

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT
(Conducted through Virtual Court)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकरअपीलसं./ITA No. 113/Rjt/2022
निर्धारणवर्ष/Asstt. Year:2017-2018

M/s Vaidya Realities, 1-A Vidyut Nagar Society, "Vande matram", Opp. Rajkot-1 Astron Shopping Centre, Rajkot-360001. PAN: AAIFV8723D	Vs.	The Principal Commissioner of Income Tax, Rajkot-1,
(Applicant)		(Respondent)

Assessee by :	Shri Sagar Shah, AR
Revenue by :	Shri Shramdeep Sinha, CIT. DR

सुनवाईकीतारीख/**Date of Hearing** : **02/01/2024**

घोषणाकीतारीख/**Date of Pronouncement**: **19/01/2024**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the order of the Principal Commissioner of Income Tax, Rajkot-1, arising in the matter of order passed under Section 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2017-18.

2. The only grievance raised by the assessee is that the Ld. PCIT erred in holding the assessment framed u/s 143(3) of the Act, as erroneous in so far prejudicial to the interest of revenue.

3. The necessary facts are that the assessee in the present case is a partnership firm and engaged in the Real estate business/ residential housing project. There was a survey operation at the business premises of the assessee u/s 133A of the Act dated 25/10/2016. The assessee based on the seized documents impound during the survey operation admitted having received on-money in its real estate project. Accordingly, the assessee agreed to surrender unexplained income amounting to Rs. 1, 77,66,000/- which was duly offered in the income tax return under the head business and profession and the same was accepted by the AO in the assessment framed u/s 143(3) of the Act, vide order dated 19/12/2019.

4. Subsequently, the Ld. PCIT on verification of the assessment records found that the income offered by the assessee is representing on-money received which should have been taxed under the provisions of section 69 of the Act, and accordingly the same should have been brought to tax at the special rate specified u/s 115BBE of the Act and that too without allowing any deduction against such income. However, the assessee against such income has claimed deduction on account of remuneration and interest paid to the partners amounting to Rs. 1,16,58,398/- and 16,27,064/- respectively. Thus, the Ld. PCIT held that the assessment has been framed u/s 143(3) of the Act without verification with respect to undisclosed income offered by the assessee for Rs. 1,77,66,000/- in pursuance to the provisions of section 69 r.w.s. 115BBE of the Act which is erroneous and causing prejudice to the interest of revenue.

5. Being aggrieved by the order of the learned PCIT, the assessee is in appeal before us.

5.1 The learned AR before us filed a paper book running from pages 1 to 156 and contended that the assessment has been framed by the AO after raising the query in the notice issued u/s 142(1) of the Act with respect to the income offered during survey operation. The Ld. AR further submitted the query raised by the AO

was duly answered by the assessee vide letter dated 14/11/2019. The Ld. AR in support of his contention drew our attention on pages 32 to 48 of the paper book where the question raised by the AO and replies made by the assessee were placed.

5.2 Besides the above, the Ld. AR further contended that none of the authorities below has doubted that the income surrendered in the survey was not representing the on-money received in relation to the real estate project carried out by the assessee and therefore the same was accepted as business income of the assessee. Once the assessee has established that the income in dispute does not fall under the deeming provision u/s 69 of the Act, the question of charging the same at the special rate does not arise.

5.3 On the other hand, the Ld. DR vide letter dated 16-01-2024 submitted as under:

2. Kind attention of Hon'ble ITAT was invited to the provisions of section 69 of the Act and provisions of section 115BBE of the IT Act. It was emphasized that the provision u/s 69 speaks of 'Investments not recorded in the books of account maintained by assessee from any source of income. Further, the section states that 'the value of the Investments may be deemed to be the income of the assessee of such financial year. These provisions are to be simultaneously read with S. 115BBE(2) which begins with a Non-obstante clause and states that "no expense is permissible from deemed income." The highlighted portions in the provision were emphasized to suggest the following:

(i) That even if, the investment is out of unrecorded business Income, the entire value of investment is to be treated as deemed Income. When this is read along with provisions of 115BBE(2), it can be said that no expense is permissible from such value of investment deemed to be undisclosed Income of the assessee. Thus, assessment order was bad in law in permitting expense from deemed income in the hands of the assessee.

(ii) Thus, it was humbly submitted that based on above submission, the decision in ITA No. 92/RJT/2020 para 5.2 is "a mistake of law" because Ld. ITAT has not considered the impact of section 115BBE(2) read along with section 69. To such extent the main reliance by the appellant on ITA No. 92/RJT/2020 during the hearing of the case is misplaced. It is simultaneously submitted that the doctrines of 'per-incurium' and 'sub-silentio' are explanations to the rule of 'stare decisis', If a decision has been given in ignorance of law or any statute or any binding authority, the doctrine of 'per-incurium' is attracted (State of UP Vs Synthetics and Chemicals Ltd. (1991) 4SCC 139) rule of 'sub-silentio' is applicable where a particular point of law is not perceived by the Court or was not present to its mind or is not consciously determined by the Court [Arnith Das Vs State of Bihar, AIR 2000 SC 2264, para 21]

(iii) Simultaneously, the deemed income is taxed at special rates under 115BBE(1). Non-subjecting the undisclosed business-income offered in lieu of unaccounted and unexplained investment in property, is another mistake of law in the assessment order.

3. As per the facts of the case during the course of Survey u/s 133A, as can be seen from page 4 and page 5 of the statement of Mr. Shirish N Vaidya (page 41 and 42 of paper book submitted dated 12th August, 2023), a total amount of Rs. 3 crores, including Rs. 1.7766 crores pertaining to M/s Vaidya Realities for AY 2016-17 was admitted as "Undisclosed Income" of the firm. In its statement on page 4 (page 41 of paper book) Mr. Shirish N. Vaidya has specifically admitted as follows:

(a) That in the "Navin Nagar Project" of Vaidya Realities, between April, 2016 to June, 2016, the assessee has received "own money"- which is the amount over and above the registered value of residential houses sold.

(b) During this time from Navin Nagar Project, cash of Rs. 1,77,66,000/- has been received as own money.

(c) I am disclosing such cash receipts/own money as "undisclosed business Income" of M/s Vaidya Realities for the current year.

(d) I have consulted all partners of Vaidya Realities while determining such amount.

(e) This amount (Rs. 1, 77 ,66,000/-) is over and above the regular Income of my firm (Vaidya Realities).

[Other disclosures and statements do not pertain to Vaidya Realities and hence are not reproduced.]

4. Thereafter, in his books of accounts the appellant has included Rs. 1,77,66,000/- as Income disclosed during Survey which can be seen on page 26 of the paper book. However, the total taxable income declared by the assessee is only Rs. 76,22,270/-. In the assessment order, the AO has accepted the returned income at Rs. 76 ,22,270/-; and has also not taxed the same as per rates specified under S 115BBE(1) of the IT Act.

5. In the order u/s 263, Ld. PCIT has raised the following issues:

(1) Despite a substantial fall in the gross profit and net profit, the assessment order is silent and records do not show any inquiry or any satisfactory explanation given by the assessee on the issue.

(ii) The Unexplained Investment of Rs 0.1, 77 ,66,000/- being unaccounted is covered under deemed income. On such unaccounted income, the assessee had debited remuneration paid to partners and interest paid to partners. Thus, provisions of 115BBE r.w.s. 69 of the Act stand violated. The assessment order does not consider these provisions of law.

(iii) An amount of Rs. 1,30,15,424/- should also have been shown as net profit excluding disclosures made during the Survey (please see para 3 to 11 of order u/s 263).

(iv) After examining the submissions of the assessee during 263 proceedings, Ld. PCIT has concluded that the AO has not made any conscious attempt to examine the issue on the basis of the material on record. Also, that the AO did not conduct any such inquiries or verification as outlined above (para 3 to 10 of order u/s 263) and simply accepted the assessee's submission. Based on the above, Ld. PCIT has considered that the assessment order is erroneous as well as prejudicial to the interest of the Revenue. He has directed to

make fresh assessment keeping in view the observations of PCIT, after conducting necessary verifications and Inquiries and after providing proper opportunity of being heard.

6. *During the course of hearing, the undersigned also explained that the amount of Undisclosed Investment, accepted as income in the form of additional money received from sale of residential houses, which the assessee has termed 'own money', 'amount over and above the registered value of property', 'amounts in addition to the regular income of the firm during the current year', are value of undisclosed Investment/ value of residential houses over and above the registered value. Thus, the source of such investment is not recorded in the books of the assessee, and, such Investment was only found when the Survey u/s 133A was conducted, and cash-receipt documents were found and confronted to the assessee. Based on the documents and findings of the Search, the assessee has accepted unrecorded investments in property, over and above the value of property shown in Registered sale deed for which he has received own money/additional money from his customers.*

7. *Ld. ITAT was requested that the Assessing Officer has failed to conjointly read the provisions of section 69 with section 115BBE(2) and has permitted expenses in the hands of the assessee against the provisions of IT Act. Further, he has failed to notice and inquire the reasons for fall in gross profit, and thus, this case squarely falls within the definition of erroneous in the context of decision of Hon'ble Ahmedabad ITAT in the case of Babulal S. Solanki Vs ITO, ITA - 3493 / AHD / 2016 which is also relied upon by Revenue.*

8. *It is requested to uphold order u / s 263 of the IT Act.*

6. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the assessment framed u/s 143 has been held as erroneous in so far prejudicial to the interest of revenue for the reason that the income surrendered during survey operation for Rs. 1,77,66,000/- was not verified in pursuance to the provision of section 69 r.w.s. 115BBE of the Act. The controversy arises whether there was any inquiry conducted by the AO during the assessment proceeding qua the income offered by the assessee during the survey operation. In this regard, we find that the relevant queries were raised by the AO in the notice issued u/s 142(1) of the Act, dated 10/10/2019 which are reproduced as under:

Comparison of GP/NP for last three years.

Details of other income with supporting documents.

Valuation of closing stock.

Details of income offered for taxation u/s.133A.

Please explain the details of noting appearing on the papers impounded during the course of survey carried out at your business premises u/s.133A 25.10.2016.

6.1 The above queries were duly answered by the assessee vide letter dated 14/11/2019, which is placed on pages 36 to 37 of the paper book. The relevant extract of the same is reproduced as under:

Specific Information:

Point No.6

Sir, we are engaged in the business of constructing as well as executing work on construction site of client as well as of our own and thus, we are not dealing with the traded goods and there is no concept of Gross Profit. However, the net business profit offered as compared to turnover is tabulated herein below:

<i>Particulars</i>	<i>F.Y 2016-17</i>	<i>F.Y 2015-16</i>	<i>F.Y 2014-15</i>
<i>Sales (in Rs.)</i>	<i>2,98,82,300</i>	<i>66,00,700</i>	<i>1,77,01,100</i>
<i>Net Profit (in Rs.)</i>	<i>76,22,265</i>	<i>6,34,292</i>	<i>17,78,159</i>

Point no.7

Sir, the details of other income are duly evident from the schedule P5 of audited accounts already placed on records. The summary of the same is tabulated herein below:

<i>Sr.No.</i>	<i>Particulars</i>	<i>Amount (in Rs.)</i>	<i>Remarks, if any</i>
<i>1.</i>	<i>Income disclosed during survey in October, 2017</i>	<i>1,77,99,000</i>	<i>Ledger account enclosed at pg 1</i>
<i>2.</i>	<i>Interest Income</i>	<i>77,340</i>	<i>Ledger account enclosed at page 2</i>

** Copy of statement recorded during the course of survey proceedings enclosed at pg 3 to 8*

Point No.8.

Sir, Kindly note that there is no change in the method of valuation of closing stock and the method of valuation of the closing stock is duly reported at clause no.14(a) of Form no.3CD already placed on records.

Point no.9

The income disclosed during the course of survey proceedings is duly disclosed as business income in the Return of Income filed for the year consideration and is included in other income in audited books of accounts.

Point no.10

Sir, these details are duly disclosed in the statement recorded under section 131 during the course of survey proceedings and the same is enclosed herewith at pg3 to 8

6.2 On perusal of the above details, it is transpired that there was application of mind by the AO during the assessment proceedings. Accordingly, it cannot be said that the assessment has been framed by the AO without conducting inquiries. As such, we hold that the AO framed the assessment after necessary inquiries with respect to the income surrendered by the assessee during the survey operation conducted u/s 133A of the Act.

6.3 Besides the above, we also note that the assessee in the statement recorded during the survey operation has also accepted that it has received on-money for its real estate project. The survey statement is place on page 1 to 5 of the paper book. Likewise, the AO in the assessment framed u/s 143(3) of the Act, has also observed as under:

During the survey proceeding certain loose papers and diary etc were found and impounded. The impounded material were confronted during the statement recorded on oath of one of the partner Sh Shirish Bhai Vaidya and he has accepted that they received on money receipt in his residential project almost 25% of the total value of the residential unit.

6.4 A conjoint reading reveals that there was due application of mind by the AO during the assessment proceedings and therefore assessment cannot be held as erroneous in so far prejudicial to the interest of revenue on account of non-verification.

6.5 Without prejudice to the above, we note that the Ld. PCIT in his order has referred the explanation 2 to section 263 of the Act, in holding that the necessary inquiries were not carried out by the AO during the assessment proceedings. However, we find that the Ld. PCIT in the notice issued u/s 263 of the Act has nowhere made any reference to the explanation 2 to section 263 of the Act, and therefore we hold that the Ld. PCIT erred in holding assessment order as erroneous and prejudicial to the interest of Revenue after referring to the explanation 2 of section 263 of the Act.

6.6 We further note that the ITAT Chandigarh in the case of Shri Parmod Singla v. ACIT reported in 154 taxmann.com 347 of the Act has observed as under:

15. *In the instant case, for the deeming provisions of section 69 to be attracted, there has to be a finding that the assessee has made investments during the financial year in the stock and by way of advances, such investments are not recorded in the books of account so maintained by the assessee, and the assessee offers no explanation about the nature and source of the investments or the explanation so offered is not found satisfactory in the opinion of the AO. Similarly, for the deeming provisions of section 69A to be attracted, there has to be a finding that the assessee was found to be owner of cash so found at the time survey, such cash has not been recorded in the books of account so maintained by the assessee, and the assessee offers no explanation about the nature and source of the cash or the explanation so offered is not found satisfactory in the opinion of the AO.*

6.7 From the above, it is transpired that to tax any item of income/ expenditure, unaccounted investment at the specific rate r.w.s. 115BBE of the Act, it is necessary to classify the income under the head deeming provision under section 69, 68, 69B etc. In the present case, the income surrendered was to be classified u/s 69 of the Act. As per the direction of the Ld. PCIT, however, we find that the Ld. PCIT has nowhere pointed out any contravention that the income surrendered by the assessee falls within the provision of section 69 of the Act. As such, the assessee in the present case was able to justify the source of income surrendered during survey operation and therefore we are of the view that the same cannot be treated as deemed income u/s 69 of the Act. Once the income goes out of the preview of the deeming provision, the provision of section 115BBE of the Act, cannot be applied.

6.8 From the above, we note that the AO has taken one of the impossible view by treating the income offered during survey operation as income under the head business and profession. The Ld. PCIT cannot substitute the view taken by the AO as per his understanding of facts of the case. In view of the above, and after considering the facts in totality, we hold that the order passed u/s 263 of the Act is not sustainable. Accordingly, we quash the same. Hence, the ground of appeal of the assessee is hereby allowed.

7. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the Court on 19/01/2024 at Ahmedabad.

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 19/01/2024

Manish, Sr. PS