

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH "A", JAIPUR
BEFORE Dr. S. SEETHALAKSHMI, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1020/JPR/2024 (A.Y.2017-18)

Nikhaar Fashions,
C/o. M/s. Kalani & Co.,
5th Floor, Milestone Building,
Gandhi Nagar Turn, Tonk Road,
Jaipur, Rajasthan – 302 015.
PAN No.:AADFN 0587C

..... Appellant

Vs.

ACIT, Circle-2,
New Central Revenue Building,
Bhagwan Dass Road,
Jaipur, Rajasthan – 302 005. Respondent

Appellant by	:	Mr. P.C. Parwal, CA, Ld. AR
Respondent by	:	Mrs. Anita Rinesh, Ld. Sr. DR
Date of hearing	:	19/11/2024
Date of pronouncement	:	21/11/2024

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of Ld. CIT (A), Jaipur dated 25.06.2024 passed u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2017-18. The assessee has raised the following grounds of appeal:-

1. *The Ld. CIT(A) has erred on facts and in law in upholding the finding of AO that excess stock of Rs.1,00,10,915/- found in survey which has been offered by*

the assessee in its return of income as business income is undisclosed investment u/s. 69 of the Act taxable u/s. 115BBE of the Act. He has further erred in relying on various judgments which are not applicable on assessee and confirmed the addition without distinguishing the various cases relied by the assessee & by making various incorrect observations.

2. *The Ld. CIT(A) has erred on facts and in law in taxing the alleged undisclosed investment u/s.115BBE of the Act @ 60% by ignoring that the substituted section 115BBE introduced by Taxation Laws (Second Amendment Act), 2016 received the assent of President on 15.12.2016 and thus any investment prior to this date is taxable @ 30% and not @ 60%.*

3. *The appellant craves to alter, amend and modify any ground of appeal.*

4. *Necessary cost be awarded to the assessee.*

2. The brief facts of the case are that the assessee partnership firm is engaged in the retail trading of designer sarees, suits and lehanga chunni etc. A survey action was there on the business premises of the assessee u/s. 133Aof the Act on 09-08-2016, i.e. during the F.Y. 2016-17 relevant to A.Y. 2017-18. During the survey operations stock of the assessee was determined physically at a value of Rs. 3, 14,26,776/- against the value of book stock arrived at Rs. 2,14,15,861/- resulting into excess stock of Rs. 1,00,10,915/-.

3. The return of income was filed u/s. 139(1) of the Act on 29.10.2017 declaring total income at Rs. 1,20,08,080/- (Including excess stock surrendered during the survey amounting to Rs. 1,00,10,915/- under the head "Income from Business and Profession"). Case of the assessee was selected for scrutiny under CASS and notice u/s. 143(2) of the Act was issued on 11.09.2018. The case of the assessee was assessed at returned income filed by the assessee with a small addition of Rs. 58,094/- on account of delay in payment of PF and ESI u/s. 36(1)(va) of the Act. While assessment was completed, the AO treated

the amount of excess stock surrendered during the survey amounting to Rs. 1, 00, 10,915/- under the head income from other sources and applied section 69B of the Act r.w.s. 115BBE of the Act. The assessee being aggrieved with this order of the AO preferred an appeal before the Ld. CIT (A), Jaipur, who in turn confirmed the action of the AO. The assessee being further aggrieved preferred an appeal before us.

4. We have gone through the order of the AO, order of the Ld. CIT (A) and submissions of the assessee along with the grounds taken before us. It is observed that the facts mentioned (supra) are not under challenge by the either side and the only issue involved is applicability of section 69B of the Act r.w.s. 115BBE of the Act. It is observed that the surrendered amount of excess stock was duly routed through the Audited Financial Results of the assessee by debiting the cost of goods sold. We have considered the statement of Mr. Pradeep Kumar Jain also vide question no. 24 of his statement, wherein he categorically stated that **"I surrendered the amount for A.Y. 2017-18 from my undisclosed sources for regular taxation."**. As the moot question involved is whether the income declared during the survey can be taxed u/s. 69B of the Act r.w.s. 115BBE of the Act or not, scope of section 133A of the Act has to be analysed alongwith the guidelines of the CBDT applicable to the search cases.

5. The case was selected for scrutiny based on parameters prescribed at para 1 of the manual compulsory guidelines of CBDT issued vide Instruction no. 4/2018 dated 20.08. 2018. CBDT had clearly given instruction via Instruction No. 4/2018 that the case pertaining to sec. 133A of the Act can be selected for manual scrutiny if the following conditions are satisfied i.e.

- **Any books of accounts, documents etc. were impounded during survey.** In appellant case no books of accounts, documents were impounded by the income tax authority during survey. As per sec. 133(A)(3) (1a) of the Act if any books of accounts or documents is required to be impounded then there must be a recording of reason for doing so. Since, no books of accounts or documents were impounded there is no such recording of reasons is provided to the appellant. Before amendment in finance act 2002 of section 133A of the Income-tax Act, the powers of an income-tax authority conducting a survey are limited to the inspection of books of account and other documents available at the place of business or profession of the assessee, placing of marks of identification thereon, taking copies or extracts therefrom, making an inventory of any cash, stock or valuable article or thing checked or verified by him and recording the statement of any person which may be useful for, or relevant to any proceedings under the Act.
- With a view to prevent the destruction or misappropriation of any evidence found during survey, it is proposed to empower the income-tax authority to impound and retain in his custody books of account or other documents inspected by him during survey, **after recording his reasons for doing so.**
- As also held by Honourable Supreme court in the case of **Rumena Rahman vs. Union of India [2004] 265 ITR 0016** that there must be an order with recording reason for impounding any books of accounts and documents before impounding any books of accounts and document during survey. As no books of accounts and

documents are impounded therefore no such recording of reason for impounding was provided to the appellant during survey.

- **Returned income is less than the returned income of preceding assessment year.**

Returned income of appellant during A.Y. 2017-18 was Rs. 1,20,08,080/- and returned income of preceding A.Y. i.e. 2016-17 was Rs. 42, 05,997/- . Returned income of the A.Y. 2017-18 is not less than the income of immediately preceding A.Y. From the submissions before the bench made by the Ld. Sr. DR. it can be verified that the gross total income of A.Y. 2017-18 and 2016-17 was Rs. 1,20,08,080/- and Rs. 42, 05,997/- respectively.

- **The Assessee has retracted from disclosure made during the Survey:**
The assessee had not retracted from its disclosure made during the survey and the same can be verified from the assessment order itself wherein the relevant portion of the statement of the manager of the assessee is discussed and reproduced. From that statement the appellant had surrendered an income of Rs. 1, 00, 10,915/- under the head "Income from Business and Profession" over and above his regular income in the year under appeal in its return filed u/s. 139 of the Act for A.Y. 2017-18.
- Since the assessee is not fulfilling any of the conditions mentioned in the Instruction No. 4/2018 dated 20.08.2018 at para 1 for manual selection for scrutiny. So the scrutiny and the assessment order u/s. 143(3) is null and void ab initio. The same view is supported by the

decision of Allahabad tribunal in the case of "**Girdhar Gopal Rastogi Vs CIT (2022)142 Taxmann.com (142)**" wherein it was held that "*Where there is no impounding of books of accounts during survey Under section 133A of the Act and returned income of assessee for year under consideration is not less than returned income of immediately preceding year then case would not fall in category of compulsory scrutiny*".

6. As no ground has been taken by the assessee on the validity of assuming jurisdiction, we are not adjudicating the matter on the same, but as this legal issue is also involved and the authorities below are supposed to be careful and vigilant enough in terms of the CBDT Circular/Notification and Guidelines etc. as the same are binding in nature on them and has to be applied word by word. This issue is discussed as a guideline to the authorities below and representatives of the assessee for future reference.

7. There was no material/documentation on record which even remotely demonstrated that assessee had expended any sum of money on excess stock found over and above amount which had been recorded in its books of accounts. The only source of income of the appellant is its income from trading in designer sarees etc. The revenue was not able to advance any evidence during assessment proceeding that the said income is not connected with the business income of the assessee, hence all the income earned by the assessee relate to business income only.

8. further, 5 heads of income are in a sense exclusive of one another, and income which falls within one head cannot be assigned to, or taxed under, another head. We take strength by the judgement of Honourable Supreme Court in the case of **Karanpura Development Co. Pvt Ltd [1962] 44 ITR 362**

(SC). Relevant para of the case law for your reference is extracted herein below:

"The Income-tax Act puts the tax on income, profits and gains irrespective of the source from which they are derived. Section 3 of the Act provides, inter alia, that income-tax shall be charged on the total income of every company. Under section 4(1) of the Act, total income includes all income, profits or gains from whatever source derived, subject to certain conditions about residence, etc., with which we are not concerned. Section 6 then enumerates six heads of income chargeable to income-tax. Two of these heads are (a) income from property and (b) profits and gains of business, etc. The several heads into which income is divided under the Income-tax Act do not make different kinds of taxes. The tax is always one; but it may arise from different sources to which the different rules of computation have to be applied. The manner of this computation is indicated in the sections that follow. Before income, profits or gains can be brought to computation, they must be assigned to one or more heads."

9. Further, by following the principle of natural justice as well as **CBDT Circular No. 14 (XL-35) dated 11/04/1955-Department must not take advantage of ignorance of assessee to collect more tax than what is legitimately due.** To attract deeming provision of sections 69B of the Act the foremost requirements that is to be followed is that the income should be from any other source rather than from its regular source of earning. What is relevant before invoking the deeming provisions is not just the factum of survey action but besides that, what is the explanation so offered by the assessee explaining the nature and source of income so found during the course of survey proceedings and which has not been recorded in the books of account and the same is the essence of the statutory provisions as duly recognized by the Hon'ble Courts and various Benches of the Hon'ble Tribunal

and which has been reiterated from time to time. The statement of the assessee must be read as a whole and not in piecemeal especially where the revenue is relying on the same statement and in such circumstances, the defence available to the assessee in terms of part of the statement having not been considered by the revenue cannot be ignored. The mere fact that survey/search proceedings have been initiated at the business premises of the assessee doesn't mandate the Assessing officer to automatically invoke the deeming provisions and before invoking the deeming provisions, he must call for the explanation of the assessee and only where the explanation so offered is not found satisfactory, he can proceed and invoke the deeming provisions.

10. There are several judicial pronouncements wherein it was held that “Where miscellaneous business income of certain amount surrendered by assessee was taken as income from undisclosed source under section 69B of the Act and tax was calculated on it under section 115BB of the Act, since revenue was not able to submit any evidence to effect that said income was not connected with business income of assessee or was accumulated from non-recognising source, entire addition was certainly without forming proper basis and thus impugned application of section 69B of the Act upon income disclosed by assessee and taxing same at special rate as per section 115BB of the Act was improper”.

- [2023] 155 taxmann.com 293 (Amritsar - Trib.)/ [2023] 106 ITR (T) 125 (Amritsar -Trib.) [17-07-2023]
- [2023] 157 taxmann.com 817 (Chandigarh - Trib.) [29-11-2023]

11. It was held by the Coordinate tribunal that:

"Where during course of survey assessee surrendered certain amount on account of addition made to factory building, since source of investment in said building was stated to be out of business income which was duly honoured by assessee while filing return of income wherein amount was offered to tax under head "business income" and tax was paid on same at normal rate, provisions of section 69B read with section 115BBE of the Act could not be invoked so as to make addition on account of said surrendered amount treating it as unexplained investment.

- [2024] 158 taxmann.com 679 (Amritsar - Trib.) [06-12-2023]: it was held that

Where assessee claimed that entire amount of excess cash found from business premises was generated from undisclosed sale of medicine, since revenue was unable to show any other sources related to excess cash, excess cash was from business of assessee and, thus, application of section 115BBE of the Act on amount of excess cash was bad in law.

- [2024] 160 taxmann.com 239 (Surat-Trib.) [21-12-2023]

Where Competent Authority carried out survey under section 133A of the Act at hospital of assessee and found certain unaccounted receipts in name of doctors and assessee thereafter filed revised return and disclosed unaccounted receipts as part of profit or gain of business of hospital, as unaccounted receipts were relating to business operations of assessee's hospital, they were taxable as business income under section 28 of the Act; section 68 of the Act was not applicable

- [2024] 158 taxmann.com 655 (Chandigarh - Trib.) [23-01-2024]:

Where during course of survey, assessee surrendered excess stock, cash and receivables and offered same to tax as business income, however, AO treated said surrendered amount as unexplained investment under sections 69A and 69B of the Act, since it emerged that source of income of assessee was from its business operations, income surrendered by assessee during survey could not be brought to tax under deeming provisions of sections 69A and 69B of the Act.

- [2023] 152 taxmann.com 595 (Chennai - Trib.)/ [2023] 107 ITR

INCOME TAX : Where assessee had admitted certain sum towards excess stock found during course of survey, since excess stock found during course of survey did not have any independent identity as asset was a mixed part of overall stock found in business premises of assessee, which represented business income and moreover, assessee had explained source for excess stock i.e., out of income earned from current year business, Assessing Officer was not justified in treating additional income admitted towards excess stock as unexplained investment under section 69B of the Act and levying tax as per section 115BBE of the Act.

- [2024] 161 taxmann.com 44 (Madhya Pradesh) [19-03-2024]

Where undisclosed income surrendered during search and seizure proceedings is derived from regular business activities, it is liable to be taxed at normal rate instead of tax rate stipulated under section 115BBE of the Act.

- [2023] 157 taxmann.com 5148 (Rajkot - Trib.) [30-11-2023]

Where assessee, a medical practitioner, voluntarily surrendered certain amount during survey as his unaccounted professional receipts and taxed said receipts at normal rate, since assessee had no other source of income, other than business income and AO had conducted inquiry and perused details submitted, and taken a decision to accept explanation provided by assessee after proper application of mind, provision of section 115BBE of the Act could not be invoked to tax income as deemed income.

- [2023] 154 taxmann.com 347 (Chandigarh - Trib.) [24-07-2023]

Mere fact that survey/search proceedings have been initiated at business premises of assessee doesn't mandate Assessing officer to automatically invoke deeming provisions of sections 69 and 69A of the Act; said provisions can be invoked only where explanation offered by assessee is not found satisfactory; where from

explanation offered by assessee it clearly emerged that source of income offered during survey was from his business operations, such income could not be taxed under sections 69 and 69A of the Act.

12. The powers of survey under section 133A of the Act have been clarified by the CBDT from time to time. By its Circular No. 7-D (LXIII- 7 of 1967), dated May 3, 1967, it is clarified that the place of survey must be one where business or profession of an assessee is carried on, although it is not necessary that it should be the principal place of business or profession. The place where entry can be made under the section must not be a place where the assessee does not carry on business. Business or residential premises of third parties, including a chartered accountant, a pleader or income-tax practitioner, of whom the assessee may be a client, are not places which could be entered into for the purpose of section 133A of the Act. It would be improper for an ITO (now Assessing Officer) or an Inspector, authorised in this behalf, to enter the office of a chartered accountant for the purpose of inspecting the books of his client. It is also necessary that the place entered should be the business premises and not residential premises of the assessee and the entry should be made during business or office hours.

13. By an *Explanation* to section 133A (1) of the Act, it is clarified that a place where business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or

profession are or is kept. Based on above, the primary objects of the survey may be categorized as under:

Broaden the country's tax base by discovering new taxpayers.

Gather information for checking whether the existing taxpayers are discharging their tax obligations correctly and truthfully and to get information for detecting evasion of tax by the existing taxpayers.

To do spot checking to find out whether the books of account and records are being maintained on day-to-day basis and not manipulated later.

To check the correctness of the cash and stocks shown in the books of account maintained in the ordinary course of business /trading.

14. In, nutshell, the proceedings u/s. 133A of the Act introduced in the statute to have a check and balance on the business/ professional behaviour of the assessee. The survey conducted u/s. 133A of the Act is there in the statute just to verify the business affairs of the assessee. If found correct, no consequences. If something is missing out of business affairs, alarm the assessee to incorporate the same in his books of accounts and rectify their statutory computation of total income. Nowhere in the scheme it is ever anticipated or desired to change the head of income. Rather, undisclosed income if any discovered during the survey proceedings, there is a compulsion to treat the same as income under the head business and profession. As the department surveyed business premises only and interacted and verified with business employees and documents only.

15. We have thoroughly examined the judicial pronouncements relied upon by the Ld. CIT (A) and found the same as not tenable and applicable on the facts of the matter under consideration, as the same pertains to the matter

where additions were made in the regular assessment and not in the case where a survey has been conducted. It is absolutely misinterpretation of the law and forceful imposition of judicial pronouncements. The Ld. CIT (A) totally ignored the judicial pronouncements relied upon by the assessee and that is too when they are relevant and applicable to the facts of the case.

16. Moreover, as far as the authenticity of the statement recorded during the survey proceedings are concerned, Section 133A does not empower the authorities to record the statements. This is a settled position of law that the statement obtained under section 133A would not automatically bind upon the assessee. However, an admission is extremely an important piece of evidence but it cannot be said that it is conclusive; and it is open to the person who made the admission to show that it is incorrect. The burden lies on the assessee to establish that the admission made in the statement at the time of survey was wrong and that there was no additional income. Judgement in ***CIT v. S. Khader Khan Son [2008] 300 ITR 157 (Mad.)*** is very important as Supreme Court also affirmed this judgement *S. Khader Khan Son's case (supra)* where it has been held that the statement, obtained under section 133A would not automatically bind upon the assessee.

17. In view of the above discussion on facts and law and further relying on the judicial pronouncements, the order of the authorities below is set aside and the AO is directed to calculate the tax without applying section 69B r.w.s. 115BBE of the Act, as the income of the assessee is chargeable to tax as normal business income u/s. 28 of the Act. In the light of above, Ground No. 1 raised by the assessee is allowed.

17. As the substantive ground, i.e. ground no. 1 has already been allowed in favour of the assessee, we do not find any requirement to deliberate upon

ground no. 2 and the same is left undecided. Ground Nos. 3 & 4 are general in nature, hence no adjudication is required.

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

Order pronounced in the open court on 21st day of November 2024.

Sd/-

Sd/-

(Dr. S. SEETHALAKSHMI)

JUDICIAL MEMBER

Jaipur, दिनांक/Dated: 21/11/2024

(GAGAN GOYAL)

ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., Sr.DR., ITAT,
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt.Registrar)
ITAT, Jaipur

