

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 976/JP/2019
निर्धारण वर्ष / Assessment Year :2014-15

The ACIT, Circle-02, Alwar	बनाम Vs.	Shri Sudesh Kumar Gupta Prop. M/s Salasar Textiles, 1, Babu Karan Singh Complex, Court Road, Behror, Distt. Alwar
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACUPG6791Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Ms. Chanchal Meena (Addl.CIT)
निर्धारिती की ओर से / Assessee by : Sh. P. C. Parwal (CA)

सुनवाई की तारीख / Date of Hearing : 08/06/2020
उदघोषणा की तारीख / Date of Pronouncement: 09/06/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue against the order of Id. CIT(A), Alwar dated 23.05.2019 wherein the sole ground of appeal reads as under:-

"1. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is justified in quashing the action of the AO u/s 154 of the Act in applying provision of section 115BBE of the IT Act on undisclosed investment of Rs. 21,00,000/- surrendered during the course of survey proceedings."

2. Briefly stated, the facts of the case are that a survey u/s 133A was conducted on 29.08.2013 at the business premises of the assessee. During

the course of survey proceedings, stock was physically verified and valued at Rs. 46,07,640/- and the assessee surrendered an amount of Rs. 21,00,000/- as undisclosed investment in stock from undisclosed income. The surrendered income of Rs 21,00,000/- was thereafter offered and reflected in return of income filed by the assessee for the year under consideration. Subsequently, the matter was taken up for scrutiny and the returned income of Rs. 22,80,070/- filed by the assessee was accepted and assessment was completed u/s 143(3) of the Act vide order dated 01.09.2016. Subsequently, a notice u/s 154 was issued to the assessee and the contents thereof read as under:-

"the assessee has surrendered of Rs. 21,00,000/- as undisclosed investment in stock from undisclosed income during the survey conducted u/s 133A of the Act on 06.09.2013 on which the tax was to charged @ 30% while passing the order u/s 143(3) of the Act on 24.05.2016 but the tax was charged as per slab rate by Rs. 5,13,374/- instead of 6,48,900/-. As per section 115BBE of the Act where the any income included in total income referred u/s 68, 69, 69A, 69B, 69C and 69D of the IT Act, the tax has to be charged @ 30%."

3. The assessee, in response to the aforesaid notice, submitted that in the survey statement, he has admitted excess stock of Rs. 21,00,000/- on estimated basis and the same was offered to tax in the return of income which was accepted by the AO while completing the assessment proceedings. It was submitted that the excess stock offered in survey is part of the business income and without any corroborative evidence, the excess stock was determined by valuing the business stock at current price instead of purchase price and nothing was brought to suggest that this was not a regular item of stock dealt with by the assessee. It was further submitted that where asset in which undeclared investment is sought to be taxed is not clearly

identifiable or does not have independent identity but is integral and inseparable part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. Further, reliance was placed on the Co-ordinate Bench decision in case of DCIT vs. Ram Narayan Birla (*482/JP/2015 dated 30.09.2016*).

4. The submission so filed by the assessee was considered but not found acceptable to the Assessing Officer. As per the Assessing officer, during the course of survey proceedings, the assessee has surrendered an amount of Rs. 21,00,000/- as undisclosed investment in stock from undisclosed income and the issue has been elaborately discussed in the assessment order passed u/s 143(3) of the Act. It was accordingly held that section 69 is clearly attracted in the case and tax is to be charged in accordance with section 115BBE of the Act. Accordingly, tax @ 30% on surrendered income of Rs. 21,00,000/- was charged instead of tax charged as per the slab rate while passing the assessment order u/s 143(3) of the Act.

5. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). As per Id. CIT(A), the Assessing Officer is not justified in taxing surrendered stock u/s 115BBE where he has already accepted it under the head business income while passing the assessment order u/s 143(3) of the Act and in support, relied upon the Co-ordinate Bench decisions in case of Chokshi Hiralal Maganlal vs. DCIT 141 TTJ (Ahd) 1 and DCIT vs. Ram Narayan Birla (supra). Further, the Id CIT(A), relying on the decision of Hon'ble Supreme Court in case of T. S. Balram ITO vs. Volkart Brothers reported in 82 ITR 50, held that action of the Assessing officer u/s 154 is not justified. Against the said findings, the Revenue is in appeal before us.

6. During the course of hearing, the Id. DR relied on the findings of the AO and submitted that the provisions of section 69 are clearly attracted in the

instant case and therefore, AO was justified in invoking the provisions of section 154 of the Act as there is no dispute that the amount has been surrendered by way of undisclosed investment in stock from undisclosed income and the provisions of section 69 and section 115BBE are clearly attracted and there cannot be two views about it.

7. Per contra, the Id. AR relied on the findings of the Id. CIT(A) and submitted that the amount surrendered during the course of survey has been duly offered by the assessee as business income while filing his return of income and the said return of income has been accepted by the Assessing Officer. It was submitted that there is no finding recorded by the Assessing officer while passing the assessment order that the provisions of section 69 are attracted in the instant case and in absence thereof, the provisions of section 115BBE cannot be applied. Further, reliance was placed on the Co-ordinate Bench decision in case of DCIT vs. Ram Narayan Birla (supra).

8. We have heard the rival submissions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs 21,00,000/- as undisclosed investment in stock from undisclosed income during the course of survey. In the return of income, the same has been offered to tax under the head "business income" and the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation either in the quantum, nature or classification of income so offered by the assessee. The assessee, being an individual, has offered the same to tax applying the slab rate of taxation as applicable to an individual. The case of the Revenue is that the same is taxable @ 30% as per provisions of section 115BBE r/w section 69 of the Act and is thus a mistake apparent from record rectifiable u/s 154 of the Act.

9. In order to appreciate the rival contentions, it would be appropriate to refer to the provision of section 115BBE at the relevant point in time which reads as under:

"115BBE. (1) Where the total income of an assessee,—

(1) 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 the income referred to section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty 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)."

10. The provisions of section 115BBE thus provides that where the income of the assessee includes any income referred to in section 69, the income tax payable shall be at the rate of 30% on income so referred in section 69 and on the remaining income, 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 in section 69. In other words, it provides for a special rate of taxation at the rate of 30% as against the normal rate of taxation which may be applicable to the assessee. The question is whether assessee's income involves income referred to in section 69 and the provisions thereof reads as under:

"69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion

of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."

11. In the instant case, as we have noted above, the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation to the income so offered by the assessee and the assessment has been completed u/s 143(3) of the Act. Further, there is nothing on record which shows that the Assessing officer has called for any explanation of the assessee regarding the nature and source of such investment during the course of assessment proceedings and any formation of opinion and recording of satisfaction by the Assessing officer which is required before invoking the provisions of section 69 of the Act. Though the Assessing officer has issued a show-cause as to why penalty proceedings u/s 271(1)(c) may not be initiated in respect of such investment, however, he has not issued any show-cause for invoking provisions of section 69 of the Act or has called for any explanation of the assessee regarding the nature and source of such investment. In fact, the assessment order so passed by the Assessing officer is silent about invoking the provisions of section 69 of the Act. Where the provisions of section 69 have not been invoked by the Assessing officer while passing the assessment order u/s 143(3), going by the plain language of section 115BBE, the latter cannot be invoked in the instant case.

12. It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE of the Act. Had that been the case, it would clearly be a case of rectification and powers under section 154 can be invoked. However, in the instant case, the Assessing officer has not invoked the provisions of section 69 at first place while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of

requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act. We therefore upheld the order of the Id CIT(A) and the matter is decided in favour of the assessee and against the Revenue.

In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 09/06/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 09/06/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- The ACIT, Circle-02, Alwar
2. प्रत्यर्थी / The Respondent- Sh. Sudesh Kumar Gupta, Alwar
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 976/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar