

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA NO.19/Chd/2023
निर्धारण वर्ष / Assessment Year : 2018-19

M/s DDK Spinning Mills 68-A, Focal Point, Phase-8 Ludhiana-141010	बनाम	The DCIT Circle-3, Ludhiana-141001
स्थायी लेखा सं./PAN NO: AAKFD9098F		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate
राजस्व की ओर से/ Revenue by : Smt. Amanpreet Kaur, Sr. D.R

सुनवाई की तारीख/Date of Hearing : 16/10/2023
उद्घोषणा की तारीख/Date of Pronouncement : 29.11.2023

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A)-5, Ludhiana dt. 02/12/2022 pertaining to Assessment Year 2018-19.

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

1. That the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in taxing the amount of Rs. 45,00,000/- u/s 69B read with section 115BBE of the Income Tax Act, 1961.

2. That the Ld. CIT (A) has failed to appreciate the various judgments of the Jurisdictional Bench of the ITAT, Chandigarh Bench in many cases, where the amount offered during survey under similar circumstances have been taxed at the normal rate of tax.

3. That the various submissions and arguments/case laws as quoted before the Ld. CIT(A) have not been appreciated.

4. That the Ld. CIT(A) has failed to appreciate that during the course of survey, no other income was noticed by the department and, as such, taxing the amount offered as deemed income, is against the facts and circumstances of the case.

5. That the Ld. CIT(A) has also failed to appreciate that at the time of survey, it was agreed that the applicant shall pay the taxes on the amount offered during survey at the normal rate of taxes, for which, the payment of advance tax was made within the stipulated time.

6. That the appellant craves, leave to add or amend the grounds of appeal before the appeal is finally heard or disposed-off.

3. Briefly the facts of the case are that the assessee is carrying on the business of Spinning Mills and has filed its return of income declaring total income of Rs. 72,77,610/- on 29/10/2018. The case of the assessee was selected for scrutiny and thereafter notices under section 143(2) and 142(1) were issued and served on the assessee. During the course of assessment proceedings, the AO observed that during the course of survey carried out at the business premises of the assessee on 27/03/2018, the assessee had surrendered a sum of Rs. 45,00,000/- by surrender letter dt. 27/03/2018 on account of addition to factory building. However the assessee has treated this surrender as normal business income in its P&L Account and has paid tax at normal rate. Further the assessee has not given any explanation about the source of making the investment in the building. The head of surrender relates to the unexplained investment in building which is coverable under section 68/69/69A/69B/69C for which the provisions of Section 115BBE of the Income Tax Act are applicable. Therefore, by notice under section 142(1) dt. 15/01/2021, the assessee was asked to show cause as to why the surrendered amount of Rs. 45,00,000/- should not be taxed as per the provisions of Section 115BBE of the Act.

3.1 In response, the assessee filed its written submission dt. 23/02/2021 which were considered but not found acceptable to the AO and thereafter, the AO held that the amount surrendered by the assessee on account of investment in building found during the course of survey cannot be considered as business

income but to be considered as unexplained investment under section 69B of the Act and accordingly subject to taxation as per the provisions of Section 115BBE of the Act.

4. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) who has since sustained the said addition and against the said finding and the direction of the Ld. CIT(A), the assessee is in appeal before us.

4.1 During the course of hearing, the Ld AR reiterated the submissions made before the Ld. CIT(A) which are contained at pages 51 to 72 of the assessee's paper book and the same reads as under:

"2.1 At the outset, it is submitted that survey operations u/s 133A of the Act was conducted on the business premises of the assessee on 27.03.2018 and during the course of survey, cost of building was found in excess by Rs. 45 Lacs and the same was surrendered during the course of survey proceedings. As evident from the surrender letter (enclosed at Pg 23 of the PB), the said surrender was made subject to no penal action or prosecution and with an understanding that the said surrender has no relation whatsoever to the nature of any income referred to in Section 68, 69, 69A, 69B 69C & 69D of the Income Tax Act, 1961. It was also committed to the department that the tax shall be paid in three instalments i.e. on 31.03.2018, 30.04.2018 and 15.06.2018 and cheques were also handed over to the department computing the tax at normal rates. It depicts that the department agreed for taxing the said surrender of Rs. 45 Lacs at normal rates of tax. Therefore, the additional business income, as surrendered during the course of survey operations, was committed to be taxed at normal rates of tax as the department had not reserved any objection to charge tax on the said income at rates mentioned in section 115BBE of the Act as against the normal rates of tax.

2.2 Further, it is submitted that during the course of survey conducted at the premises of the assessee, no other source of income or any other discrepancy was noticed by the department and each fit every document found from the business premises was duly explained to the survey team as well as before the AO during the assessment proceedings. It is also not disputed by the department that the assessee is involved in any other business activity other than the business of spinning mill carried on by it.

2.3 Further, the Ld. AO has not brought on record any evidence or material to establish that the assessee was involved in any other activities and as such the business income disclosed by the assessee is on accordance with law. It is also verifiable/evident from the fact that during the course of survey operations, certain loose papers and other documents were seized and same were explained to the AO vide letter dated 20.02.2021 as having being accounted for

in the books of accounts. The copy of the said reply is forming part of paper book at Pg 28-34. From a perusal of reply your goodself would notice there was no discrepancy in the stock tally prepared by the department and cash count made by them which depicts that the assessee follows proper accounting practice and everything is on record before the OA.

2.4 It is further submitted that the surrender made by the assessee on account of building is merely on account of its valuation. As evident from the preliminary Survey Report u/s 133AH) of the Act (enclosed to Pg 24-26 of PB). the main issue on the basis of which survey was conducted is "Construction of building and not property reflected in Return of income." The said land and building was purchased by the assessee in the year 2014 and all the purchase cost as well as additions made to the said building in subsequent years were duly accounted for in the books of accounts of the assessee. The said fact is evident from the copies of depreciation charts of various years as filed along with income tax returns of various wherein after the purchase of land and building, no addition has been made to it. The copies of depreciation chart are forming part of paper book at Pg 44-47. Further, copy of ledger account of building from the date of its purchase to 31.03.2018 depicting purchase of building and further additions made to it is also forming part of paper book at Pg 48-50. Therefore, whatever amount was invested by the assessee in building account has been duly accounted for in the books of accounts. However, during the course of survey proceedings, the valuation of building leading to the difference of Rs. 45,00,000/- which has been surrendered by the assessee only to buy peace of mind as mentioned in the offer letter dated 27.03.2018 forming part of paper book at Pg 23. There is no corroborative evidence in hand with the department as well AO that how the excess investment made in building has been determined by them, however, the assessee did not want to indulge into any litigation and therefore, to co-operate with the department, it surrendered a sum of Rs. 45,00,000/- on account of investment made in building. Therefore, it is not the case that any unexplained investment has been made by the assessee out of books of accounts rather it is merely a valuation difference which nowhere leads to the applicability of Section 69B of the Income Tax Act, 1961. Accordingly, the surrender made on account of building is part of the business income of the assessee which is liable for taxation at normal rates of tax.

2.5 The above explanation proves that, though, no additional investment has been made by the assessee over and above the amount recorded in books, however, the amount surrendered during the course of survey proceedings is just to buy peace of mind and to avoid any litigations and therefore, the same may please be treated as business income of assessee which deserves to be taxed at normal rates of tax.

2.6 Further, we wish to bring your goodself's kind attention to the preliminary survey report u/s 133A(1) of the Act, wherein in column 10(g) it has been mentioned as under:

Yes, the assessee has agreed to pay additional tax on the additional income of Rs. 45 Lakh offered as additional income during the course of survey.

It depicts that the assessee has offered additional business income over and above the business income declared in the computation of income i.e. the additional income is business income in itself and therefore, the same is liable to be taxed at normal rates of tax only.

Further, as per para 11(c) of the same report, it has been mentioned as under:

The assessee has offered additional income amounting to Rs. 45,00,000/- to cover all the discrepancies found during the course of survey.

It further depicts that the additional income is offered to cover the discrepancies of the running business only and therefore, the additional income offered is business income only and the same may please be taxed at normal rates of tax instead of higher rates of tax as defined in section 115BBE of the Act.

2.7 Without prejudice to the above, as mentioned in the whatever discrepancy was found by the department, the said discrepancy was related to the business carried on by the assessee i.e. even if the amount surrendered by the assessee to the tune of Rs. 45,00,000/- is deemed to have invested in the factory building, then also, since no other source of income of the assessee having been identified by the department to be carried on by the assessee other than the business as per return of income, the said investment definitely have been made by the assessee out of the suppressed business profits of the year under consideration and therefore, the surrender income is liable to be taxed at normal rates of tax as against the tax rates specified in section 115BBE of the Act.

2.8 It is also pertinent to mention here that the said factory building has been taken on lease from M/s Punjab State Hosiery & Knitwear Development Corporation Ltd. which is a Government Authority and the assessee has not made any major alterations to the said building and whatever additions to the building have been made are duly capitalized in the books of accounts and therefore, it is not the case of any unexplained investments and whatever difference of valuation has been calculated by the department is purely a business income of the assessee.

2.9 Further, we wish to bring to your goodself's kind attention to the provisions of section 69B as under:

"Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing

Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year"

Apparently, the provisions of section 69B cannot be made applicable in the case of assessee as primary condition for invoking the provisions of section 69B is that the assessee is found to be in possession of any investment, the source of which is not explainable by the assessee whereas in the case of the assessee, it has been duly explained that the addition has been made merely on the basis of difference of valuation of factory building as made by the survey team and it is not the case of any definite investment made out of books of accounts. Further, the valuation of any building can be a matter of opinion only which may vary from persons to person and even no valuation was got done from the approved valuer. Thus, no definite conclusion can be drawn about such investment and thus, it is proved that the assessee agreed to offer to buy peace of mind only. Therefore, the provision of Section 69B of the Act, are not applicable in the case of the assessee.

Moreover, the excess investment in building has been disclosed by the assessee in the Building Account in the books of accounts of the assessee; accordingly, the excess investment in building could not have been treated as Undisclosed Investment u/s 69B r.w.s. 115BBE of the Act.

2.10 During the course of survey, the assessee was found to carrying on same business and thus, nay sum offered is out of the same business and thus, nature and source stands identified and nothing adverse has been found during the course of survey operations and thus, the onus on the assessee stands discharged as the assessee cannot be asked to prove negative, when nothing else has been found.

2.11 Further, once the nature and source of the investment is explained, as done in the case of the assessee, the applicability of section 69B comes to an end and accordingly, excess investment in the building should be treated as business income.

2.16 In the backdrop of above facts and judicial pronouncements and considering the provisions of section 69B r.w.s.115BBE, following factors emerge for levy of higher rate tax u/s 115BBE and the same are distinguished as under:

Whether nature of income is clearly explained during the course of survey or during assessment proceedings	Yes, the assessee has duly explained the nature of income during the course of survey as well as assessment proceedings that the said investments is merely a valuation difference between the assessee and the department and therefore, undoubtedly business income of the assessee.
Whether income can be classified under a particular head of income based on nature so as to demonstrate that it is flowing from one of the specific sources of income of	Moreover, no business activity other than the business of spinning mills is found to be carried on by the assessee and whatever valuation of

the taxpayer	building has been determined is related to the business carried on by the assessee.
Whether supporting circumstantial evidences of the above are available	Therefore, one thing is pretty much clear here is that the excess investment is certainly a business income of the assessee and it is just that the said excess investment is a difference of opinion which nowhere leads to the applicability of Section 69B of the Act.

4.2 It was further submitted that the case of the assessee was selected for scrutiny only on the issue of amount surrendered by the assessee during the course of survey action dated 27.03.2018. During the course of survey, the assessee has surrendered an amount of Rs. 45,00,000/- on account of investment in factory building. The assessee surrendered the said amount of Rs. 45,00,000/- vide surrender letter dated 27.03.2018 and thereafter, treating the surrender out of the business income of the assessee credited the said amount in the profit and loss account prepared for the year ending 31.03.2018 and declared net profit amounting to Rs. 72,75,506.45 and hence, paid taxes on the said amount at normal rate of tax. Further, the assessee debited the said amount of Rs. 45,00,000/- to the building account and passed the journal entry as follows:

Date	Particulars	Debit	Credit
28.03.2018	Building Account	45,00,000	
	Addition made at survey		45,00,000/-

4.3 It was further submitted that the during the course of survey action as well as during the course of assessment proceedings later on, the Ld. AO had not passed any adverse remark with respect to any other source of income. Hence, it was submitted that the income from spinning mills business is the only source of income of the assessee and the assessee has made investment out of the income earned from such business only. Further, during the course of assessment

proceedings as well, no other source of income has been identified by the Ld. AO from where the assessee could have earned income. Hence, when there is no other source of income identified, the asset in possession of the assessee is deemed to be earned from the business of the assessee. Reliance in this regard is placed on the judgment dated 18.02.2021 in the case of Shri Harish Sharma vs. The ITO in ITA No. 327/CHD/2020 wherein, it has been held that that Section 68 not applies when assessee explained nature & source of Income. Hence, when all the incomes earned by the assessee/ assets in the possession of the assessee are only from the business income of the assessee, there do not arise any question as to application of provisions of section 69A of the Act and hence taxing such income at special rate as per section 115BBE of the Act is invalid.

4.4 It was further submitted that it is a settled principle in law that when there is no other source of income identified during the course of survey or during the course of assessment proceedings, any income arising to the assessee shall be treated to be out of the normal business of the assessee only and therefore, the surrender amount of Rs. 45,00,000/- on account of factory building should be treated as the business income of the assessee. Reliance in this regard is placed on the judgment in the case of Daulatram Rawatmull vs. CIT [1967] 64 ITR 593, wherein Honb'ble Calcutta High Court held as follows:

"61. In the instant case the assessee is a firm formed for the purpose of carrying on business. There is nothing on record to show that the firm had any source of income other than business. Therefore, in our opinion, it is not unreasonable to hold that any amount representing secret income arose out of business of the firm."

4.5 It was submitted that the same view has been taken by Honble Calcutta High Court in case of Mansfield and Sons v. CIT [1963] 48 ITR 254 and in the case of the assessee also, there has been no other source of income identified, neither during the course of survey action nor during the assessment proceedings initiated later on. Hence, the income of the assessee is only on

account of the business carried on by the assessee since past many years and in these circumstances, the provisions of section 69A of the Act are not applicable.

Further, reliance is also placed on the following judgments:

- *Hon'ble Chandigarh (Jurisdictional) Bench of ITAT in the case of M/s. Sham Jewellers in ITA No. 375/CHD/2022, wherein, it has been held as under:*

"Ground Nos. 8 & 9 challenge the action of the lower authorities in applying the provisions of section 115BBE and thereby charging tax at the rate of 60%. The main thrust of the arguments of the Ld. AR has been that all the additions made or sustained relate only to the business income of the assessee and that nowhere in the assessment order has it been alleged that some other source of income had been detected which gave rise to additional income. It is seen that during the course of assessment proceedings, the various explanations submitted by the assessee have duly mentioned that the surrendered income was derived from the business. A perusal of the assessment order would also show that nowhere in the body of the assessment order, the AO has even contradicted this explanation of the assessee. The AO has not brought on record any iota of evidence to demonstrate that the assessee had any other source of income except income from business and, therefore, it is our considered view that deeming such income under the provisions of sections 68 or 69 would not hold good. In our view, in such a situation, the AO could not have legally and validly resorted to taxing the income of the assessee at the rate of 60% in terms of provisions of section 115BBE of the Act."

- In addition to this, in the case of M/s. Sham Fashion Mall in ITA No. 315/CHD/2022, the Hon'ble Chandigarh Bench of ITAT has held as under:

"12.0 In ITA No. 315/CHD/2022, in the case of Sham Fashion Mall, the only issue before us is the challenge to the provisions of section 115BBE by the AO and its sustenance by the Ld. CIT-(A). In this case the returned income has been accepted by the AO. We have also gone through the assessment order as well as the order of the Ld. CIT-(A) and it is seen that nowhere in the orders of both the lower authorities is there any fact brought on record or even a whisper of any allegation against the assessee that the assessee had any other source of income except income from business and income from other source. There is no iota of evidence to even suggest that the lower authorities had unearthed any other source of income of the assessee except under the heads of income declared by the assessee in the return of income. Therefore, in absence of any such evidence of any other undisclosed source of income of the assessee having been detected by the tax authorities, we are afraid that the invocation of provisions of section 115BBE will not hold good in the present case as well. The detailed reasons and observations in this regard have already been incorporated in Para 10.17 to 10.23 of this order in the case of M/s Sham Jewellers wherein also we have rejected the action of the Income Tax Authorities in applying the provisions of section 115BBE of the Act. Likewise, on identical facts and on

identical reasoning and law, we allow the grounds of the assessee in the present appeal also and hold that the application of provisions of section 115BBE of the Act in the case of M/s Sham Fashion Mall was bad in law and the same cannot be sustained.

13.0 In the result, ITA No. 315/Chd/2022 also stands allowed."

- Hon'ble Chandigarh (Jurisdictional) Bench of ITAT in the case of Gaurish Steels Pvt. Ltd. as reported in 82 Taxmann.com 337, wherein, it has been held as under:

"It has been held that income surrendered by the assessee during the survey on account of discrepancy in cost of construction of building, discrepancy in stock and discrepancy in advances and receivables would be considered as business income and not as deemed income under section 69."

- In the case of Bajaj Sons. Ltd., the Hon'ble Chandigarh Bench of ITAT, ITA No. 1127/CHD/2019, has stated as under:

"The AO has not pointed out any unexplained credit in the books of account, any unexplained investment, any unexplained money, bullion or jewellery, any unexplained expenditure or any amount of loan repaid in the assessment order in this respect. Therefore, the provisions of Section 68, 69, 69A, 69B, 69C and 69D are not attracted on the surrendered amount of Rs. 15 lacs. The said amount of Rs. 15 lacs was offered in case any discrepancy is found in the books of account. However, in actual neither any unexplained investment nor any unexplained expenditure or otherwise any unexplained asset was found during the search action so far as the aforesaid surrender of Rs. 15 lacs was concerned. In these circumstances, the aforesaid surrender of Rs. 15 lacs can be said to have been offered to cover up the discrepancies in respect of likely disallowances of claims, if any, relating to its business income.

9. *In view of this, since the aforesaid surrender is not covered under the provisions of Section 68, 69, 69A, 69B, 69C and 69D, the provisions of Section 115BBE are not attracted in this case.*

10. *In view of the above, the action of the lower authorities in invoking provisions of Section 115BBE on the surrender income of Rs. 15 lacs is set aside and the AO is directed to compute the said surrendered income under normal provisions as applicable to the business income of the assessee.*

11. *In the result, appeal of the assessee stands allowed."*

- The binding judgment of Hon'ble Chandigarh Bench in the case of The DCIT vs M/s Khurana Rolling Mills Pvt. Ltd. as reported in ITA No. 745/CHD/2016.

"9. In the facts of the present case, it is not disputed that the surrender had been made on account of undisclosed debtors. Since the facts are identical to that in the case of *Famina Knit Fobs (supra)*, and no distinguishing facts have been brought to our notice by the Ld. DR, the decision rendered in that case will also apply to the present case, following which we hold that the Ld. CIT(A) had rightly treated the surrendered income as in the nature of business income of the assessee and accordingly, allowed the benefit of set off of losses against the same. The order of the Ld.CIT(A) is accordingly, upheld. The ground raised by the Revenue is dismissed."

* In the case of *Prashanti Surya Contruction Co. Pvt. Ltd.* in ITA No. 315/CHD/2014, the Hon'ble Chandigarh (jurisdictional) ITAT Bench has held as under:

"Since the facts of the present case are identical to that in *Gaurish Steels Pvt. Ltd. (supra)*, the surrender having been made by the assessee on account of investment made in the BOT project which was the business of the assessee, the decision rendered by the I.T.A.T. in the said case will squarely apply in the present case, following which we hold that the income surrendered by the assessee of Rs. 1.75 crores is assessable under the head income from business and profession".

• In the case of *M/s. Arora Alloys vs. DCIT* in ITA No. 1481/CHD/2017 the Hon'ble Chandigarh (jurisdictional) ITAT Bench has held as under:

"In the light of the above, let us examine the facts of the present case. The stand of the assessee is that expenditure incurred for construction of building was from the routine business, and such addition of Rs.32 lakhs ought to be treated as business income. We find force in this contention of the Id. counsel for the assessee, because the expenditure incurred for creating a business asset and it must have been generated through the business carried out by the assessee. It is pertinent to bear in mind that expenditure laid out for the purpose of business is to be allowed deduction either as expenditure or to be capitalized on which depreciation will be allowed. The assessee might have earned income from the business which has not been accounted and used for constructing the business asset, though specific details have not been discussed either in the impugned order about the nature of evidence found during the course of survey. We also need not to ponder on this aspect because the assessee has admitted this unexplained expenditure on construction of building. This admission has to be accepted as given by the assessee, wherein it was alleged that it is for the purpose of the business. Therefore, to the extent the expenditure incurred for construction of the building, out of unexplained source is concerned, it is to be construed as earned from the business and it will take character of the business income. Once this income is to be assessed under the "business income", then all incidental benefits for set off from brought forward loss or any other expenditure is to be given to the assessee."

4.6 It was further submitted that section 115BBE of the Act does not state the head of income in which the income of the assessee stands taxable, hence, in such circumstances, the Ld. AO has to look into surrounding circumstances to determine under which the income of the assessee should stand taxable and in this regard, it is hereby submitted that as the assessee has been filing its return of income since past many years and the facts and circumstances of the case of the assessee hereby represent that the assessee has been showing his income under the head income from business and not under any other source of income. In addition to this, the cheques for payment of tax on surrender income at normal rate of tax were handed over to the department during the course of survey and the same were duly accepted by the AO.

4.7 Without prejudice to the above, it was submitted that during the course of survey action at the business premises of the assessee on 27.03.2018 as well as during the course of assessment proceedings, the Ld. AO has not passed any adverse opinion with respect to any other source of income of the assessee, neither the AO has brought on record any adverse material on record. Hence, the business income is the only source of income of the assessee. And, hence, all the income earned by the assessee is only on account of such business and therefore, needs to be taxed under the business head only. And, the case of the assessee is squarely covered by the judgment in the case of M/s. Arora Alloys vs. DCIT in ITA No. 1481/CHD/2017 the Hon'ble Chandigarh (jurisdictional) ITAT Bench has held as under:

"the assessee, wherein it was alleged that it is for the purpose of the business. Therefore, to the extent the expenditure incurred for construction of the building, out of unexplained source is concerned, it is to be construed as earned from the business and it will take character of the business income. Once this income is to be assessed under the "business income", then all incidental benefits for set off from brought forward loss or any other expenditure is to be given to the assessee."

4.8 It was further submitted that in the order passed by the Id CIT(A) dated 02.12.2022, the Id CIT(A) has placed reliance on the judgments in the cases of Fakir Mohamad Haji Hasan v CIT 247 IT 290 (Guj), Kim Pharma Pvt. Ltd. v CIT 216 Taxman 153 (P&H), Famina Knit Fab v ACIT 176 ITD 246 (Chandigarh Trib.), Pr. CIT v. Khushi Ram & Sons Foods (P) Ltd. In this regard, it was submitted that the said judgments are duly discussed in the judgment of the Hon'ble Chandigarh Bench of ITAT in the case of M/s Khurana Rolling Mills Pvt. Ltd. as reported in ITA No. 745/CHD/2016 as well as in the case of judgment of the Hon'ble Chandigarh Bench of ITAT in the case of M/s. Bindas Foods Pvt. Ltd. in ITA No. 409/CHD/2021.

5. Per contra, the Ld. DR has relied on the findings of the AO which are contained at para 4.3 to 4.7 of the assessment order which read as under:

“4.3 The reply of the assessee has been perused and not found tenable as the claim of the assessee that the surrender of investment in building was duly recorded in the books of accounts and thus the provisions of section 115BBE are not applicable is found to be without any cogent documentary evidence. The assessee has claimed that the investment in the building was derived from the business but the assessee has not given any explanation regarding the sales and purchases on account of which such business income was earned or the details of the construction undertaken at the factory premises. Therefore, it cannot be considered that by mere qualifying that the investment in the building was from the business in the surrender letter would explain the sources of the investment in building. Even during the course of survey the assessee was having the full opportunity to show the sources of the income from where the investment was made in the building but the assessee had not given any explanation showing that such income was its business income. Further, the assessee had not provided the bills and vouchers which were not recorded in the regular books of accounts and which the assessee did not wanted to update in his books of accounts and because of which the assessee had generated unaccounted business income as claimed by him. Therefore, in view of the facts of the case and the material available on record, it has been found that the sources of investment in the building are unsubstantiated and the remains unexplained and thus, the provisions of section 69B of the Income-tax Act, 1961 are applicable.

4.4 The facts of the case are that investment in building was found not recorded in books of accounts of the assessee on the date of survey and the assessee had not explained the nature & sources of investment in such building either during the course of survey or post survey or during the assessment proceedings by presenting the documents related to those entries due to which the income was earned for investment in building. The condition of proving the

source of such investment in building is the primary condition for applicability of provisions of Section 69B of the Income Tax Act which the assessee has not fulfilled and thus such income cannot be considered as income from business and profession as claimed by the assessee. Section 69B creates a fiction to deem certain unrecorded investments as income of the assessee for the financial year. Hence, even if the assessee offers the same as income in the Return of Income, it does not take away such income out of category of deemed incomes u/s 69B for the financial year in which it was found. The offer to surrender had been made by the assessee only after a Survey u/s 133A was conducted at the premises of the assessee and detailed physical verification of the building in possession of the assessee was made. And neither the investment in building nor the sources of the same were disclosed in the books of accounts.

4.5 Further, the assessee has relied upon the judgements in case of M/s Gaurish Steel Pvt. Ltd. vs. ACIT, Circle-V, Ludhiana in ITA No.1080/Chd./2014 dated 17.09.2015 and M/s Marshel Machines Pvt. Ltd in ITA No.57/Chd/2017, M/s Khurana Mills Pvt. Ltd of the Chandigarh Bench and M/s Prashanti Surya Construction Co. Pvt. Ltd. in ITA No.315/Chd/2014/ITAT but has not attached the full copies of the judgments with its reply. Further, it has been found that the facts of the cases relied upon by the assessee are differentiable from the case of the assessee as the assessee has clearly mention in the surrender letter dated 27.03.2021 that the books of accounts of the assessee were not complete as the assessee's accountant was on leave for last few days and the assessee had made surrender on account of addition to factory building. The assessee in his reply has only reproduced the second para but not the first para of the surrender letter which is being reproduced below:-

Quote

"During the course of Survey proceedings u/s 133A of the Act at our business premises on 27/03/2018, it was duly stated that the books for the Financial Year 2017-18 were not complete as the assessee's accountant was on leave for last few days. In order to buy peace of mind and to avoid any litigations with Department on such matters and to cover up all possible leakages of revenue, the assessee voluntarily and without any fear pressure and compulsion, offers to taxation Rs.45,00,000/- on account of addition to Factory Building subject No Penal Action and Prosecution under any of the provisions of Income Tax Act and allied laws for the A.Y. 2018-19."

Unquote

From the above it is clear that the assessee had not recorded the bills and vouchers of the addition to Factory in his books of accounts as on the date of the survey and on being confronted the assessee surrendered Rs.45,00,000/- and the assessee has not produced the documents related to those entries either during the course of survey or during the assessment proceedings.

4.6 Further, the assessee was provided multiple opportunities to provide the sources of investment in building and link the sources of investments with the receipts in his books of accounts. But the assessee has failed to do so. By not offering detailed explanation the assessee has not disclosed his channel through which such unexplained investment in building had reached the assessee's

business premises. The building and the capital for investment in such building cannot come from vacuum and there ought to be some source. The assessee it did not submit any material evidences that the investment in building was out of the unaccounted sales made by the business or the capital was introduced from some hidden source of the firm which the assessee do not want to disclose. The onus to prove the sources of the surrendered income lies entirely on the assessee and just because the assessee is carrying on certain business, it does not necessarily follow that the amount surrendered is earned by it through genuine business transactions. But the assessee has not disclosed any of such transactions. Thus the sources of such investment in building remains unexplained and the unaccounted investment cannot be treated as income from regular business income. Moreover, the offering of such income without any supporting evidences to the nature and sources of the income which were not recorded in the books of accounts of the assessee, itself tantamount to having accepted that the sources are unexplained and thus the preponderance of probability is that such investment in building is considered as unexplained investment of the assessee firm u/s 69B of the Income Tax Act. And as the income is to be assessed u/s 69B of the Income-tax Act, 1961, it would be subject to tax as per the provisions of the section 115BBE of the Income-tax Act, 1961.

A) The Hon'ble ITAT Chandigarh in case of Famina Knit Fab Vs ACIT 176 ITD 246 (Chandigarh rib.) has also held that as far as the income is surrendered and to be assessed u/s 69, 69A, 69B and 69C of the Act, the same is to be subjected to tax as per the provisions of section 115BBE of the Act.

B) Pr. CIT vs. Khushi Ram and Sons Foods Pvt. Ltd. in ITA No. 126 of 2015, of the Hon'ble Punjab and Haryana High Court where it was held that the onus to establish the source of surrendered income lay entirely on the assessee.

4.7 In view of the above, the amount surrendered by the assessee of Rs.45,00,000/- on account of investment in building found during the course of survey is not considered to be business income of the assessee but considered as unexplained investment of the assessee u/s 69B of the Income Tax Act, and charged to tax as per the provisions of section 115BBE of the Income Tax Act. Penalty proceeding u/s 271AAC are initiated in respect of income determined u/s 69B of the Income Tax Act, 1961."

5.1 Further our reference was drawn to the findings of the Ld. CIT(A) which are contained in para 6.1 which read as under:

"6.1 Grounds of Appeal No. 1 to 4 These grounds relate to charging of AO of the surrendered income of Rs. 45 lacs u/s 69B of the Act and taxing the same u/s 115BBE of the Income Tax Act, 1961. The said surrender was made during the course of survey on account of discrepancies noticed in the cost of construction of factory building of the assessee. The AR in his submissions has tried to justify the same as unexplained investment out of the business income of the assessee. The AR has claimed that the appellant is not having any other source of income, but income arising from business. Further, the AR has relied upon judgments as quoted in his submissions.

The contentions of the assessee have been examined. The judgments quoted by the AR have been gone through. It is important to emphasize here that in all the judgments quoted by the AR in his support, the Hon'ble High Courts/Ld. Tribunal Benches have very clearly held out that the AO shall give an opportunity to the assessee to establish a linkage between the surrendered income with the business income, if any. If the assessee is able to do that then the income can be considered as from business. In the case of the assessee, the AO gave an opportunity to the assessee to establish a linkage between the surrendered income under the head of 'investment in building' and the business income. Hence, from above discussion, it is clear that in all the cases, the settled position of law is that the nexus between the surrendered income and business needs to be established before the same can be treated as income from business.

Merely having a known business activity will not, per se, render any unexplained asset/ income as business/profession income u/s 14, unless the burden of proving the source u/s 68 to 69D is also discharged. The onus of proving that such receipts are from an activity other than disclosed business activities is not upon the AO. Therefore, there can be no presumption against the deeming fiction u/s 68 to 69D to hold that income/investment, whose source is not explained, will still be classified as income under any head u/s 14. It would be, therefore, impermissible to attempt and classify such incomes under any of specific heads, even if there is any activity which can be remotely/indirectly linked to such deemed income. The word 'source' in the same context would refer to nexus of such income generating activity/transaction with name and identity, creditworthiness of person with whom such activity/transaction was done along with proving the genuineness of transaction also.

The requirement of proving these 3 essential ingredients to prove the source in order to escape the rigors of the deeming fiction has been upheld universally. The conjoint burden of proving the 'nature and source' is therefore, not restricted to merely claiming the nexus of any activity/transaction to a particular credit/income/asset but also requires to establish with cogent evidence the nexus of such activity/transaction with source also by providing the name and identity, creditworthiness of person with whom the activity/ transaction was done along with proving the genuineness of transaction.

Thus, the unrecorded excess investment in building found during survey proceedings, there can be no presumption to treat the value representing such excess investment in building as application of business income in absence of any evidence of earning that income or details as to when, how and from whom such income was derived which has been invested in building.

It is worthwhile to go through of the submissions of the AR dated 10.05.2022 where the AR has given the crux of the judgments contending that the same are favorably applicable to his case. The AR has contended that the nature of the income has been duly explained during the course of survey as well as assessment proceedings. This contention of the AR is not found correct as nowhere during the assessment proceedings, the AR has been able to establish nexus between the investment in building and normal business income. Further, the AR has contended that the assessee has carried out no activity other than business so there is no question of the investment in building being related to unexplained sources. In above context, it is important to allude to the findings in

the assessment order that the assessee has not been able to produce any documentary evidence, bills, vouchers, purchase & sale, documents to justify the additional income of Rs. 45 lacs which has been surrendered as investment in building. If the AR is sure about the business nature of the receipts necessary documentary evidence should have been adduced.

In the case of PCIT vs. M/s. Khushi Ram & Sons Pvt. Ltd., the Hon'ble High Court of Punjab & Haryana in ITA No. 126 of 2015 dated 21.07.2016 held as under:

"It is not necessary that the surrendered amount is from business income, It could be on account of any other transaction legal or otherwise. Merely because an assessee carries on certain business, it does not necessarily follow that the amounts surrendered by him are on account of its business transactions. There is no presumption that absent anything else an amount surrendered by an assessee is his business income. It is for the assessee to establish the source of such surrendered amount."

In the case of SVS Oil Mills vs. ACIT, Chennai, the Hon'ble High Court of Madras in ITA No. 765 of 2018 dated 26.03.2019. held in para 9 of the order, as under:

"When the excess stocks were found during the Survey, there is no question of allowing the Assessee to record any additional purchases because such purchases had already been recorded in the books of accounts of the Assessee. Therefore, the excess stock, per se, has to be naturally brought to tax as 'undisclosed income' by itself and there is no question of any corresponding deduction from that in such cases."

Similarly, in the case of Kim Pharma Pvt. Ltd. vs. CIT in ITA No. 106 of 2011 dated 27.04.2011, the Hon'ble High Court of Punjab & Haryana held that, where the amount surrendered during the survey was not reflected in the books of accounts and the source from where it was derived was not declared, the same was assessable as deemed income u/s 69A of the Act.

The Hon'ble Supreme Court in the cases of Roshan Di Hatti vs. CIT [1977] 107 ITR 938 (SC) and Kale Khan Mohammad Hanif vs. CIT [1963] 50 ITR 1 (SC) held that the law is well-settled that the onus of proving the source of a sum of money found to have been received by an assessee is on him. Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source.

The above observations also get support from the decision of Hon'ble ITAT Cochin Bench, Cochin in the case of M/s. Bhima Jewellers vs. PCIT Kozhikode in ITA No. 208/Coch/2018, Assessment Year 2013-14 vide order dated 20.08.2018. The relevant para of this order is reproduced below:-

"6.2. The opening words of section 14 'Save as otherwise provided by this Ad' clearly leave scope for 'deemed income of the nature covered under the scheme of sections 69, 69A and 69C being treated separately, because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from 'other sources' because the provisions of sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and

source of investment, acquisition or expenditure, as the case may be, have not been explained or satisfactorily explained. Therefore-, in these cases, the source not being known, such deemed income will not fall even under the head 'Income from other sources'. Therefore, the corresponding deductions, which are applicable to the incomes under any of these various heads, will not be attracted in case of deemed incomes which are covered under the provisions of sections 69, 69A, 69B & 69C in view of the scheme of those provisions.

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

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

Similarly in the case law of ITO Vs Dulari Digital Photo Services (P) Ltd. ([2012] 24 Taxman.com.(CHD). the question before the Co-ordinate Bench was whether unexplained cash credit under section 68 of the Act can be considered for set-off against losses under various heads of income. After examining the relevant provisions in detail, Co-ordinate Bench has clearly outlined that for income to be considered even from other sources, the sources have to be established. The relevant observations read as follows:

"14.....

Section 2(45) defines 'total income' as 'the total income referred to in section 5. computed in the manner laid down in this Act". It is relevant to note that the principal charging section 4 makes the total income referred to in the principal charging section. Section 14 classifies the heads of income while sections 15 to 59 provide for its quantification. Chapter VI of the Income tax Act provides for aggregation of income and set off or carry forward of loss. Thus Chapter VI is in two parts; first part deals with aggregation of income while the second part deals with set off or carry forward of losses. Chapter has been placed after Chapter IV and V, It comes into play only after the computation of total income under the various heads of income in terms of in terms of Chapter IV has been done. Income falling under Chapter VI is taxed by aggregating the same with the income quantified in terms of Chapter IV. Chapter VI is not subservient to Chapter IV. Besides, section 14 allows the taxability of income under specific provisions of the IT. Act outside Chapter IV For the reasons afore

stated, the income assessable under section 68 cannot be assessed as income from other sources under section 56.

15. Thus what is taxed under Chapter IV is income from a known source including income from other sources. A source of income means a specific source from which a particular income springs or arises. Once a source giving rise to a particular income is identified, it has then to be placed under a particular head of income as specified in section 14. Thus income can be taxed under a specific head of income as enumerated in section 14 only when it is possible to peg the same to a known source/head of income. If the nature and source of a particular receipt is not known, it cannot then be pegged to a known source/head of income. Chapter IV contemplates computation of income arising from known sources/heads of income whereas Chapter VI, on the other hand, contemplates aggregation of the entire sum the nature and sources of which are not known. The aforesaid two Chapters are completely different in their nature, scope and effect. Though the income assessable under them are part of total income as defined in sections 2(45)/4/5 of the IT. Act yet that does not mean that income assessable under section 68 has to be assessed under section 56. In the case before us, source of unexplained cash credits is not known and hence they cannot be linked to any known source/head of income including income from other sources. In order to constitute 'income from 'other sources', the source, namely, the "other sources", has to be identified. Income from unexplained or unknown sources cannot therefore be considered or taxed as income from other sources.

The aforesaid view is fortified by the judgement of the Hon'ble Gujarat High Court in *Fakir Mohamed Haji Hasan V. CIT* [2001] 247 ITR 290/[2002] 120 Taxman 11 in which the Hon'ble High Court has held as under:-

"The scheme of sections 69,69A, 69D and 69C of the Income-tax Act 1961, would show that in cases where the nature and source of investments made by the assessee or the nature and source, of acquisition of money, bullion etc. owned by the assessee or the source of expenditure incurred by the assessee are not explained at all, or not satisfactorily explained, then, the value of such investments and money or the value of articles not recorded in the books of account or the unexplained expenditure may be deemed to be the income of the assessed. It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will, therefore, be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act. However, when these provisions apply because no source is disclosed at all on the basis of which the income can be classified under one of the heads of income under section 14 of the Act, it would not be possible to classify such deemed income under any of these heads including income from "other sources" which have to be sources known or explained. When the income cannot be so classified under any one of the heads of income under section 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise. If it is

possible to peg the income under any of those heads by virtue of a satisfactory explanation being given, then these provisions of sections 69, 69A, 69B and 69C will not apply, in which event, the provisions regarding deductions, etc., applicable to the relevant head of income under which such income falls will automatically be attracted.

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

Accordingly, the arguments of the AR that the surrendered income is to be treated as business income of the assessee is not acceptable and the additions made u/s 69B, are to be treated separately and it would not be possible to classify such deemed income falling under Chapter-VI, under any of the heads including 'income from other sources' but they will be aggregated along with the incomes computed under Chapter IV. The AR has not been able to adduce documentary evidence to establish the nexus between the surrendered income and business and no source for the surrendered income could not related to. The judgments cited supra i.e.:

- (1) Fakir Mohammed Haji Hasan Vs. CIT ([2001] 247 ITR 290 (Guj.)
- (2) PCIT vs. M/s. Khushi Ram & Sons Pvt. Ltd., the Hon'ble High Court of Punjab . & Haryana in ITA No. 126 of 2015 dated 21.07.2016
- (3) SVS Oil Mills vs. ACIT, Chennai, the Hon'ble High Court of Madras in ITA No. 765 of 2018 dated 26.03.2019
- (4) Kim Pharma Pvt. Ltd. vs. CIT in ITA No. 106 of 2011 dated 27.04.2011,
- (5) The Hon'ble Supreme Court in the cases of Roshan Di Hatti vs. CIT [1977] 107 ITR 938 (SC)
- (6) Hon'ble ITAT Cochin Bench, Cochin in the case of M/s. Bhima Jewellers vs. PCIT Kozhikode in ITA No. 208/Coch/2018, Assessment Year 2013-14

also bring out a clear legal position that for any income to be treated as business income, the nexus/the source, has to be established. Hence, the action of the AO in applying the rate as prescribed u/s 115BBE on the surrendered income included in the ITR, treated by the AO as income u/s 69 in the assessment order, is found sustainable. Keeping in view the above facts and discussion, it is held that the AO has rightly treated the surrender of Rs. 45,00,000/- on account of unexplained investment in building found during the survey as deemed income

u/s 69B and to be taxed as per provisions of Section 115BBE of the Income Tax Act, 1961 and hence the same is confirmed."

6. We have heard the rival contentions and perused the material available on record. Section 69B provides that where in any financial year, the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.

7. In the instant case, for the deeming provisions of Section 69B to be applied, firstly, there has to be a finding by the Assessing officer that the assessee has made investments during the financial year in the construction/purchase of the building. Thereafter, the Assessing Officer is also required to record a finding that the amount expended on making such investments in the building exceeds the amount recorded in this behalf in the books of account so maintained by the assessee for any source of income. Thereafter, the assessee has to be given an opportunity and his explanation has to be sought and in a scenario, where the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year. Therefore, we are unable to appreciate where the Assessing officer says that the condition for proving the source of such investment is the primary condition for applicability of provisions of section 69B of the Act which the assessee has not fulfilled. The explanation of the assessee explaining the source of investment will arise once the Assessing

officer records a finding that the assessee has made investments during the financial year in the construction/purchase of the building and the amount expended on making such investments in the building exceeds the amount recorded in this behalf in the books of account maintained by the assessee. There has to be a finding by the Assessing officer and thereafter, the explanation of the assessee has to be sought and not vice-versa. Further, these are cumulative conditions which have to be individually satisfied and only in a situation, where all these conditions are satisfied, the deeming provisions of section 69B are attracted and not otherwise.

8. Moving further, for the Assessing officer to record a finding that the assessee has made investments during the financial year in the construction/purchase of the building, there has to be some tangible material in possession of the Assessing officer which demonstrate that certain amount has been actually expended by the assessee during the year towards the purchase or construction of the building and which is in excess of the amount recorded in the books of accounts. There has to be some material/documentation in form of bills, invoices, payment receipts, etc which shows that there is outflow of funds from the assessee to certain third parties towards purchase or construction of the building or atleast an obligation on part of the assessee to pay certain sum to third parties towards purchase or construction of building. Therefore, the onus is clearly on the Assessing officer to discharge this burden and record a specific finding in this regard and once the same is done, the onus can be shifted to the assessee to explain the nature and source of such investment. However, we find that in the instant case, the Assessing officer has clearly failed in discharging this initial onus and it is thus a clear case of mechanical application of provisions of section 69B without satisfying the essential condition contained therein. There is nothing on record, infact, there is no whisper in the entire survey proceedings, which has formed the basis for the compulsory scrutiny, and the subsequent

assessment proceedings, that there is any material/documentation which even remotely demonstrate that the assessee has expended certain sum of money on construction of the building over and above the amount which has been recorded in the books of accounts.

9. We find that the whole case of the Revenue rests on the statement of one of the Partners of the assessee's firm recorded u/s 131 at the close of the survey proceedings conducted on 27/03/2018 at the business premises of the assessee. In response to question no. 9, he has stated that the land and building was purchased by the assessee firm in year 2014 and in response to question no. 10, he has stated that the investment in the immovable property is duly reflected and accounted for in balance sheet and the account books are kept at the business premises only. Thereafter, in question no. 18, he has stated that *"in order to (buy) peace of mind and to avoid litigation, we humbly surrender before your goodself an amount of Rs 45 lacs subject to no penal action on account of addition made to factory building only having no relation whatsoever to the nature of any income referred to in section 68, 69, 69A, 69B, 69C or 69D of the Act. The income tax return for A.Y 2018-19 shall be filed incorporating Rs 45 lacs as the same has been out of business income during the year towards cost of factory building and the tax due on the amount surrendered shall be paid in three installments i.e, on 31/03/2018, 30/04/2018 and by 15/06/2018."* On similar lines, the assessee thereafter has submitted a surrender letter of even date i.e, 27/03/2018 addressed to the Additional CIT, Range 1, Ludhiana.

10. It is a settled proposition of law that the statement recorded u/s 131 during the course of survey has no evidentiary value in absence of any corroborative evidence on record and in this regard, useful reference can be drawn to the decision of Hon'ble Madras High Court in case of CIT vs Khader Khan Son reported in 300 ITR 157 wherein it was held that statement recorded during the

course of survey u/s 133A has no evidentiary value as the officer is not authorized to administer the oath and to take any sworn statement which alone has evidentiary value as contemplated under law and reference was drawn to provisions of section 132(4) which enables the authorized officer to examine person on oath and where any such statement so recorded can be used in evidence under the Act. In that case, it was held by the Hon'ble High Court that basis statement of one of the partner's of the assessee firm, it cannot be held that disclosed income was assessable as lawful income of the assessee firm since there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee and it cannot be held that Revenue has lost lawful tax payable by the assessee. Therefore, in our considered view, in the instant case, the statement of the partner of the assessee firm recorded u/s 131 during the course of survey and subsequent affirmation thereof by the assessee by way of surrender letter on a standalone basis and without any corroborative evidence doesn't fulfill the statutory mandate of deeming provisions which provides that it is for the Assessing officer to records a finding that the assessee has made investments during the financial year in the construction/purchase of the building and the amount expended on making such investments in the building exceeds the amount recorded in this behalf in the books of account so maintained by the assessee and for the purposes of recording such a finding, there has to be some tangible material in possession of the Assessing officer which demonstrate that certain amount has been actually expended by the assessee during the year towards the purchase or construction of the building which is clearly absent in the instant case. Therefore, the statement of the one of the partners of the assessee firm without any corroborative evidence cannot come to the aid of the Assessing officer for the purposes of invoking the deeming provisions of Section 69B of the Act.

11. Having said that, even if we look at the statement so recorded of the partner of the assessee firm, we find that there is clear affirmation that the land and building was purchased in the year 2014 and the same has been duly reflected in the books of accounts. Further, in order to buy piece of mind and to avoid litigation, an amount of Rs 45 lacs has been offered on account of addition made to factory building and the source thereof has been stated to be out of business income. Therefore, even taking into consideration the said statement on a standalone basis, we find that the source of investment has been stated to be out of business income and the surrender has been duly honored by the assessee while filing the return of income wherein the amount has been offered to tax under the head "business income" and the deeming provisions therefore cannot be invoked in the instant case.

12. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, we are of the considered view that the income has been rightly offered to tax by the assessee under the head "business income" and provisions of section 69B r/w 115BBE cannot be invoked in the instant case.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 29.11.2023

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date:

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

1. अपीलार्थी/ The Appellant

2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant Registrar