



**आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**INDORE BENCH, INDORE**  
**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No. 428/Ind/2022**  
**Assessment Year: 2018-19**

M/s. Brij Mohandas Devi Prasad, House No. 62, Ward No.18, Station Road, Sehore (Assessee / Appellant)	<b><u>बनाम/</u></b> Vs.	ACIT/DCIT, Central Circle 2, Bhopal (Revenue / Respondent)
<b>PAN: AADFB3526F</b>		
Assessee by	Shri Kunal Agrawal, CA & Shri Mahesh Agrawal, CA, Ld. Ars	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	20.04.2023	
Date of Pronouncement	17.07.2023	

**आदेश/O R D E R**

**Per B.M. Biyani, A.M.:**

Feeling aggrieved by appeal-order dated 09.11.2022 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal ["Ld. CIT(A)"], which in turn arises out of assessment-order dated 25.06.2021 passed by learned DCIT, Central Circle-2, Bhopal ["Ld. AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2018-19, the assessee has filed this appeal on following grounds:

1. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO by treating the excess stock found during the survey proceedings as unexplained investment u/s 69 r.w.s. 115BBE of the Act.*

2. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO by treating the excess cash found during the survey proceedings as unexplained money u/s 69A r.w.s. 115BBE of the Act.*
3. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO by taxing both the surrendered income offered during the survey proceedings which was earned from business activities u/s 115BBE of the Act.*
4. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO by taxing both the surrendered income offered during the survey proceedings u/s 115BBE of the Act based on presumption, suspicion, conjectures and surmises.*
5. *On facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO by taxing both the surrendered income offered during the survey proceedings u/s 115BBE of the Act ignoring the submissions filed and case laws relied upon by the appellant."*

2. Heard the learned Representatives of both sides at length and case-records perused.

3. Brief facts leading to present appeal are such that the assessee is a partnership firm engaged in the retail business of gold and silver items. A survey u/s 133A was conducted upon assessee on 06.02.2018 falling within previous year 2017-18 relevant to AY 2018-19 under consideration. During survey, the statement of assessee's partner Shri Deepak Soni were recorded wherein, vide replies to Q.No. 6,7 and 8,he surrendered excess stock of Rs. 2,97,55,184/- and excess cash of Rs. 5,82,644/-; both aggregating to Rs. 3,03,37,828/-. Thereafter, while filing return of income of relevant AY, the assessee faithfully honoured the surrender made by partner and disclosed additional income of Rs. 3,03,37,828/- as "Income from Business" u/s 28 and paid taxes @ normal rate of tax as applicable to business income. During assessment-proceeding, the AO issued notice dated 21.06.2021 asking the assessee as to why the excess stock and excess cash should not be treated as unexplained investment in stock u/s 69 and unexplained money u/s 69A. Finding no reply from assessee, though the AO accepted the additional income of Rs. 3,03,37,828/- as declared by assessee but

assessed the same u/s 69/69A and thereby applied higher rate of tax u/s 115BBE. Aggrieved by action of AO, the assessee went in first-appeal.

4. During first-appeal, both of the assessee and the AO made submissions which are re-produced by CIT(A) in Para No. 3.1.1 to 3.1.3 of his order. The assessee's contention was such that its sole source of income was the business of gold and silver jewellery for about 30 years and the excess-stock as well as excess-cash were the outcome of suppressed business income over the years; no other source of income except the same business had been found during survey. The assessee also relied upon certain judicial rulings where such income had been accepted as business income. Regarding excess-stock, it was further submitted that the excess-stock was a part and parcel of overall physical stock found during survey and was neither found nor identified separately. Per contra, the AO's submission to CIT(A) was such that if the income belonged to past years, why the assessee did not offer the same in earlier years? The AO further contended that if the surrendered income is taxed @ normal rate, what would be the difference between a person who has rightly paid tax on his income and the assessee whose additional income had been detected during survey? Lastly, the AO also contended that the assessee had not given any evidence like bills, payment proof, transport bills, etc. to prove that the excess stock and excess cash was suppressed profit of business. While deciding first-appeal, Ld. CIT(A), vide Para No. 3.1.4 to 3.1.5 of his order, accorded preference to the submission of AO. Further, replying upon decision of **M/s SVS Oil Mills, Tax Appeal No. 765/2018 (Madras High Court)**, the CIT(A) accepted the excess-stock as undisclosed income u/s 69/69B and relying upon the decision in **Shri Shyam Lal Goyal and Others, ITA No. 245-247/Ind/2021, order dated 29.06.2022 (ITAT Indore Bench)**, he accepted excess stock as undisclosed income u/s 69A. This way, he upheld the invocation of section 115BBE as correct approach of AO and did not grant any relief to assessee.

5. Still aggrieved, the assessee has come in this appeal before us assailing the orders of lower-authorities.

6. During hearing before us, Ld. AR for the assessee made several submissions and raised vehement contentions as under:

(i) Ld. AR straightaway carried us to the relevant pages of statement recorded by survey-team and submitted that Q.No. 6 and 7 relates to excess-stock and Q.No. 8 relates to excess-cash. We re-produce below these questions and replies made by assessee's partner for an immediate reference:

प्रश्न 6

आप दिनांक - 06/02/2018 को आपके प्रतिष्ठान पर सर्वे कार्यवाही के दौरान सोने के मौलिक संचयन पर 18662.460 ग्राम का स्टॉक पाया गया, जबकि आपकी बुक्स के अनुसार शुद्ध स्टॉक (सोने की मात्रा) 10567.125 ग्राम <sup>मात्रा</sup> लेनी चाहिए थी, इस प्रकार मौलिक संचयन पर पाये गये सोने के स्टॉक के अंतर 8095.335 ग्राम के अंतर जिसका मूल्य रुपये ~~₹ 2655.65~~ 2655.65 की औसत प्रतिश्राम की दर से (औसत दर आपकी बुक्सों के हिमाख से ली गई है), (जिसमें Making charges शुल्क शामिल है) में रु. 2,14,98,371 होता है, कृपया अंतर की राशि को बयान कीजिए?

उत्तर ->

में उल्लेखित अंतर पाये गये सोने के स्टॉक 8095.335 ग्राम, जिसका मूल्य रु. 2,14,98,376/- है, को अपनी चारू वित्तीय वर्ष - 2017-18 के लिए नियमित आप के अतिरिक्त अधोक्षित आप के रूप में स्वीकार करता हूँ तथा इस पर नियमावली अनुसार आपका अंतर करने के लिए तैयार हूँ, जिसे मैं मार्च-2018 तक जमा कर दूंगा।

प्रश्न 7

आप दिनांक - 06/02/2018 को आपके प्रतिष्ठान पर सर्वे कार्यवाही के दौरान चांदी के मौलिक संचयन पर 810758 ग्राम का स्टॉक पाया गया, जबकि आपकी बुक्स के अनुसार शुद्ध स्टॉक (चांदी की मात्रा) 540309 ग्राम लेनी चाहिए थी। इस प्रकार मौलिक संचयन पर चांदी के स्टॉक के अंतर 270449 ग्राम <sup>मूल्य रुपये 30.53/-</sup> की औसत प्रतिश्राम की दर से जो आपके अंतर, जिसका मूल्य ~~₹ 82,56,808/-~~ 82,56,808/- होता है, कृपया अंतर की राशि को बयान कीजिए?

नावरा

प्राधिकृत अधिकारी  
(अंतर अधिनियम 1991 की)

Kr  
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श्रीधर कुमार

6/2/18

-4-

28

3000 = 7

में उपरोक्त अधिक पाये गये चाँदी के वजन 270 449 ग्राम के अंतर्गत जिसका मूल्य रुपये 82,56,808/- है, को अपनी चार विवर्तित वर्ष 2017-18 के लिए निपूतित आप के अतिरिक्त अधोक्षित आप के रूप में स्वीकार करता है। तथा इस पर निपूतित आया अदा करने के लिए तैयार है। जिसे मैं मार्च-2018 तक जमा करवा दूंगा।

पृष्ठ = 8

आज दिनांक - 06/02/2018 को आपके प्रतिष्ठान पर सर्वे कार्यालयी के दौरान चाँदी के औद्योगिक उत्पादन कर रुपये 15,66,134/- पाये गये जिनके पुनः मूल्य अनुसार जुता नकदी रुपये 8,24,982/- लेनी चाहिए थी। इस प्रकार नकदी में जुता रुपये 7,41,152 का अं है। कृपया अंतर जो कि नकदी में को उपलब्ध करिआ ?

3002 =

प्रतिष्ठान में रुपये 8,24,982/- की ~~जुता~~ नकदी, जो कि दिनांक 05/02/2018 का Closing Balance था। आज दिनांक-06 को Sale रुपये 2,06,610/- है एवं Purchase रुपये 48,102/- है। जिससे कारण अंतर रु 5,82,644 होता है। फिर इस अंतर का उत्तर देने में मैं अभी असमर्थ हूँ। तब अंतर की राशि को अपनी चार विवर्तित वर्ष 2017-18 के लिए निपूतित आप के अतिरिक्त अधोक्षित आप के रूप में स्वीकार करता है। तथा इस पर निपूतित आया अदा करने के लिए तैयार है। जिसे मैं मार्च-2018 तक जमा करवा दूंगा।

नामा

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6/2/18

प्राधिकृत अधिकारी (आयकर अधिनियम 1961 की धारा 132(ब) के अन्तर्गत)

प्रश्न ३१

उत्तर

उसके अतिरिक्त आप और लुई: कहना चाहिए है।  
 प्रश्न क्रमांक 6, 7, 8 में जो क्रमांक सोने, चांदी, एवं नालदी में  
 क्रमांक जो अंतर (सोने में) रुपये 2,14,98,376/-, (चांदी में)  
 रुपये 82,56,808/- एवं नालदी में 5,82,644/- रुपये पाया गया है  
 उसे मैं अपनी चार वित्तीय वर्ष 2017-18 के लिए निम्नलिखित आप के  
 अतिरिक्त अधोषित आप के रूप में स्वीकार करता हूँ। तथा स.म.प.र.  
 नियमानुसार आपका उदा करने के लिए तैयार हूँ। जिसे मैं मार्च-201  
 तक अग्रिम कर के रूप में जमा करा दूंगा।

उपरोक्त लालान के शर्तों के अन्तर्गत के विनियम 6919, 52, 44 (1) के  
 अन्तर्गत लालान के शर्तों के अन्तर्गत (वर्ष) काजी (15) द्वारा निर्दिष्ट एवं प.र.स.म.प.  
 तथा स.म.प.र. करवाए कराने।

श्री प्रकाश कुमार  
 6/2/18

मो. 11  
 6.2.18  
 प्राधिकृत अधिकारी  
 (आयकर अधिनियम 1961 की  
 धारा 133 के अन्तर्गत)

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Ld. AR analysed, line by line and word by word, the above Q.No. 6, 7 and 8 raised by survey-officer and the replies made by assessee as under:

- (a) In regard to excess-stock, Ld. AR submitted that as per Q.No. 6, the authorities found physical stock of 18,662.460 grams of gold and concluded that as per books of assessee, the stock should have been 10,567.125 grams. Thus, the difference of 8,095.335 grams was observed and the same was valued at Rs. 2,14,98,376/- applying average rate of Rs. 2,655.65 per gram. Similarly, as per Q.No. 7, the authorities found physical stock of 810758 grams of silver and concluded that as per books of assessee, the stock should have been 5,40,309 grams. Thus, the difference of 2,70,449 grams was observed and the same was valued at Rs. 82,56,808/- applying average rate of Rs. 30.53 per gram. Referring to the replies given by assessee's partner to both of Q.No. 6 and 7, Ld. AR submitted that the assessee's partner admitted to accept the difference of Rs. 2,14,98,376/- and Rs. 82,56,808/- as "additional undeclared income" in addition to regular income of current financial year 2017-18 and pay tax thereon.
- (b) In regard to excess-cash, Ld. AR submitted that as per Q.No. 8, the authorities found physical cash of Rs. 15,66,134/- as against the cash-balance of Rs. 8,24,982/- disclosed by books of account and thus arrived at excess cash of Rs. 7,41,152/-. But, the assessee's partner, explained the difference to the extent of Rs. 1,58,508/- immediately and admitted to accept the remaining difference of Rs. 5,82,644/- as "additional undeclared income" in addition to regular income of current financial year 2017-18 and pay tax thereon.



Ld. AR submitted that nowhere in Q.No. 6, 7, 8, the survey-officer has asked the assessee to explain the source of excess-stock/excess-cash and nowhere in the replies the assessee has admitted the same as having been earned from "undisclosed sources". Ld. AR submitted that the survey officer has merely asked the assessee to explain the difference and the assessee's partner instantly admitted the same as "additional undeclared income" in addition to regular income. Therefore, from the questions raised and replies given, it cannot be inferred that the "additional undeclared income" was earned from undisclosed or unknown sources. Ld. AR submitted that the assessee honoured the surrender made by it's partner and accordingly credited the "additional undeclared income" in its P&L A/c in addition to regular income (Page No. 18 of Paper-Book); disclosed the same as forming part of "Income from Business" u/s 28 in the return of income and paid tax to department without disputing the same. Therefore, the department must accept the assessee's disclosure as admitted.

- (ii) Then, Ld. AR re-iterated and emphasized the same submission as made by assessee before CIT(A) contending that the assessee is a partnership firm and its sole source is the business of gold and silver jewellery; that no piece of evidence whatsoever had been found during the course of survey indicating any other source of income. He submitted that the assessee has been in this line of business for about 30 years and the excess-stock as well as excess-cash were the outcome of suppressed business income over the years.
- (iii) With regard to excess-stock, it is further submitted that the assessee is engaged in the business of jewellery and the excess-stock found during survey was a part of overall physical stock lying with the assessee; there was no separate identity, identification, existence, holding or any other difference in the normal stock and so-called excess stock. Ld. AR submitted that the excess stock was merely a

mathematical expression of the difference arrived at by survey-team in the value of available stock and stock that ought to have been from books of account. Therefore, the difference is merely an "undeclared business income"; it cannot be attributed in any manner other than as part of business. Ld. AR strongly contended that this is the correct legal proposition in such facts and the same is held by ITAT, Ahmedabad in **M/s Fashion World Vs. ACIT, ITA No. 1634/Ahd/2006 order dated 12.02.2010**, relevant paras are reproduced below:

*"12. Thus the important aspect that emerges from the entire discussion is that for invoking deeming provisions under [sections 69, 69A, 69B & 69C](#) there should be clearly identifiable asset or expenditure. In the present case we find that entire physical stock of Rs.25,14,306/- was part of the same business. Both kind of stock i.e. what is recorded in the books and what was found over and above the stock recorded in the books, were held and dealt uniformly by the assessee. There was no physical distinction between the accounted stock or unaccounted stock. No such physical distinction was found by the Revenue either. The assessee has repeatedly claimed that unaccounted business income is invested in stock and there is no amount separately taxable under [section 69](#). The department has ignored this claim of the assessee and sought to tax the difference between book-stock and physical-stock as unaccounted investment under [section 69](#) without considering the claim of the assessee that first the business receipt has to be considered and then investment should be treated as coming out of such unaccounted income. The difference in stock so worked out by the authorities below had no independent identity of its own and it is part and parcel of entire lot of stock. The difference between declared stock in the books and what is physically found would only be a mathematical expression in terms of value and not a separate independent identifiable asset. Therefore, it cannot be said that there is an undisclosed asset existed independently. Once this is so then what is not declared to the department is receipt from business and not any investment as it cannot be co-related with any specific asset.*

*13. Thus in a case where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under [section 69](#) on the premises that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under [section 69](#) would not be necessary. Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/expenditure with the known head,*

*give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head. It is only where no nexus is established with any head then it should be considered as deemed income under [section 69](#), [69A](#), [69B](#) & [69C](#) as the case may be. It is because when assessee fails to explain satisfactorily the source of such investment then it should be taxed under [section 69](#), [69A](#), [69B](#) & [69C](#) as the case may be. It should not be done at the first instance without giving opportunity to the assessee to establish nexus. Therefore, there is no conflict with the decision of Hon. Gujarat High Court in the case of Fakir Mohmed Haji Hasan (supra) where investment in an asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. Therefore, we hold that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment.*

*14. To conclude sum of Rs. 8,10,011/- being difference in stock is represented by undeclared business income. It does not have a separate physical identity. It is to be only taxed under the head 'business'. Other assets have separate physical identity being furniture and fixtures, air conditioners etc. They cannot have a direct nexus with business and therefore investment therein has to be considered under [section 69](#) only."*

Ld. AR submitted that the reliance of CIT(A) on the decision in M/S SVS Oil Mills (supra) is mis-placed. Ld. AR submitted that in that case, the AO, CIT(A) and ITAT, all three authorities, recorded a clear finding that the assessee neither recorded the excess-stock/excess-cash in books of account nor declared in the return of income and based on such finding, the Hon'ble High Court was pleased to hold that no substantial question of law arose in assessee's appeal. But, in the present case, the assessee has very much recorded the excess-stock and excess-cash in books of account, credited to Profit & Loss A/c and thereby included in the Return of Income. Hence, the decision is clearly distinguishable and not applicable to present case of assessee.

- (iv) With regard to excess-cash, it is submitted that the CIT(A) has recorded a wrong finding on top of Page No. 17 of appeal-order that

*“the appellant (**means assessee**) has himself admitted that the excess cash of Rs. 5,82,644/- found from his premise is earned from undisclosed sources”*; therefore his reliance on **Shri Shyam Lal Goyal and others (supra)** is totally mis-placed. Ld. AR submitted that in reply to Q.No. 8, the assessee has nowhere stated that the excess cash was earned from undisclosed sources; the assessee has simply admitted the excess-cash as “undeclared additional income” in addition to regular income.

- (v) Lastly, Ld. AR relied upon the decision of Hon’ble Rajasthan High Court in **Pr. CIT vs. Bajarang Traders (2017) 86 Taxmann.com 295** and Co-ordinate Bench of **ITAT, Indore in ACIT vs. Shri Anoop Neema, ITA No. 05/Ind/2020 order dated 06.01.2022.**

7. Per contra, Ld. DR for the Revenue supported the orders of lower-authorities and made following submissions:

- (i) It is submitted that in the statement records during survey, assessee’s partner has not stated that the excess stock and excess cash represented income earned from business.
- (ii) It is further submitted that the assessee has not filed any reply to AO during assessment-proceeding. That the section 69/69A/69B are deeming provisions and unless the assessee satisfies the AO, the AO can very well invoke section 69/69A/69B and consequently section 115BBE.

8. We have considered rival submissions of both sides and carefully perused the surrender made by assessee’s partner in the recorded statement as well as the orders of lower-authorities in the light of applicable provisions of law and judicial rulings cited before us. The dispute before us is only regarding applicability of the provision of section 69/69A/69B and consequential higher rate of tax u/s 115BBE of the Act in respect of the

income surrendered and offered to tax by the assessee on account of excess stock and excess cash found during survey. While the assessee has declared the surrendered income as business income in the return of income, the lower-authorities have treated the same as deemed income u/s 69/69A/69B of the Act. Since the surrendered income consists of two components, namely (i) excess-stock, and (ii) excess-cash, we would like to deal both components separately one by one.

**Excess-Stock:**

9. *Firstly*, we are in agreement with the very first and foremost contention of Ld. AR that in Q.No. 6 and 7 of statement, the survey-officer has nowhere asked the assessee to explain the source of excess-stock/excess-cash; he has simply asked the assessee to explain the difference. Going further to replies, we do not find that the assessee's partner has admitted the same as having been earned from "undisclosed sources"; he has only admitted the same as "additional undeclared income" in addition to regular income. Therefore, from the questions raised and replies given, it is little difficult to deduce that the "additional undeclared income" was earned from undisclosed or unknown sources. Needless to mention that it is also undisputed that the assessee is a partnership firm and its sole source of income for last 30 years is the business of jewellery and no evidence had been found during survey indicating any other source of income and the assessee claims that the excess-stock was outcome of suppressed business income over the years.

10. *Secondly*, it is pertinent to note that during the course of survey what was detected in respect of the stock was that the physical stock found at the business premises of the assessee was excess in comparison to the stock recorded in the books of account. It is not the case of the AO that the excess stock found during the survey was separated from other stock of the assessee but it is one and common nature of stock found during survey

except the quantity of the stock on physical verification was found to be excess in comparison to the stock recorded in books of accounts. Thus, there is no separable identifiable stock found during survey then the stock regularly held by assessee in the normal course of business of jewellery. Once the stock found during survey is part of total stock of business, then the said excess stock cannot be given a separate identity than the other stock of assessee. Further, even if excess stock found during survey was not recorded in the books of account but when the survey was conducted before closure of financial year then the assessee was at liberty to incorporate excess stock in books of account at the time of finalizing accounts, which also the present assessee has done which is evident from a separate credit entry made in Profit & Loss A/c. The Hon'ble Rajasthan High Court in case of **Pr. CIT vs. Bajarang Traders (supra)** has upheld the finding of the Tribunal that excess stock found during the survey is not separable and identifiable but it is part of mixed stock found at the premises which including declared stock as per books as computed by the survey team. Therefore, it is held that the provision of section 69B of the Act cannot be made applicable as primary condition for invoking the provision is that asset should be separately identifiable and it should have independent physical existence on its own. Further, the Coordinate Bench of this Tribunal in case of **ACIT vs. Anoop Neema (supra)** has also considered an identical issue as under:

*"7. We have heard rival contentions and perused the records placed before us. Revenue's sole grievance is that Ld. CIT(A) erred in not treating the income of Rs. 1,41,75,568/- declared during the course of search carried out on 15.12.2016 as unexplained investment u/s 69 r.w.r.t. 115BBE of the Act. We notice that during the course of search excess stock of gold weighing 6433.812 gms was found amounting to Rs.1,41,75,568/-. Mr. Anoop Neema in his statement recorded on oath on 16.12.2016 u/s 132(4) of the Act accepted the value of excess stock as additional business income for financial year 2016-17. So far as, admission of undisclosed income of Rs.1,41,75,569/- is concerned there is no dispute at the end of both the parties. The bone of contention is that whether the provision of section 115BBE of the Act are applicable on the surrendered income of Rs.1,41,75,568/- we find that Ld. CIT(A) on examination of the fact, settled judicial precedence, also appreciating that the alleged income is business income earned by the assessee during the*

normal course of its business and was part of the total business stock available at the business premises and also observing that provisions of section 115BBE of the Act are applicable from 01.04.2017 and are thus not applicable on the case of assessee as the search was carried out on 15.12.2016 observing as follows:

Ground No 1 to 5:- Through these grounds of appeal, the appellant has challenged the treating of Rs. 1,41,75,568/- declared during search as unexplained investment u/s 69 r.w.s 115BBE of the Act and not as a business income. During the course of search, valuation of stock was taken by registered valuer and net weight of gold was found at 25,857.490 gms valued at Rs. 5,67,73,734/-, however, the value of gold as per books of accounts of the assessee was at 19,423.678 gms valued at Rs. 4,25,98,165/-. Therefore, a difference in stock of 6433.812 gms was found amounting to Rs. 1,41,75,569/-. Statement of Shri Anoop Nema was recorded on oath on 16.12.2016, wherein, he has accepted value of excess stock of gold as additional income for FY 2016-17 (AY 2017-18). The relevant extract of statement is also scanned on page no 4 & 5 in the body of assessment order. The AO during the course of assessment proceedings observed that the assessee has declared excess stock as undisclosed income in return of income for AY 2017-18. However, the AO required the assessee to separately credit the excess stock of Rs. 1,41,75,568/- in P/L account but the same was not done by him. The AO therefore, considering the excess stock as unexplained investment made addition of Rs. 1,41,75,568/- to the income of the appellant u/s 69 r.w.s 115BBE of the Act.

4.1.1 The appellant during the course of appellate proceedings has stated that an excess stock of gold was found during the course of search and the same was also not recorded in regular books of accounts, thereby the AO has invoked provisions of section 69, however, no enquiry was made by the AO regarding the source of acquisition of excess stock, therefore, the disallowance made by the AO u/s 69 r.w.s 115BBE is unlawful. Further, the amended provisions of section 115BBE are applicable from 01.04.2017 and not from the date of search.

4.1.2 I have considered the entire matrix of the case, various case law cited by the appellant and also perused assessment order. It is undisputed fact that during the course of search excess stock of gold worth Rs. 1,41,75,568/- was found in possession of appellant. Therefore, appellant during search made disclosure of 1,41,75,568/- on account of undisclosed income, however, the appellant while filing return of income has directly credited the same in his capital account and without showing the same as additional income. Therefore, the additional income offered was not shown in profit and loss account. Thus, the AO was justified in making addition on account of undisclosed income declared in statement recorded on oath u/s 132(4) during search. Also, the appellant has accepted the addition made by the AO amounting to Rs. 1,41,75,568/- vide written submissions dated 26.07.2019. However, the appellant has objected to the findings of the AO on treating the additional income offered (or say business income) by the appellant as unexplained investment u/s 69 r.w.s 115BBE of the Act. After considering the plea of appellant inter alia facts of the case it can be easily said that the

instant case revolves around applicability of two different sections i.e. section 69A and section 115BBE of the IT Act.

(a) Applicability of provisions of section 69A (unexplained investment) of the Act:-

The AO found appellant of guilty of invoking provisions of section 69 of the Act and has re-classified the income of the appellant u/s 69A of the Act. before moving ahead, I find it important to quote relevant provision section 69 of the Income Tax Act which is as under:-

*"69. Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*[emphasis supplied]

Any assessee can be held guilty of invoking provisions of section 69 of the Income Tax Act if, (i) where in any financial year, the assessee is found to have made certain investments; (ii) such investments are not recorded in the books of account, if any, maintained by the assessee; (iii) the assessee offers no explanation about the nature and source of such investments; and finally, (iv) even if any explanation is offered by the assessee, such explanation in the opinion of the Assessing Officer is not satisfactory. Conditions (i) and (ii) are mandatory in nature and out of condition (iii) and (iv) only one or both as the case may be fulfilled. In the instant case condition no (i) and (ii) has been fulfilled by the appellant, however, on perusal of copy of assessment order it has been observed that neither the search party nor the AO has ever enquired about source of acquisition of excess stock. During the course of search statement of appellant was also recorded on oath u/s 132(4) of the Act wherein in reply to Q.No 8 the appellant has specifically and clearly admitted that the undisclosed income has been earned out of business income in the relevant previous year. Thus, condition (iii) or (iv) has not been invoked by the appellant, therefore, addition u/s 69 alone of this fact is untenable as held by Hon'ble Jurisdictional ITAT, Indore Bench in the case of Mukesh Sangla HUF vs. DCIT (2016) 27 ITJ 172 (Trib.-Indore).

Nonetheless, neither the search party during course of search nor the AO during assessment proceeding found that appellant has been doing business other than manufacturing and trading of gold ornaments or has any other undisclosed source of income. Further the excess stock found in possession of the appellant was not kept separately and was not easily identifiable. The excess stock was part of the mixed lots of stock found at the premises of the appellant which included declared stock as per books of account and also the excess stock as found during the search. Since the excess stock in possession was not clearly identifiable or was not kept at a secret place, therefore, it can be safely held that the same could have been earned/accumulated over the time. However, this presumption of accumulating over a period of time is ruled out with simple stroke of statement of appellant wherein he has admitted that the same has been earned in FY 2016-17 (AY 2017-18). Further, the appellant



does not have any income other than manufacturing and trading of gold ornaments, therefore, the excess stock found during search was earned out of business income by the appellant. Hon'ble Ahmadabad ITAT in the case of Chokshi Hiralal Maganlal vs DCIT, (ITA No 3281/Ahd/2009 dated 05.08.2011) has held that "the provisions of section 69A/69B of the IT Act can only be applied the case where the asset is separately applicable and separately identifiable and it should have independent physical existence of its own. Since the excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the investment in the excess stock has to be treated as business income. Similar, view has been taken by Hon'ble jurisdictional Indore tribunal in the case of M/s Shahnai Shriram Market vs ITO 1(1), Ujjain (ITA No 658/Ind/2014 dated 15.05.2015).

(a)(i) It is a settled law that additional income declared on account of excess stock is business income of the assessee. This proposition finds support from the following case laws:-

**(a)** Bajrang Traders Vs. ACIT (Circle)-2, Alwar (ITA No. 137/Jp/17 dated 17.03.2017). In this case, it is held as under:-

2.11 Having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or "income from other sources". In the present case, the assessee is dealing in sale of food grains, rice and oil seeds, and the excess stock which has been found during the course of survey is stock of rice. Therefore, the investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. The decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore, the investment in the excess stock has to be brought to tax under the head "business income" and not under the head income from other sources". In the result, ground No.1 of the assessee is allowed.

**(b)** DCIT (Central), Ajmer Vs. Ramnarayan Birla (ITA No. 482/Jp/2015 dated 30.09.2016) In this case, it is held as under:-

4.3. We have heard rival contentions and perused the material available on record. Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed that the assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs. 77,66,887/- was found in respect of gold and silver jewellery. The Coordinate Bench in the case of Chokshi Hiralal Maganlal vs. DCIT, 131 TTJ (Ahd.) 1 has held that in a cases where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premises that such excess investment is not recorded in the books of account and its

*nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head. It is observed that there is no conflict with the decision of Hon'ble Gujarat High Court in the case of Fakir Mohd. Haji Hasan (supra) where investment in an asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. Therefore, the Hon'ble Coordinate Bench held that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case the excess stock was part of the stock. The revenue has not pointed out that the excess stock has any nexus with any other receipts. Therefore, we do not find any fault with the decision of the Id. CIT (A) directing the AO to treat the surrendered amount as excess stock qua the excess stock found.*

**(c)** *Fashion World Vs. ACIT (Circle)-12, Ahmedabad (ITA No. 1634/Ahd/2016 dated 12.02.2010) In this case, it is held as under:-*

*12. Thus the important aspect that emerges from the entire discussion is that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable asset or expenditure. In the present case we find that entire physical stock of Rs.25,14,306/- was part of the same business. Both kind of stock i.e. what is recorded in the books and what was found over and above the stock recorded in the books, were held and dealt uniformly by the assessee. There was no physical distinction between the accounted stock or unaccounted stock. No such physical distinction was found by the Revenue either. The assessee has repeatedly claimed that unaccounted business income is invested in stock and there is no amount separately taxable under section 69. The department has ignored this claim of the assessee and sought to tax the difference between book-stock and physical-stock as unaccounted investment under section 69 without considering the claim of the assessee that first the business receipt has to be considered and then investment should be treated as coming out of such unaccounted income. The difference in stock so worked out by the authorities below had no independent identity of its own and it is part and parcel of entire lot of stock. The difference between declared stock in the books and what is physically found would only be a mathematical expression in terms of value and not a separate independent identifiable asset. Therefore, it cannot be said that there is an undisclosed asset existed independently. Once this is so then what is not declared to the department is receipt from business and not any investment as it cannot be co-related with any specific asset.*

14. To conclude sum of Rs.8,10,011/- being difference in stock is represented by undeclared business income. It does not have a separate physical identity. It is to be only taxed under the head 'business'. Other assets have separate physical identity being furniture and fixtures, air conditioners etc. They cannot have a direct nexus with business and therefore investment therein has to be considered under section 69 only.

15. In view of the above, AO is directed to consider the sum of Rs.8,10,011/- as undisclosed business income assessable under the head 'business' and other two sums under section 69. The business income including application of section 40(b) has to be considered accordingly. For calculation of income in view of our above observations, we restore the matter to the file of AO.

**(d)** Chokshi Hiralal Maganlal Vs. DCIT, Ahemadabad (ITA No. 3281/Ahd/2009 dated 05.08.2011) In this case, it is held as under:-

9. Since in the present case excess stock found during the survey is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the survey officers, the provisions of section 69B cannot be made applicable as primary condition for invoking the provisions of section 69A, 69B is that the asset should be separately identifiable and it should have independent physical existence of its own. Since excess stock is a result of suppression of profit from business other the years and has not been kept identifiable separately but i.e. the part of overall physical stock found, the investment in the excess stock 'has to be treated as business income as per detailed reasons given in the case of Fashion World (supra). Once excess stock is treated as business income then assessee is entitled for higher remuneration to the partners as per section 40(b). As a result, this ground -of assessee is allowed.

**(e)** Shri Lovish Singhal Vs. ITO, Ward-2, Sriganganagar (ITA No. 143/Jodh/2018 dated 25.05.2018) In this case, it is held as under:-

I have heard the rival contentions and record perused. I have also carefully gone through the orders of the authorities below. I have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id AR during the course of hearing before the ITAT in the context of factual matrix of the case. From 18 ITA 142 to 146/Jodh/2018 Vasu Singhal Vs ITO with 4 Ors. cases the record, I find that during the course of survey, income was surrendered by the assessee on account of stock, excess cash found out of sale of stock and also in respect of incriminating documents. As per judicial pronouncements cited by the Id. AR and also the decision of Hon'ble Rajasthan high court in the case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017 I observe that the Hon'ble High Court in respect of excess stock found during the course of survey and surrender made thereof was found to be taxable under the head 'business and profession'. Similarly in respect of excess cash found out of sale of goods in which the assessee was dealing was also found to be taxable as business income. Applying the proposition of law laid down in the judicial

*pronouncements as discussed above, I hold that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act. Thus, there is no justification for taxing such income U/s 115BBE of the Act.*

**(f)** *ACIT Vs. Sanjay Bairathi Gems Ltd – 189 TTJ 487/492 (Jp). In this case, it is held as under:-*

*From the above, it is seen that the excess stock found during the search operation is not separately and clearly identifiable but is part of mixed lots of stock found at the premises which included declared stock as per books and also the excess stock as computed by the authorized officers during the search operation at the premise. Since excess stock is a result of suppression of profit from business over the years and has not been kept identifiable separately but is the part of overall physical stock found, the investment in the excess stock has to be treated as business income. Further, the excess stock so found is part of the regular business, therefore, following decision of Hon'ble Tribunal Bench Jaipur in case of Ramnarayan Birla (cited supra), the same has to be taxed under the business income. Otherwise even if the same is taxed under s. 115BBE of the Act, the provisions of not allowing the set off has come into effect from 1st April, 2017.*

**(g)** *ACIT vs M/s A Star Exports and M/s Asian Star Diamonds International Pvt Ltd (2015) 5 TMI 1312 (ITAT Mumbai) wherein it has been held as under:-*

*“8. We have considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by Id. DR and AR during the course of hearing before us. From the record we found that the assessee a partnership firm is in the business of trading, import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery The main object of the assessee firm is to carrying out the business of import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery. The partnership business was of importers, exporters, manufacturers, processors, investors, wholesalers, distributors, retailers, dealers and indenting agent of diamonds, synthetic stones, gems and jewellery, precious and semi-precious metals and miners and ornaments and article made thereof including jewellery, decorative and precious objects of arts and crafts and to cut, design polish rough diamond, gems and precious stones and that of investment and lending and to do any other business as may be mutually agreed upon by the partners. In the return of income filed for the year under consideration, the assessee has shown income under the head profit and gains of business and profession and other sources. In the search action, three loose papers were found and seized as part of Annx - 5 of the panchnama prepared on 29.10.2011 at the office premises of 114/116, Mittal Court, C-Wing, 11th floor, Nariman Point, Mumbai - 400021. These documents mention the carat value, rate per carat and total value of diamonds. In the course of search proceedings Shri Vipul Shah confirmed that these loose papers were containing stock details of M/s A'Star Exports, M/s. Asian Star Diamond International P. Ltd. and M/s. Rahil Agencies. The stock mentioned*

in the above referred seized papers was stated as placed in one safe located at the office premises. The stock of diamonds found from the safe was valued by the Govt. Approved valuer appointed by the Income Tax Department at the time of prohibitory order execution and was valued as follows:

The statement of Shri Vipul Shah was again recorded on 27/12/2010, wherein he admitted the unaccounted stock of 34,50,00,516/- including unaccounted stock of 13,47,63,640/- pertain to the assessee. The computation of the total income of the assessee had declared undisclosed income of 13,47,63,640/- in the form of stock of polished diamonds under the head "profit and gains of the business and profession". In the course of assessment the assessee submitted .its explanation on why the undisclosed stock should be treated as a business income. In this connection it was stated that at the time of search, the investigating officers found unaccounted stock in the business premise of the assessee at 114/116, Mittal Court, 'C' Wing, 11th Floor, Nariman Point, Mumbai - 400021. This stock was valued at 13,47,63,640/- by the income tax valuer. Consequently the assessee declared this amount as stock in trade and this contention of the assessee was accepted by the Investigating officer. Who has released the stock after valuation and not impounded/seized. The statement of Shri Vipul P. Shah Partner of the firm was again recorded on 20.11.2012 wherein in reply to the question no. 22 he has stated that this undisclosed income is generated through unrecorded trading of diamonds. Q.22 Please explain as to how this undisclosed income is generated? Ans: it is through unrecorded trading of diamonds. "

It is clear from the above facts that the declaration was related to business stock in trade hence it is evident that the declaration amount is required to be assessed under the head' Income from Business or profession. Thus, the undisclosed income of 13,47,63,640/- declared voluntarily by the assessee for A.Y. 2011-12, is undisclosed stock held under the customary trading of the business and hence should be treated as the business income of the assessee firm and not as undisclosed investment as held by the AO. If all the three conditions of Section 69 exist together, the unrecorded investment or value of assets can be deemed to be assessee's income of the relevant financial year. In the present case all three conditions as required under section 69 are not fulfilled because the appellant has offered explanation and nature of source of acquisition as undisclosed stock received from the unaccounted trading of diamond as source of income. The partner of the firm has time and again stated in his statement that diamond found in the premises during the search is out of unrecorded trading of diamonds hence the third part of section 69 is not satisfied hence the said stock is not taxable under section 69 of the Act."

- (h)** M/s SurekhJewellers vs DCIT ITA No 18/PN/2016 dated 12.06.2016.
- (i)** M/s Silver Palace vs DCIT ITA No 893/PUNE/2016 dated 29.06.2018 (ITAT Pune)
- (j)** M/s Solanki Jewellers vs DCIT ITA No 858/PN/2016 dated 18.11.2016.

**(k)** *ITO vs Jmandas Muljibahai (2006) 99 TTJ 197 (ITAT Rajkot).*

**(l)** *M/s Dev Raj Hi Tech Machines vs DCIT ITA No 326 of 2014 dated 07.10.2015 (ITAT Amritsar)*

*(a)(ii) From the above discussion and in view of the plethora of judgments on this settled issue, I am of the considered view that section 69 was clearly not applicable in the case of appellant and the suppressed income found by way of excess stock was business income of the appellant and cannot be treated as unexplained investment u/s 69A of the IT Act.*

*8. We on perusal of the above finding and the various judgments and decisions referred hereinabove by Ld. CIT(A) find that the alleged excess stock was not kept separately at any other place and was part of the total business stock found at the assessee's business premises are sufficient enough to indicate that the alleged investment in excess stock is part of the business income. We also find that alleged excess stock was duly accepted by assessee as part of unaccounted business and source thereof stated during the course of search itself and no other incriminating material was found during search proceedings and therefore is not an undisclosed income as held by the Id. AO. We, therefore, find no infirmity in the finding of Ld. CIT(A) rightly holding that the provision of section 115BBE of the Act are not applicable on the surrendered income on account of excess stock valuing at Rs. 1,41,75,568/- found during the course of search. Thus, grounds no. 1 to 3 raised by the revenue are dismissed."*

11. Therefore, once the facts emerging from record shows that the excess stock found during survey was a part of entire lot of stock of assessee, part of which is recorded in books of account and part of the same was not found recorded and therefore, treated as excess stock at the time of survey and consequently surrendered by the assessee and also offered to tax in the return of income then the excess stock cannot be treated as deemed income u/s 69 or 69B of the act in view of the judgment of Hon'ble Rajasthan High Court and Coordinate Bench of this Tribunal cited above. Accordingly, this issue is decided in favour of the assessee and against the revenue. The orders of the authorities below *qua* this issue is set aside. The assessee succeeds to this extent.

**Excess-Cash:**

12. With regard to excess-cash, the position is materially different. On perusal of Q.No. 8 of statement, we find that the survey-officer found excess cash of Rs. 7,41,152/-. When the assessee's partner was asked to explain the difference, he himself explained difference to the extent of Rs. 1,58,508/- [Rs. 2,06,610/- related to sale (-) Rs. 48,102/- related to purchase of survey-day] and admitted his inability to explain the remaining difference of Rs. 5,82,644/- which is very much clear from the reply given by him at the very first stage of recording statement itself. The said reply is re-produced below for an immediate reference:

*उत्तर - प्रतिष्ठान में रुपये 8,24,982/- की कुल नकदी, जो कि दिनांक 05/02/2018 का Closing Balance था । आज दिनांक 06/02/2018 की Sale रुपये 2,06,610/- है एवं Purchase रुपये 48,102/- है । जिसके कारण अंतर रु. 5,82,644/- होता है । इस अंतर का उत्तर देने में मैं अभी असमर्थ हूँ तथा अंतर की राशि को अपनी चालू वित्तीय वर्ष 2017-18 के लिए नियमित आय के अतिरिक्त अघोषित आय के रूप स्वीकार करता हूँ । तथा इस पर नियमानुसार आयकर जमा करने के लिए तैयार हूँ । जिसे मैं मार्च-2018 तक जमा करवा दूंगा।*

Notably, neither before lower-authorities nor before us, the assessee has not shown anything to demonstrate that the said reply was not correct. Therefore, there could hardly be any dispute that the excess-cash of Rs. 5,82,644/- represented assessee's income from unexplainable source attracting the provisions of section 69A. Ld. AR, in his submission, has referred to a part of the reply and not taken into account this part of assessee's reply. Being so, we are inclined not to accept Ld. AR's submission that the excess cash could be treated as business income. Consequently, we

uphold the action of lower-authorities in holding excess cash as deemed income u/s 69A attracting higher rate of tax u/s 115BBE. The assessee fails to this extent.

**13. Resultantly, this appeal of assessee is partly allowed.**

*Order pronounced in the open court on 17/07/2023.*

Sd/-  
(VIJAY PAL RAO)  
JUDICIAL MEMBER

sd/-  
(B.M. BIYANI)  
ACCOUNTANT MEMBER

**Indore**

दिनांक/Dated : 17.07.2023

CPU/Sr. PS

*Copies to: (1) The appellant  
(2) The respondent  
(3) CIT  
(4) CIT(A)  
(5) Departmental Representative  
(6) Guard File*

*By order*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Indore Bench, Indore*