that the tax has to be levied under section 115BBE of the Act. Unless and until such a compliance is there in the assessment order, it cannot be said that there was any mistake apparent from record or that the proceedings are amenable to the jurisdiction of the learned Assessing Officer under section 154 of the Act. Having not recorded any such satisfaction as required under law, the learned Assessing Officer cannot be allowed to contend that the provisions of section 115BBE of the Act are applicable to the case of the assessee and, therefore, the error in respect of leviable rates has to be rectified under section 154 of the Act.

14. With this view of the matter, I am of the considered opinion that consistent view taken by the Co-ordinate Benches of this Tribunal referred to above is applicable to the facts of the case on hand on all force. Accordingly, I hold that exercise of jurisdiction under section 154 of the Act by the learned Assessing Officer is bad in law and consequently the proceedings under section 154 of the Act are liable to be quashed."

13. It was accordingly submitted that the ld CIT(A) has rightly set-aside the order passed by the AO u/s 154 and the same should be affirmed and the appeal of the Revenue be dismissed.

14. We have heard the rival contentions and purused the material available on record. On perusal of the provisions of Section 115BBE of the Act, it provides that where the total income of the assessee includes any income referred to in sections 68, section 69, section 69A, section 69B, section 69C or section 69D of the Act or so determined by the Assessing Officer, then income tax has to be calculated as so provided under such section and the same, being special rate of tax shall supersede the rate of tax as applicable otherwise. Therefore, where the income so surrendered during the course of survey has been offered in the

return of income under the respective deeming provisions or brought to tax under the deeming provisions while completing the assessment by the AO, the income tax has to be determined as per the provisions of section 115BBE of the Act. Invocation of Section 115BBE of the Act is thus dependent on the income offered or determined under the deeming provisions and cannot be invoked on a standalone basis without invoking the deeming provisions specified therein.

15. In the instant case, the income surrendered during the course of survey on account of discrepancy in the inventory has been offered to tax as business income in the return of income and has been accepted as such and assessed as business income by the AO during the assessment proceedings. As the surrendered income has been offered by the assessee and accepted as regular business income by the AO during the assessment proceedings, the AO has rightly not invoked the deeming provisions while completing the assessment as the question of invocation of section 115BBE doesn't arise for consideration at first place and therefore, there is no mistake apparent from record. In view of the same, invocation of jurisdiction by the AO under section 154 for non-invocation of Section 115BBE simplicitor doesn't arise for consideration and has rightly been set-aside by the ld CIT(A) following a consistent view taken across various Benches of the Tribunal as referred supra under similar facts and circumstances of the case and these decisions thus supports the case of the assessee.

16. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 23.12.2024.

Sd/-	Sd/-
परेश म. जोशी	**विक्रम सिंह यादव**
(PARESH M. JOSHI)	**(VIKRAM SINGH YADAV)**
न्यायिक सदस्य / JUDICIAL MEMBER	**खा सदस्य/ ACCOUNTANT MEMBER**

AG

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

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

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar