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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 861/JP/2019
निर्धारण वर्ष/Assessment Year :2015-16

M/s Alokik Steels Pvt. Ltd. Village Post- Patan, Tehsil- Kishangarh, District- Ajmer	बनाम Vs.	Principal Commissioner of Income-Tax-II, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAGCA9590E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Siddharth Ranka &
Sh. Saurav Harsh (Adv.)
राजस्व की ओर से/ Revenue by : Sh. B. K. Gupta (CIT)

सुनवाई की तारीख/ Date of Hearing : 04/02/2021
उदघोषणा की तारीख/Date of Pronouncement: 03/03/2021

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of ld. Pr. CIT-2, Jaipur dated 07.03.2019 passed u/s 263 of the Act wherein the assessee has taken the following grounds of appeal:-

"1. That on the facts and in the circumstances of the case, the ld. Principal Commissioner of Income-tax grossly erred in passing an order u/s 263 of the Income-tax Act and in holding that the assessment made by the ld. Assessing Officer is found to be erroneous in so far as it is prejudicial to the interest of the Revenue.

1.1. That on the facts and in the circumstances of the case, the ld. Principal Commissioner of Income-tax grossly erred in passing the impugned order u/s. 263 of the Income-tax Act and in holding that "the ld. AO passed the assessment order with non-application of mind and without proper inquiry" which is wholly unjustified, bad in law and deserve to be quashed.

1.2. That the ld. Principal Commissioner of Income-tax failed to appreciate that the ld. Assessing Officer had passed the assessment order after appreciating all supporting documents and evidences which was just and proper therefore the assessment order passed by the ld. Assessing Officer is neither erroneous nor is prejudicial to the interest of the Revenue.

1.3. That the ld. Principal Commissioner of Income-tax grossly erred in ignoring the detailed submissions made by the assessee in response to notice u/s. 263 and in passing the impugned order on assumptions, presumptions, conjectures and surmises which is bad in law.

1.4. That the ld. Principal Commissioner of Income-tax grossly erred in holding that the ld. Assessing Officer has failed to consider applicability of section 115BBE read with section 69A of the Act on Rs. 1,77,95,859/- reflecting turnover surrendered before the Central Excise Authorities and in granting benefit of brought forward of losses/depreciation.

2. That on the facts and in the circumstances of the case, the order passed by the ld. Principal Commissioner of Income-tax u/s.

263 of the Act is barred by limitation and thus deserves to be set-aside and quashed."

2. At the outset, it is noted that there is a delay in filing the present appeal by 18 days. After hearing both the parties and considered the affidavit filed by the assessee, the delay is hereby condoned and the appeal is admitted for necessary adjudication.

3. During the course of hearing, the ld. AR taken us through the factual background of the case and submitted as under:-

"1. The assessee company deals in manufacture & trading of Iron Ingots for past several years. A search at the factory premises of company took place on 16.01.2015 by the Central Excise Commissionerate (Anti Evasion Branch, Jaipur) and Sh. Krishan Jindal, Director of the company admitted:

(1) Quantity of 177.609 MT ingots valued at Rs. 53,10,480/- was found short;

(2)Further during the course of search on examination kanta slip and kaccha record, recovered from residence of Director, he has accepted that a quantity of 562.940 MT. valued at Rs. 1,77,95,858/- was removed without entering the same in the books of accounts.

2. The assessee had filed its return of income for the assessment year 2015-2016 on 29.09.2015 at the total income of Rs. NIL and carried forward unabsorbed depreciation of Rs. 1,93,71,020/-. In the return of income filed, the assessee included the cash sales of Rs. 53,10,480/- in its sales accounts

towards shortage of stock. Furthermore, in the computation of income & return of income filed by the assessee, it offered the income on such transaction at Rs. 5,53,095/- being G.P. of 3.11% on Turnover of Rs. 1,77,95,856/-. The income of Rs. 5,53,095/- earned from out of books sale on estimated G.P Basis is clearly shown in online E-Return at Page no. 10 in head other information column 5(d) as any other item of Income and same is again repeated at Page no. 17 in head computation of income from business of profession column no 24 with narration - "any other income not included in profit and loss account".

3. The return was selected for complete scrutiny through CASS. During the course of hearing, the ld. Assessing Officer had also verified the books of accounts, etc. Furthermore, the said income of Rs. 5,53,095/- is very well shown in computation of income placed before learned Assessing Officer by narration "income estimated on turnover surrendered in excise survey being GP of 3.11% on Rs. 1,77,95,858/- = 5,53,095/-. As far as assessee is concerned, it has disclosed and incorporated the undisclosed income in the income tax return filed by it. The ld. Assessing Officer has gone through the income-tax return and computation of income in detail and has cross-checked the same to his satisfaction. He was satisfied that the gross-profit rate on good sold without invoices is duly disclosed in the Income-tax Return of the assessee. During the course of hearing, the ld. Assessing Officer had also verified the books of accounts, etc. The ld. Assessing Officer passed the assessment order dated 06.12.2017 u/s 143(3) after complete verification and detailed scrutiny. The ld. Assessing Officer has made certain disallowances

amounting to Rs. 1,30,840/- against which no appeal has been preferred by the assessee and the ld. Assessing Officer allowed carried forward unabsorbed depreciation of Rs. 1,92,40,180/-.

4. That thereafter the ld. PCIT issued a notice dated 29.11.2018 u/s. 263 of the Act wherein it was alleged that the ld. Assessing Officer has not considered the above two aspects relating to surrender made before the Central Excise authorities during the course of assessment proceeding and thus the assessment order dated 06.12.2017 passed by the ld. Assessing Officer is erroneous and prejudicial to interest of the revenue (copy enclosed).

5. Detailed reply dated 05.03.2019 was furnished by the assessee in consequence of afore-said notice u/s. 263 of the Act alongwith supporting evidences.

6. The ld. PCIT vide her impugned order dated 07.03.2019 was satisfied about tax treatment of (1) Quantity of 177.609 MT ingots valued at Rs. 53.10 lacs sold/cleared without payment of excise duty and without raising any central excise invoice. However, the ld. PCIT was not satisfied about tax treatment of quantity of 562.940 MT. valued at Rs. 1,77,95,858/-."

4. In the above factual matrix, it was submitted by the ld AR that the assessee has duly disclosed the transaction in its return of income which stood duly verified by the Assessing Officer. Therefore, the observations by the ld. Pr. CIT that no enquiry has been made by the Assessing Officer is bad in law. It was submitted that the AO made the necessary inquiry and has examined the books of accounts which are duly audited and all

the transactions have been shown in the return of income as well as in computation of income. It was submitted that there is no straight jacket formula or parameter to make inquiry in the assessment proceedings. What is required is that the AO should frame the assessment in accordance with the provisions of the Act and in light of the relevant judicial pronouncement and other material available on record. In the instant case, the ld. Pr. CIT has failed to state what correct provision of law has not been examined or applied by the Assessing Officer.

5. It was further submitted by the ld AR that in the impugned order dated 07.03.2019, the ld. PCIT has travelled beyond the issues raised in the show cause notice issued u/s 263 of the Act and no opportunity to rebut the same was provided to the assessee and the same is against the principles of natural justice. In the impugned order it was held that the undisclosed stock of Rs. 1,77,95,858/- was required to be taxed u/s 69A of the Act read with section 115BBE of the Act and the benefit of unabsorbed depreciation/loss were not to be given to the assessee appellant. In support, the reliance was placed on the Delhi Bench in the case of Sanjeev Singh v. PCIT *(ITA No. 1781/Del/2016 dated 24.04.2019).*

6. It was further submitted that on perusal of provisions of section 69A, it is crystal clear that the same can be invoked in case of any (1) money, (2) bullion, (3) jewellery or (4) other valuable article. However, in the instant case the Central Excise Department had neither found any (1) money, (2) bullion, (3) jewellery or (4) other valuable article, it only found kachi parchies having reference to undisclosed sales. No physical goods were found by the officials of the Central Excise department. Hence, the invocation of section 69A is not appropriate in the instant backdrop and facts. On the contrary the assessee has correctly offered the Gross Profit

earned on out of books sale as its income. It is apparent that the ld PCIT has assumed the undisclosed sales as undisclosed stock found by the Central excise authorities whereas it is not so. Only loose slips of unaccounted sale of Rs. 1,77,95,856/- was found by the Central Excise Authorities and unaccounted stock of Rs. 1,77,95,856/- was not found. The findings recorded by the ld. PCIT in para 2& 7 are contradictory. Initially reference is to clandestine removal of goods, thereafter it is referred as unexplained stock.

7. It was further submitted that the income was offered by the assessee company under the head "business income" for the reason that the assessee company has no other income other than income from business of trading and manufacturing of MS Ingots. Furthermore, the undetected transactions unearthed by the officials of the Central Excise department directly related to the business being carried out by the assessee company, it is not a case where some unconnected transactions other than relating to MS Ingots were found by the officials. In support, the reliance was placed on the Jaipur Bench decision in the case of Bajaragan Traders v. ACIT *(ITA No. 137/JP/2013 dated 17.03.2017)* which has subsequently been affirmed by the Hon'ble Rajasthan High Court as reported in PCIT vs Bajrang Traders (2017) 11 TMI 388, Jodhpur Bench decision in case of Lovish Singhal v. ITO *(ITA Nos. 142-146/Jodh/2018 dated 23.05.2018)* and in case of Pawan Kumar (HUF) vs. ITO *(ITA Nos. 371-375/Jodh/2018 dated 10.05.2019).*

8. It was further submitted that the amendment brought in section 115BBE(2) of the Act wherein the words 'or set off of any loss' were inserted w.e.f 01.04.2017. The said amendment has been made w.e.f assessment year 2017-18 and therefore, the benefit of unabsorbed

depreciation/loss has wrongly been directed to be disallowed by the ld. Pr. CIT. In support, the reliance was placed on Jaipur Bench decision in case of Navjeevan Trade & Commodities Pvt. Ltd. vs. ITO (2018) 8 TMI 665.

9. It was further submitted that the GP ratio was rightly disclosed by the assessee and entire turnover could not have been added by the Assessing Officer and in support, the reliance was placed on the following decisions:

- DCIT v. Panna Corporation (2014) 11 TMI 797 (Gujarat)
- CIT v. Hariram Bhambhani (2015) 2 TMI 907 (Bombay)
- ITO v. Pushpendra Kumar Jain (2016) 1 TMI 1190
- Sanvira Holdings v. DCIT (2020) 5 TMI 139.

It was accordingly submitted that in light of the above submissions, the impugned order passed by the ld. Pr. CIT deserves to be set aside and quashed.

10. In his submission, the ld. CIT/DR taken us through the order of the ld. Pr. CIT and the relevant facts of the case as stated in para 2 of the order which reads as under:-

> *"2. As per certain information received from the Commissioner of Central Excise Commissioner (Anti Evasion Branch), Jaipur, it is seen that during search of the factory premises of M/s Alokik Steel Pvt, Ltd on 16.01.2015, documents relating to clandestine removal of goods were recovered. Physical stock verification of the finished goods was also done in the premises of the company and shortage of 177.609 MT in finished goods i.e M.S. ingots was noticed. In his statement, Sh. Krishan Jindal,*

Director of the company, admitted that a quantity of 177.609 MT ingots valued at Rs.53.10 lac were sold/cleared without payment of Central Excise Duty and without raising any Central Excise Invoice. Shri Jindal after calculating the Central Excise Duty on 177.609 MT 'MS Ingots' removed clandestinely, paid an amount of Rs.6,56,375/- towards central excise duty.

On examination of records including kanta slip and Kaccha record, covered from the residence during the search dated 16.01.2015, it has been observed that on earlier occasions, the assessee had also removed clandestinely their manufactured goods without issue of invoice and without payment of duty. Shri Krishan Jindal after having seen the resumed kaccha record and a chart of clandestine removal admitted in his statement dated 21.01.2015 that a quantity of 562.940 MT manufactured by them were also removed without entering the same in their RG-1 register and without issue of invoices and without payment of central excise duty. Shri Krishan Jindal, Director of the company after calculating the duty liability of Rs.20,80,424/- on the said clandestine removal of 562.940 MT ingots submitted an on-line challan of Rs.10,30,000/- on 21.01.2015. Thus the company removed' 740.549 MT of 'MS Ingots' without issuance of invoices and without payment of Central Excise. This amounted to an unrecorded turnover of about Rs.1.77 Cr. which was required to have been examined by the A.O. in the course of scrutiny proceedings. However, records show that this issue has not been considered in any manner by the Assessing Officer (A0). The taxability of the sum of Rs.1.77 Cr. has not been

examined by the A.O and the assessment order dated 6-12-2017 is silent on this issue."

11. It was submitted that in light of aforesaid facts on record, a show cause was issued to the assessee on 29.11.2018 and after considering the submissions so filed by the assessee, the ld. Pr. CIT has held that the order has been passed by the Assessing Officer in a routine and perfunctory manner without verification and examination of the issue relating to excess turnover detected by Excise Department amounting to Rs. 1,77,95,859/- and our reference was drawn to the relevant findings of the ld. Pr. CIT which are contained at paras 5 to 9 of his order. In support of his contentions, the ld CIT/DR has relied on the following decisions:

- Daniel Merchant Pvt. Ltd. and ANR vs. ITO (Special Leave to Appeal No. 23976/2017 dated 29.11.2017)
- Virbhadra Singh (HUF) vs. Pr. CIT (2017) 86 taxmann.com 113(HP)
- CIT, Nagpur vs. Ballarpur Industries Ltd. (2017) 85 taxmann.com 10 (Bombay)
- CIT vs. Bhawal Synthetics (India), Udaipur, (2017) 81 taxmann.com 478 (Rajasthan)
- Malabar Industrial Company Ltd. vs. CIT (2000) 109 taxmann 66 (SC)
- Kirtidevi S. Tejwani vs. Pr. CIT-22, Mumbai, (2020) 116 taxmann.com 965 (Mumbai-Trib)
- Addl.CIT vs. Mukur Corporation, (1978) 111 ITR 312, Gujrat
- CIT vs. Assam Tea House (2012) 25 taxmann.com 93 (Punjab & Haryana)

- Nagal Garment Industries Pvt. Ltd. vs. CIT (2020) 113 taxmann.com 4 (Madhya Pradesh)
- Pr. CIT, Ludhiana vs. Venus Woolen Mills, Ludhiana (2019) 105 taxmann.com 287 (Punjab & Haryana)

12. We have heard the rival contentions and perused the material available on record. Firstly, we refer to the contention raised by the ld. AR that the findings of the ld. Pr.CIT have been given beyond the show cause notice and thus, no opportunity was provided to the assessee which is against the principles of natural justice. It has been further contended that the provisions of section 69A of the Act read with section 115BBE of the Act have been wrongly invoked by the ld Pr CIT as only loose slips of unaccounted sales and not any unaccounted stock was found by the excise authorities and secondly, the amendment to sub-section (2) to section 115BBE relating to set off of loss is effective from A.Y 2017-18 and not applicable to the impugned assessment year. It was accordingly submitted that where the provisions of section 69A of the Act read with section 115BBE of the Act are not applicable in the instant case, the assessment order so passed by the AO cannot be held to be erroneous.

13. It is a settled legal proposition that Section 263 does not require any specific show cause notice detailing specific grounds on which revision of assessment order is being proposed affecting initiation of exercise or to require Commissioner to confine himself to terms of notice excluding consideration of any other issue. At the same time, before the Commissioner records his findings on consideration of the relevant facts and material under consideration, he is required to provide an opportunity of hearing to assessee and failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of

jurisdiction but on the ground of violation of principles of natural justice. In this regard, useful reference can be drawn to the decision of the **Hon'ble Supreme Court** in case of **CIT vs Amitabh Bachchan** (2016) 384 ITR 200 wherein it was held as under:

> *"9. Under the Act different shades of power have been conferred on different authorities to deal with orders of assessment passed by the primary authority. While Section 147 confers power on the Assessing Authority itself to proceed against income escaping assessment, Section 154 of the Act empowers such authority to correct a mistake apparent on the face of the record. The power of appeal and revision is contained in Chapter XX of the Act which includes Section 263 that confer suo motu power of revision in the learned C.I.T. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of assessment, so far as the Revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under Section 147 and/or to revise the assessment order under Section 263 of the Act. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the Revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant Sections noticed above. While doing so it must also be borne in mind that the legislature had not vested in the Revenue any specific power to question an order of assessment by means of an appeal.*

10. Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic pre-condition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in Gita Devi Aggarwal v. CIT [1970] 76 ITR 496 and in CIT v. Electro House [1971] 82 ITR 824 (SC). Paragraph 4 of the decision in Electro House (supra) being illumination of the issue indicated above may be usefully reproduced hereunder:

"This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33-B. The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what

that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33-B. This Court in Gita Devi Aggarwal v. CIT, West Bengal ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B." (Page 827-828).

[Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961]

11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances

surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision."

14. In the instant case, what is therefore required to be examined is that firstly, on appreciation of relevant material on record, the ld. Pr. CIT should be satisfied that the order passed by the Assessing officer is erroneous in so far as it is prejudicial to the interest of the Revenue and he should record his findings bringing out the reasoning for arriving at such a finding which should be discernable from the order. Secondly, the ld Pr.CIT should afford an opportunity of being heard to the assessee thus, adhering to the principal of natural justice before arriving at such a finding that the order passed by the Assessing officer is erroneous in so far as it is prejudicial to the interest of the Revenue.

15. Firstly, we refer to findings of ld Pr. CIT at Para 7 of her order wherein the ld Pr. CIT has stated that "as per law, the entire unexplained/excess stock of Rs.1,77,95,858/- was required to be considered u/s 69A and brought to tax separately u/s 115BBE at the rate of 30% and no expenditure/allowance was to be allowed to be set off." Thereafter, at Para 8, she has stated that "….on the issue regarding taxability of the undisclosed investment u/s 69A read with section 115BBE, the A.O has not applied his mind at all. No query has been raised. The issue has not been examined at all. The relevant provisions of the law have not been invoked by the A.O". We find that the aforesaid findings by the ld Pr CIT at Para 7 & 8 of the impugned order relates to undisclosed investment in stock which is sought to be brought to tax u/s 69A r/w section 115BBE of the Act. The question that arises for consideration is whether such findings are borne out of material availble on records thus

rendering the order passed by the AO as erroneous and whether before arriving at such a finding, an opportunity of being heard was provided to the assessee during the course of revisionary proceedings.

16. In this regard, in order to appreciate the relevant material/information available on record, we refer to the show cause notice dated 29.11.2018 issued by the ld Pr. CIT and find that the show cause notice has been issued in the context of certain information received from Central Excise Department, Jaipur pursuant to search of the assessee's premises and on the basis of the information so received, it has been stated that the entire sales of 740.549 MT of MS Ingots is unaccounted sales/turnover and was required to be examined and added to the total income by the AO. Therefore, the relevant material on record which is discernable from the show-cause was in relation to unaccounted sales/turnover of 740.549 MT of MS Ingots amounting to Rs 1,77,95,858/- and we find that what has been found during the course of search conducted by the excise department were certain kanta slips and Kaccha records which shows clandestine removal of manufactured goods without issue of invoice and payment of duty. Even in statement of Shri Krishan Jindal, Director of the assessee company recorded on 21.01.2015, he has admitted that 562.940 MT of manufactured by the company was removed without entering the same in the RG-1 register and without issue of invoices and payment of Central Excise Duty. We therefore find that documents and statement so recorded talks about clandestine removal of manufactured goods without issue of invoice and payment of duty and in other words, unaccounted and out of books sales and not about any stock of goods which is not entered in the books of accounts which was found and can be brought to tax under section 69A of the Act. Though one may argue that unaccounted sales and undisclosed investment in stock which

has ultimately been sold are related to each other and a presumption can be drawn that where unaccounted sales are found during the course of excise search, it is likely that there is undisclosed investment in stock (which has ultimately been sold by the assessee) and thus, the same needs to be brought to tax. To our mind, a presumption howsoever strong cannot substitute and take the role of credible and verifiable material/evidence which forms the basis and foundation of fastening the tax liability in hands of the assessee more so where each of these transactions carry different tax liability. Thus, in absence of any material available on record that there was undisclosed investment in stock, the very invocation of provisions of section 69A and section 115BBE by the ld Pr. CIT is not borne out of records and thus, there is no legal and justifiable basis to hold that the order so passed by the AO is erroneous. Further, we agree with the contentions of the ld AR that the amendment to sub-section (2) to section 115BBE relating to set off of loss is effective from A.Y 2017-18 and not applicable to the impugned assessment year and the findings of the ld Pr CIT in this regard has no legal and justifiable basis.

17. Admittedly, as we have noted above, the show cause notice dated 29.11.2018 talks about the bringing to tax the unaccounted sales and it doesn't talk about any undisclosed investment in stock which has been found during the course of search. Further, we find that during the course of revisionary proceedings, no further show-cause or query has been raised by the ld Pr CIT or for that matter, any discussions/deliberations with the assessee as to the applicability of provisions of section 69A and section 115BBE of the Act and therefore, the directions at Para 7 & 8 of the impugned order are clearly without providing an opportunity of being heard to the assessee and where such findings are recorded by the ld Pr

CIT, it renders such findings legally unsustainable due to violation of principal of natural justice.

18. In light of aforesaid discussions, we are of the considered view that the findings and directions of the ld Pr CIT contained at Para 7 & 8 of her order are not borne out of material available on record and secondly, the such findings have been recorded without providing any opportunity of being heard to the assessee, therefore, such findings are hereby set-aside and to that extent, the order of the Pr CIT stands modified.

19. Now coming back to the other findings of ld Pr CIT, at Para 6 of the impugned order, she has stated that as per the statement of computation of income, the assessee has estimated income of Rs. 5,53,095/- on turnover surrendered in excise search being gross profit of 3.11% on Rs.1,77,95,858/- which has been taken in the statement of computation of income and not apparent or separately indicated in the audited final accounts. Thereafter, at Para 9 of the order, the ld Pr CIT has held that the order has been passed by the AO without verification and examination of issue relating to excess turnover detected by the excise department amounting to Rs 1,77,95,859/-.

20. These findings are no doubt in context of undisclosed sales/turnover basis material found during the course of excise search and which is also subject matter of show-cause notice allowing adequate opportunity to the assessee and which has infact been availed by the assessee by responding to the show-cause vide its submissions dated dated 5.03.2019 and thus, as far as opportunity of being heard is concerned, the same has been duly provided and there is no violation of principle of natural justice as far as these findings are concerned.

21. The question that still looms large is where the assessee has disclosed gross profit of 3.11% on Rs.1,77,95,858/- and which has been accepted by the AO, how the order so passed by the AO is held as erroneous and prejudicial to the interest of Revenue by the ld Pr CIT as to whether rate of gross profit so declared and accepted is erroneous or the quantum of unaccounted turnover so declared and considered by the AO is erroneous and thus prejudicial to the interest of Revenue.

22. In this regard, we refer to the contention advanced by the ld AR that gross profit has been rightly declared by the assessee and the entire turnover of Rs 1,77,95,859/- could not have been added and therefore, where the gross profit and turnover so declared has been accepted by the AO as well as by ld Pr CIT, there is no basis to still hold that the order so passed by the AO is erroneous and prejudicial to the interest of the Revenue. In this regard, as we have held above, the material available before the ld Pr CIT relates to unaccounted turnover and not unaccounted investment in stock and in absence thereof, we have set-aside the aforesaid findings of the ld Pr CIT contained at Para 7 & 8 of her order, it is therefore only profits embedded in such undisclosed turnover of Rs 1,77,95,859/- which can be brought to tax and to this extent, we accept the contention so advanced by the ld AR. In this regard, we draw support from the decision of the **Hon'ble Gujarat High Court** in case of **DCIT vs Panna Corporation** (supra) wherein it was held as under:

> *"9. Having heard the learned counsel for the parties and having perused the orders under consideration, what emerges is that the findings arrived at by the Assessing Officer that the respondent - partnership firm received on money of Rs. 62 lakhs during the block period for sale of the flats, is not seriously in dispute. The Tribunal*

confirmed such findings arrived at by the Assessing Officer. However, the Tribunal did not permit the revenue to collect the tax on the entire receipt believing the it was only the income embedded in such receipt which can be subjected to tax.

10. As pointed out by the counsel for the respondent, this Court in the case of Commissioner of Income Tax v. President Industries, reported in (2002) 258 ITR 654 had taken a similar view. In the said case, during the course of survey conducted on the premises of the assessee, from the excise records found, an inference was drawn by the Assessing Officer that sales accounting to Rs. 29 lakhs and odd had not been disclosed in the books of account. The Assessing Officer made addition of the entire sum of the said undisclosed sales as income of the assessee for the assessment year 1994-95. Such addition was confirmed by the Commissioner (Appeals). The Tribunal, however, held that the entire sales could not have been added as income of the assessee, but only to the extent the estimated profits embedded in the sales for which the net profit rate was adopted entailing addition of income on the suppressed amount of sales. Such decision was carried in appeal by the revenue before the High Court. The High Court rejected the appeal, observing that unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed, such addition could not be sustained. It was observed that in absence of such findings of fact, the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the

negative. The High Court rejected the appeal holding that no question of law which requires to be referred arises.

11. In the case of Commissioner of Income Tax v. Gurubachhan Singh J. Juneja, reported in (2008) 302 ITR 63 (Guj.), once again a somewhat similar issue came up before this Court. In the said case, the assessee was engaged in the business of trading of tyres. Search proceedings were carried out at the residential and business premises of the assessee. On the basis of loose sheets which were seized during such search operation, the Assessing Officer held that sales to the extent of 10.85 lakhs was not found in the books of account. Such amount was included in the total income of the assessee. The Commissioner (Appeals) gave substantial relief to the assessee and reduced the income on the basis of gross profit rate. The Tribunal confirmed the order of the Commissioner (Appeals). On further appeal before the High Court by the revenue, the High Court refused to refer any question holding that in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged undisclosed sales, the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference.

12. Counsel also relied on the decision in the case of Commissioner of Income Tax v. Samir Synthetics Mill, reported in (2010) 326 ITR 410, wherein the High Court confirmed the view of the Tribunal accepting only the profit of unaccounted sale for the purpose of collecting tax.

13. Our attention was also drawn to the decision of the M. P. High Court in the case of Man Mohan Sadani v. Commissioner of Income Tax, reported in (2008) 304 ITR 52, wherein referring to and relying upon the decision of this Court in the case of Commissioner of Income Tax v. President Industries (supra) and other decisions of other High Courts, the M. P. High Court had also taken a similar view. It was observed that entire sale proceeds of the assessee should not be added in his income and that the Tribunal has erred in doing so.

14. We may recall that the Tribunal, in the impugned judgement, relied on its previous judgement in case of Kishor Mohanlal Telwala. The said judgement of the Tribunal was apparently carried in appeal by the revenue. The High Court by a speaking order dated 24.4.2000, dismissed the appeal holding that no question of law was involved. Significantly, in case or Kishor Mohanlal Telwala, the assessee was engaged in the business of construction. In his case, unaccounted receipt of Rs. 1.47 crores was detected. In this background, the Division Bench confirmed the view of the Tribunal and did not accept the contention of the revenue that as no accounts had been maintained to substantiate the expenditure incurred by the assessee, the entire amount received by the respondent should be treated as income. The Court concluded that the Tribunal was justified in considering that the respondent — assessee ought to have spent reasonable amount for the purpose of receiving such gross receipt.

15. It can, thus, be seen that consistently, this Court and some other Courts have been following the principle that even upon

detection of on money receipt or unaccounted cash receipt, what can be brought to tax is the profit embedded in such receipts and not the entire receipts themselves. If that be the legal position, what should be estimated as a reasonable profit out of such receipts, must bear an element of estimation.

16. In view of the legal position that not the entire receipts, but the profit element embedded in such receipts can be brought to tax, in our view, no interference is called for in the decision of the Tribunal accepting such element of profit at Rs. 26 lakhs out of total undisclosed receipt of Rs. 62 lakhs. In other words, we accept the legal proposition, the Tribunal accepting Rs. 26 lakhs disclosed by the assessee as profit out of total undisclosed receipt of Rs. 62 lakhs, would not give rise to any question of law."

23. Similarly, the **Bombay High Court** in case of **CIT vs Hariram Bhambhani** (supra) has held as under:

"5. Being aggrieved, Respondent-Assessee filed an Appeal before the CIT(A). In its order, the CIT(A) recorded that during the course of survey, no unaccounted invoices were impounded. Although there was unaccounted sale bills which were not recorded in the books of account on the date of survey, no document was impounded. However, later in its return filed with the Revenue, it declared turnover at Rs. 3.27 Crores, showing a net profit of Rs 36.76 lakhs. The CIT(A) relied upon its decision to hold that the Assessing Officer cannot add the amount of Rs. 35 lakhs only on the statement made without considering the

surrounding circumstances and evidence to uphold the addition. In the circumstances, the CIT(A) held that in the facts of the case, that only 4% being the profit earned on sales of Rs. 35 lakhs can be added to net profit of the applicant. Therefore, only Rs.1.40 lakhs was the profit on unaccounted sales which could be added. Thus, the balance addition of Rs. 33.63 lakhs was deleted.

6. On further Appeal, the Tribunal by the impugned order held that the entire sales which are unaccounted/cannot be undisclosed income of the assessee, particularly as the purchase had been accounted for. It was held that only net profit which would arise on such unaccounted sales can rightly be taken as the amount which could be added to the Respondent-Assessee's income for the purpose of tax.

7. The grievance of the Revenue is that Section 69C of the Act is to be invoked and entire amount of undisclosed sales has to be brought to tax. We are unable to appreciate how Section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal. We are not concerned with any unexplained expenditure in this case.

8. In any view of the matter, the CIT(A) and Tribunal have came to the concurrent finding that the purchases have been recorded and only some of the sales are unaccounted. Thus, in the above view, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax. The view taken by the

authorities is a reasonable and a possible view. Thus, no substantial question of law arises for our consideration."

24. Further, there is no dispute regarding the quantum of unaccounted turnover of Rs 1,77,95,859. The assessee has declared the same in its return of income and which has been accepted by the AO as well as by ld Pr CIT as there is neither any material on record nor any adverse finding recorded by ld Pr CIT disputing the same. Therefore, as far as the quantum of unaccounted turnover of Rs 1,77,95,859/- is concerned, the order so passed by the AO cannot be held as erroneous and prejudicial to the interest of Revenue. Therefore, the limited issue that remains to be examined is the rate of profit so declared by the assessee on such unaccounted turnover which has not examined by the AO which renders the assessment order as erroneous and prejudicial to the interest of the Revenue and therefore, to this limited extent, the directions of the ld Pr CIT are sustained and the matter is set-aside to the file of the AO to examine the rate of gross profit so declared by the assessee on such unaccounted turnover and decide as per law.

In the result, appeal of the assessee is partly allowed in light of aforesaid directions.

Order pronounced in the open Court on 03/03/2021.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 03/03/2021
*Ganesh Kr.

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

1. अपीलार्थी/The Appellant- M/s Alokik Steels Pvt. Ltd., Ajmer
2. प्रत्यर्थी/ The Respondent- Principal Commissioner of Income- Tax-II, Jaipur
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. 861/JP/2019}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar