SMT. REKHA SHEKHAWAT vs. PRINCIPAL COMMISSIONER OF INCOME TAX

ITAT, JAIPUR 'B' BENCH

Judge(s) Sandeep Gosain, J.M. & Rathod Kamlesh Jayantbhai, A.M.

ITA No. 7/Jp/2021; Asst. yr. 2017-18

Date of decision 16th August, 2022

Source : (2022) 219 TTJ (Jp) 761 : (2022) 218 DTR_Trib (Jp)(Trib) 161 : (2022) 99 ITR_Trib (Trib) 69 (JP)

Statutes referred to :

Income-tax Act, 1961, ss. 115BBE & 263

Case decided in favour of :

In favour of : Assessee

Decision pertains to :

Assessment year 2017-18

Revision—Erroneous and prejudicial order—Lack of proper enquiry vis-a-vis assessment of additional income as business income—During the course of survey under s. 133A assessee's husband admitted unrecorded income in the case of his wife i.e., assessee which was stated to be advances made for property in the course of her real estate business—Unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and thereafter used in day-to-day business activities—Questions which were raised and the answers given during the survey show that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only—Even the Principal CIT has admitted in the impugned order that this income pertains to recovery of cash amounts of advances made by the assessee to the other persons for purchase of land/plots—Undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown source of income and the source of additional income so admitted is clearly identifiable and is the regular business of real estate—Since the additional income is related to the real estate business it is certainly assessable as business income and cannot be considered as income falling under s. 68/69A—AO having applied his mind in accepting the said additional income as business income, there was no error in the assessment order—Thus, the Principal CIT was not justified in expecting the AO to apply s. 115BBE as also s. 271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind Expln. 2(a) to s. 263—Further, merely because the assessee

has taken a mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources in her return, the same cannot be taken as an admission as there is no estoppel against statute—Therefore, Principal CIT was not justified in invoking the provisions of s. 263 by wrongly holding that the assessment order under s. 143(3) was passed without considering that the additional income fell under the purview of ss. 68 and 69 and that tax was chargeable under s. 115BBE as against normal rates—Hence, the proceedings initiated under s. 263 and the impugned order are quashed

Held :

The allegation of the Principal CIT is that there has been incorrect assumption of facts and law by the AO. However, on deep and careful consideration of the material on record including the finding recorded in the assessment order and the findings recorded in the order under challenge, no incorrectness and incompleteness is found in the appreciation of facts made by the AO. SS admitted unrecorded income in the case of his wife i.e., assessee of Rs. 28,95,300 for financial year 2016-17 which consisted of the property advances of Rs. 19,15,000 and cash of Rs. 9,80,300 and there was no other known or unknown source of business. Subsequent cash recoveries were made from such trade advances and the cash of Rs. 9,80,300 so admitted were incorporated in the regularly maintained books of accounts. It is noticed that the assessee has credited on 4th July, 2016 the cash declared in survey of Rs. 9,80,300 to her capital account which constituted a part of the closing balance of cash-in-hand on that day and was thereafter carried forward to 5th July, 2016 as opening balance. Similarly, property advance was also credited to the capital account and debited to advance for property declared. Later on, cash recovery was made on 3rd Nov., 2016 which was debited in the cash book and credited to the said advance account. Available cash thereafter was used by the assessee in day-to-day transactions related to real estate business including the bank deposits made from 9th Nov., 2016 and onward. On the other hand, the capital account of assessee has been credited with the same amount of additional income of Rs. 28,95,300. Thus, the net effect of such accounting entries passed, the treatment is that the unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and thereafter used in day-to-day business activities. Questions which were raised and the answers given during the survey show that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only. In asst. yr. 2016-17 also, the assessee lady admitted the additional income of Rs. 1.71 crore and the assessment of that year was completed under the scrutiny in the order passed under s. 143(3). SS also admitted additional income in asst. yrs. 2016-17 and 2017-18, where also assessment were completed under scrutiny under s. 143(3). Such contentions were not controverted by the Departmental Representative. Moreover, it is clear from a bare reading of the order under challenge that the Principal CIT has not disputed rather admitted these facts that this income pertains to recovery of cash amounts of advances made by the assessee to the other persons for purchase of land/plots.

Hence, the undisputed facts indicate that the additional income so admitted was in the normal course of real estate business. Thus, undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown source of income and the source of additional income so admitted is clearly identifiable and is the regular business of real estate. These facts are evidently clear to bring home the point that such additional income clearly falls under s. 14 r/w s. 28. The residuary provision under s. 56 which is titled as income from other sources, comes into the picture only and only when any item of income does not clearly fall under any specific head of income as per items A to E of s. 14. Where such income finds place under a particular head being business or profession, then there is no scope of invoking s. 56 in the context of s. 14. On the other hand, a clear reading of s. 115BBE provides that it is only such income which is of the nature of s. 68/69A and so on with reference to which only s. 115BBE could be invoked. When the additional income is related to the real estate business it is certainly assessable as business income and cannot be considered as income falling under s. 68/69A as held by the CIT. The CIT also failed to appreciate that the survey was carried out in the mid of the previous year where accounts were yet to be closed on 31st July, 2017. Unless the previous year comes to an end and the accounts are finalized and produced before the AO, the assessee placing reliance thereupon for the purpose of computation of income, it cannot be said conclusively that some item of receipt is in the nature of unexplained cash credit under s. 68 or unexplained money under s. 69A. Since, the AO acted in accordance with the law prevailing on the date of the passing assessment order, no fault can be found in his action and in particular, proceeding under s. 263 cannot be invoked in such a case. The AO having already applied its mind (directly or indirectly) and the Principal CIT without appreciating the existing binding judicial pronouncements and also ignoring the directly relevant facts, was not justified in expecting the AO to apply s. 115BBE as also s. 271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind Expln. 2(a) to s. 263. Hence, there was no error in the assessment order.

(Para 2.5)

The assessee, while showing the additional income so admitted in her return of income in the computation of its total income, has shown it under the head income from other sources. Although the Principal CIT has not very clearly made this fact as a basis of finding error in the assessment order yet however, the law on this aspect is very well settled that there cannot be any estoppel against statute. It cannot be denied that showing income in a particular head of income enumerated under s. 14 r/w various other heads is a highly technical task and even the tax consultants and chartered accountants may not correctly decide the proper classification under which head such income to be declared and/or assessed. Therefore, merely because the assessee has taken a mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources, of the surrounding circumstances, such an admission cannot take away the right of a party to which he is otherwise entitled to, or in other words, to be assessed as business income. Law is

also well settled that no tax can be collected without the authority of law as guaranteed by Art. 265 of the Constitution of India. Therefore, even if the assessee has made some commitment but later on found wrong in law, it cannot work as an estoppel and the assessee, if still feels aggrieved in any manner, can pursue legal remedy. Hence, showing income under a wrong head in the return of income cannot be taken as an admission. Thus, the additional income was in the nature of business income and did not fall under s. 68 and/or s. 69 and consequently, s. 115BBE could not have been invoked. In view of the above discussion, the Principal CIT was not at all justified in invoking the provisions of s. 263.—CIT vs. Bajargan Traders (IT Appeal No. 258 of 2017, dt. 12th Sept., 2017), Ram Narayan Birla (ITA No. 482/Jp/2015, dt. 30th Sept., 2016), Chokshi Hiralal Maganlal vs. Dy. CIT (2011) 141 TTJ (Ahd)(UO) 1, Lovish Singhal vs. ITO (ITA Nos. 142 to 146/Jodh/2018, dt. 25th May, 2018) and Narayan Tatu Rane vs. ITO (2013) 7 NYPTTJ 1493 (Mumbai) followed; CIT vs. M. Pyngrope (1993) 109 CTR (Gau) 322 : (1993) 200 ITR 106 (Gau), CWT vs. Apar Ltd. (2002) 175 CTR (Bom) 312 and Mayank Poddar (HUF) vs. WTO (2003) 181 CTR (Cal) 362 relied on.

(Para 2.5)

Conclusion :

In view of the fact that the unrecorded trade advances and cash in hand admitted during the course of survey under s. 133A emanated from and related to the real estate business carried on by the assessee and the same were later incorporated in the regular books of accounts, the additional income was in the nature of business income and did not fall under s. 68 and/or s. 69 and therefore, Principal CIT was not justified in invoking the provisions of s. 263 by holding that the assessment order was passed without considering that such additional income fell under the purview of ss. 68 and 69 and that tax was chargeable under s. 115BBE as against normal rates.

Cases referred to

CIT vs. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 27 Taxman 447 (Raj)

CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266 : (2007) 295 ITR 282 (SC)

Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC)

Counsel appeared :

Mahendra Gargieya, for the Assessee : Sanajy Dhariwal, for the Revenue

ORDER

sandeep gosain, j.m. :

The assessee has filed an appeal against the order of the learned Principal CIT, Udaipur, dt. 22nd Feb., 2021 for the asst. yr. 2017-18 raising therein following grounds of appeal :

"1. The learned Principal CIT seriously erred in law as well as on the facts of the case in invoking the provisions of s. 263 of the Act and therefore, the impugned order dt. 22nd Feb., 2021 under s. 263 of the Act kindly be quashed.

2.1 The learned Principal CIT seriously erred in law as well as on the facts of the case in assuming jurisdiction under s. 263 of the Act by wrongly and incorrectly holding that the subjected assessment order under s. 143(3) dt. 25th Feb., 2019, was passed without considering that the income declared under the head of other sources of Rs. 28,95,300, being recovery of cash amount of advances paid for purchase, comes under preview of ss. 68 and 69 of the Act and thus, the tax under s. 115BBE was to be paid, as against the tax at normal rates. The assumption of jurisdiction under s. 263 being contrary to the provisions of law and facts on record. Hence, the proceedings initiated under s. 263 of the Act and the impugned order dt. 25th Feb., 2019 deserves to be quashed.

2.2 Alternatively and without prejudice to the above :

The learned Principal CIT erred in law as well on the facts of the case in holding that the income declared Rs. 28,95,300 during survey, being recovery of cash amount of advance paid for purchase, comes under preview of ss. 68 and 69 of the Act and under s. 115BBE, is completely contrary to the provisions of the law and the facts available on the record. Hence, the impugned finding that the assessment order passed under s. 143(3) at 25th Feb., 2019 was erroneous set-aside.

3. The learned Principal CIT seriously erred in law as well as on the facts of the case in assuming jurisdiction under s. 263 of the Act by wrongly and incorrectly holding that the subjected assessment order under s. 143(3) dt. 25th Feb., 2019, was passed without initiating penalty proceedings under s. 271AAC of the Act. The assumption of jurisdiction under s. 263 of the Act with reference to initiation of penalty proceedings under s. 271AAC of the Act being contrary to the provisions of law and facts on record. Hence, the proceedings initiated under s. 263 of the Act and the impugned order dt. 25th Feb., 2019 deserves to be quashed.

4. The learned Principal CIT erred in law as well as on the facts of the case in wrongly setting aside the assessment order dt. 25th Feb., 2019 despite there being complete application of mind by the AO on the subjected issues and it was nothing but a case of change of opinion, based on which, assumption of jurisdiction under s. 263 is not permissible. The impugned order dt. 22nd Feb., 2021 therefore, lacks valid jurisdiction under s. 263 of the Act and hence, the same kindly be quashed."

2.1 Apropos ground Nos. 1, 2 and 4, brief facts of the case are that the assessee filed her return of income on 7th Nov., 2017 declaring total income of Rs. 41,09,530 which was processed under s. 143(1) by the CPC, Bangalore. The case of the assessee was selected for limited scrutiny through CASS. Notice under s. 143(2) of the Act was issued on 10th Aug., 2018 which was transmitted to the assessee through E-Mail address as per returned income filed. Subsequent thereto, notice under s. 142(1) of the Act along with specific questionnaire, calling for necessary details was issued on 1st Feb., 2019 to the assessee's E-Mail address. In response to the notice under s. 143(2) and subsequent thereto notice under s. 142(1) dt. 1st Feb., 2019 along with specific questionnaire by electronic mail, was issued to the assessee by which necessary details were called for. In response to the notices and questionnaire raised by the AO, the learned Authorised Representative of the assessee furnished the requisite details before the AO which were verified by him and placed on record. The AO observed from the record that the assessee derives income from interest as well as the business of construction in the name and style of the proprietary concern M/s Jaideep construction. From the record, the AO observed that the assessee during the year under consideration has shown the net profit of Rs. 12,34,275 over the turnover of Rs. 1,52,75,000 i.e., 08.08 per cent of the turnover. The AO after considering the return of income filed, details furnished by the assessee during the course of hearing and material placed on record, determined the total income at Rs. 41,09,530.

2.2 Further, it is noted that the learned Principal CIT sent the notice for hearing to the assessee on 14th Dec., 2020 in respect of revision proceedings under s. 263 of the Act and the notice for hearing of the case was fixed on 29th Dec., 2020. The learned Principal CIT noted that the assessment under s. 143(3) of the Act for the asst. yr. 2017-18 was completed by the AO on 25th Feb., 2019, determining the income of the assessee at Rs. 41,09,530 and the learned Principal CIT called for the assessment records which were examined by him and thereafter noticed following points.

"On examination of assessment record, it is noticed that in the financial year 2016-17 relevant to asst. yr. 2017-18, the assessee had declared income of Rs. 28,95,300 under the head income from other source (income declared at the time of survey) and included the same in the return of income for the asst. yr. 2017-18. This income pertains to recovery of cash amount of advances made by the assessee to the other persons for purchase of land/plots and thus comes under the purview of s. 68 of the IT Act (unexplained cash credit) and s. 69A of the IT Act (unexplained money) and tax @ 60 per cent was to be charged as per the provision of s. 115BBE of the IT Act. However, in the ITR the assessee has failed to declare the income of Rs. 28,95,300 under s. 115BBE of the IT Act. Thus, the income-tax of Rs. 24,31,566 was to be charged on assessed income under the provisions of s.

115BBE whereas Rs. 10,89,595 has only been charged by the AO. There is undercharge of income-tax of Rs. 13,41,971 (Rs. 24,31,566-Rs. 10,89,595) having total tax effect of Rs. 16,50,608 including interest of Rs 3,08,637 under s. 234B of the IT Act. It is further seen that the penalty proceedings under s. 271AAC of the IT Act were also required to be initiated and imposed by the AO as per s. 115BBE of the IT Act which he has failed to do."

The learned Principal CIT, taking into consideration the points observed hereinabove noted that it is clear that the AO did not verify/examine these issues and has completed the assessment without going into these issues. Due to incorrect and incomplete appreciation of facts and law, the AO passed the assessment order without making any enquiries or verification, the assessment order under s. 143(3) of the IT Act for asst. yr. 2017-18 dt. 25th Feb., 2019 has been rendered erroneous insofar as it is prejudicial to the interest of Revenue. Therefore, this assessment order under s. 143(3) of the IT Act for asst. yr. 2017-18 was proposed to be suitably modified/enhanced/cancelled by invoking the provisions of s. 263 of the IT Act. However, before doing so, a notice under s. 263 of the IT Act was issued on 14th Dec., 2020 through ITBA vide DIN, to the assessee for giving opportunity of being heard as well as requiring the assessee to furnish its submissions in this regard on 29th Dec., 2020. However, no details have been furnished by the assessee on 29th Dec., 2020 rather the assessee has sought adjournment vide letter dt. 25th Dec., 2020. On request of the assessee another opportunity was provided to the assessee vide notice dt. 1st Jan., 2021 fixing hearing for 12th Jan., 2021. However, once again on 12th Jan., 2021 no details have been furnished by the assessee and finally, written submissions have been received on e-filing portal on 30th Jan., 2021 which is placed on record. The learned Principal CIT observed that the assessee vide above referred written submission has challenged the notice under s. 263 of the IT Act by citing various judicial pronouncements and stating that for action under s. 263 of the IT Act the order sought to be revised should be erroneous and prejudicial to the interest of Revenue. The learned Principal CIT considered the submissions of the assessee but the same were not acceptable to him. He further noted that the assessee had cited certain judicial pronouncements challenging the proceedings under s. 263 of the IT Act, but the facts of the case were not identical with the citations made by the assessee. Therefore, the same are not acceptable to him The learned Principal CIT after examining the assessment record noticed that in the financial year 2016-17 relevant to asst. yr. 2017-18, the assessee had declared income of Rs. 28,95,300 under the head income from other source (income declared at the time of survey) and included the same in the return of income for the asst. yr. 2017-18 which pertains to recovery of cash amount of advances made by the assessee to the other persons for purchase of land/plots and thus comes under the purview of s. 68 of the IT

Act (unexplained cash credit) and s. 69A of the IT Act (unexplained money) and tax @ 60 per cent was to be charged as per the provision of s. 115BBE of the IT Act. The learned Principal CIT thus noted from the ITR that the assessee has failed to declare the income of Rs. 28,95,300 under s. 115BBE of the IT Act. Thus, the income-tax of Rs. 24,31,566 was to be charged on assessed income under the provisions of s. 115BBE whereas Rs. 10,89,595 has only been charged by the AO. There is undercharge of income-tax of Rs. 13,41,971 (Rs. 24,31,566 - Rs. 10,89,595) having total tax effect of Rs. 16,50,608 including interest of Rs. 3,08,637 under s. 234B of the IT Act. Thus, the learned CIT(A) from the above scenario felt that that the tax on the income of Rs. 28,95,300 was to be charged @ 60 per cent under s. 115BBE, however, the assessee has failed to offer her income for correct rate of tax and the AO has failed to charge proper rate of tax on the above income of Rs. 28,95,000 in the order under s. 143(3) of the IT Act dt. 25th Feb., 2019 for the asst. yr. 2017-18, which has resulted in undercharge of income-tax of Rs. 13,41,971 (Rs. 24,31,566 - Rs. 10,89,595) having total tax effect of Rs. 16,50,608 including interest of Rs. 3,08,637 under s. 234B of the IT Act. Thus, according to the learned Principal CIT, the above AO's order is erroneous insofar as it is prejudicial to the interest of Revenue. The learned Principal CIT noted that the assessee vide para 3 of submission filed on 30th Jan., 2021 has herself stated that surrendered income wrongly considered under ss. 68 and/or 69A as income from other sources, stating that it is a matter of common knowledge that in the real estate transactions, the involvement of black money is always there and the transacting parties used to settle the deal with the help of cash movement. The unrecorded advance towards the purchase of property and the available cash not recorded in the accounts was nothing but a result of generation of the unrecorded profit from the real estate business over the years and was a part of the overall assets, investments, etc. of the proprietary of the assessee. Hence, the learned Principal CIT noted from the above episode that it is clear that the declared (surrendered) income of Rs. 28,95,300 during the survey was unrecorded and unexplained income of the assessee and in the ITR the assessee has failed to declare the income of Rs. 28,95,300 under s. 115BBE of the IT Act which was to be charged under under ss. 68 and/or 69A of the IT Act @ 60 per cent under s. 115BBE of the IT Act. Further, this income was also subject to penalty under s. 271AAC of the IT Act. The learned Principal CIT further referred to the Expln. 2 below s. 263(1) inserted w.e.f. 1st June, 2015 by Finance Act, 2015, which provides that :

"*Explanation 2*—For the purpose of this section, it is hereby declared that an order passed by the AO shall be deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue, if, in the opinion of the Principal CIT of CIT—

(a) the order is passed without making inquiries or verification which should have been made,

(b) the order is passed allowing any relief without inquiring into the claim,

(c) the order has not been made in accordance with any order, direction or instruction issued by the board under s. 119, or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

Thus, taking into consideration the above facts and circumstances of the case, the learned Principal CIT observed that the order of the AO is erroneous and prejudicial to the interest of the Revenue and he, therefore, set aside the order of the AO back to his file with following directions. The relevant para 7 of learned Principal CIT's directions as to the issue of invoking the provision of s. 263 of the Act is reproduced as under :

7. From the above, it is clear that the assessment order under s. 143(3) of the IT Act for the asst. yr. 2017-18 dt. 25th Feb., 2019 was passed by the AO in this case, without verification and examination of the issue and incorrect and incomplete appreciation of facts and law as discussed in preceding paras. Hence, assessment order under s. 143(3) of the IT Act for the asst. yr. 2017-18 dt. 25th Feb., 2019 has thus been rendered erroneous and prejudicial to interest of Revenue on this issue. The same is therefore set-aside/cancelled and restored back to the file of AO on the issue of charging of tax on the income of Rs. 28,95,300 declared during survey which was to be charged under ss. 68 and/or 69A of the IT Act @ 60 per cent under s. 115BBE of the IT Act and also subject to penalty under s. 271AAC of the IT Act, with the direction to pass fresh assessment order after conducting proper verification and examination on the above issue and thereafter appropriate action may be taken as per law. However, an opportunity of being heard should be given to the assessee before passing the order."

2.3 During the course of hearing, the learned Authorised Representative of the assessee prayed that invoking of provisions of s. 263 of the Act by the learned Principal CIT is not justified as the AO has completely examined the details as required by him in the annexure sent to the assessee. The learned Authorised Representative further submitted that requisite details as to the case of the assessee were produced/furnished before the AO who verified them and taken the printout of the desired details as demanded during the assessment proceedings. The learned Authorised Representative further submitted that the AO has explicitly mentioned that the assessee derives income from the business of construction in the name and style of the proprietary concern M/s Jaideep Construction and interest in addition to

the above. This fact is also taken into consideration by the AO in his assessment order that during the year under consideration, the assessee has shown net profit of Rs. 12,34,275 i.e., @ 8.08 per cent of the total turnover of Rs. 1,52,75,000 and thus determined the income of the assessee at Rs. 41,09,530. To support the order of the AO, the learned Authorised Representative of the assessee has filed the following detailed written submission :

"1. *Legal position on s. 263*- Judicial guideline : Before proceeding, we may submit as regards the judicial guideline, in the light of which, the facts of this case are to be appreciated.

1.1 The prerequisites to the exercise of jurisdiction by the CIT under s. 263 is that the order of the AO is established to be erroneous in so far as it is prejudicial to the interest of the Revenue. The CIT has to be satisfied of twin conditions, namely (1) The order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e., if the assessment order is not erroneous but it is prejudicial to the Revenue, s. 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase prejudicial to the interest of the Revenue' has to be read in conjunction with an erroneous order passed by the AO. Every loss of Revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. Kindly refer *Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC).*

1.2 Also kindly refer *CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266 : (2007) 295 ITR 282 (SC)* wherein it is held that :

The phrase "prejudicial to the interests of the Revenue" in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression erroneous order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."

1.3 In *CIT vs. Ganpat Ram Bishnoi (2005) 198 CTR (Raj) 546* held that from the record of the proceedings, in the present case, no presumption can be drawn that the AO had not applied its mind to the various aspects of the matter. In such circumstances, without even *prima facie* laying foundation for holding that assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the AO was required to make an enquiry, cannot be held to satisfy the test of existing necessary condition for invoking jurisdiction under s. 263. Jurisdiction under s. 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something.

1.4 In *CIT vs. Rajasthan Financial Corporation (1996) 134 CTR (Raj) 145* held that : "Once AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allowed the claim being satisfied with the explanation of assessee, the decision of the AO cannot be held to be erroneous simply because in his order not make an elaborate discussion in that regard."

1.5 *Abdul Hamid vs. ITO (2020) 207 TTJ (Gau) 1109 : (2020) 195 DTR (Gau) (Trib) 321 : (2020) 117 taxmann.com 986 (Gau)(Trib)* it was held that only probability and likelihood to find error in assessment order is not permitted under s. 263.

Ratio of these cases fully apply on the facts of the present case in principle.

2. Due application of mind :

2.1 In the present case jurisdiction under s. 263 of the Act is on the ground that the while completing assessment proceedings the AO did not verify/examine the income pertains to recovery of cash amount of advances made by the assessee to the sellers. for purchase of land/plots which comes under purview of s. 68 or under s. 69A hence, the AO failed (1) to tax the additional income under the provisions of s. 115BBE and (2) to initiate penalty proceeding under s. 271AAC consequent thereto.

At the outset it is wrong to say that the AO completed the assessment without verification and examination of the issue and incorrect and incomplete appreciation of facts and law inasmuch as the AO after making a detailed enquiry and examination of books of account, other records viz., impounded diary etc., statement recorded during survey and the relevant judicial guideline and precedents available before him, took a possible view (i.e., in the facts of the case not to impose tax under s. 115BBE) and completed the subjected assessment under scrutiny.

2.2 The relevant para of the assessment order showing that the AO has examined each any every documents submitted by assessee during scrutiny proceedings, is reproduced below :

'The case was selected for limited scrutiny through CASS, Notice under s. 142(1) of the Act along with the specific questionnaire, by which necessary details were called for was issued ....

In response .....Shri R.S. Mittal, CA, furnished the requisite details time to time..... The details furnished by the assessee/the Authorised Representative of the assessee were verified, printout of the same were taken and were placed on record.'

2.3 Further, a perusal of questionnaire it is revealed that the AO raised specific query w.r.t. cash deposit in Bank as under (PB 1-7) :

'1. Abnormal increase in cash deposits in bank account(s) during the demonization period/large cash deposits in bank account(s) during the year :

Accordingly, the assessee filed detailed submission dt. 15th Feb., 2019 (PB 8 to 12) before the AO and a categorical submission was made in Pr-3(iii) as under :

'Sources of cash deposit : The income-tax survey was conducted on the premises of the assessee on dt. 4th July, 2016 at the time of survey assessee surrendered the income of Rs. 1,75,04,250 as advances made to persons during the financial year 2014-15 and upto 30th June, 2016. The assessee recovered the advanced amount and after recovery of advances assessee deposited the cash amount in bank account.'

Further, assessee vide Pr-3(iv) submitted copy of extracts of cash book before the AO stating as under :

'The copy of extracts of cash book for the relevant period is attached."

Further, the assessee vide Pr-15 submitted as under :

'Income disclosed during the survey :

That at the time of survey assessee surrendered the income of Rs. 28,95,300 as advances for purchase of land/plots and same amount is added in total income for filing the IT return and paid the due tax as per return filed.'

Thus, the AO was fully aware of and conscious of the aspect of imposition of tax under s. 115BBE.

2.4 *Selection of the case under CASS* : Moreover, the very fact of selection of the case under CASS on the ground of heavy cash deposits based on the AIR information followed by the issuance of the notices under s. 142(1) along with questionnaire to the assessee. The AO raised very specific and relevant queries/called for explanation and evidences asking various details w.r.t. the

source of cash deposits, loans and advances, to produce cash book, bank book, etc., goes to fully establish that the AO was fully alive to the issue in hand from all angles, whether it is factual or legal aspect involved viz., not only the source but also the taxability of the additional income stated during survey was regular business income or undisclosed income so as to be taxed at normal rate or higher rates under s. 115BBE.

In the response of the notices, the assessee filed complete documents w.r.t. queries raised along with production of cash book, bank and account books, etc. which was required by the AO time to time through the Authorised Representative, and the same were duly verified and examined by the AO.

3. Additional income- business income only :

3.1 It is submitted that the only source of income in the case, is the real estate business through proprietary M/s Jaipdeep Construction. There is no other known or unknown source of business hence there is no possibility of their being any undisclosed cash or any assets being found not relating to the said business Moreover, the subjected undisclosed income of Rs. 28,95,300 consisted of the property advances of Rs. 19,15,000 and cash resulting from the same business of Rs. 9,80,300 it is submitted that advances were given during the course of the property business and hence it directly related to the said business only. Moreover, cash of Rs. 9,80,300, was a necessary consequence/generation of undisclosed profit form the real estate business. It is a matter of common knowledge that in the real estate transactions, the involvement of black money is always there and the transacting parties used to settle the deal with the help of cash movement. The unrecorded advance towards the purchase of property and the available cash not recorded in the accounts was nothing but a result of generation of the unrecorded profit from the real estate business.

In fact, a bare reading of the related questions and answers clearly shows that the husband of the assessee has even admitted such income as a result of the real estate business activities. There is no mention or whisper in these statements that such surrendered income was something beyond or in addition to the real estate business or that there was some other source of income giving rise to such undisclosed income. In these circumstances, the only inescapable conclusion is that the surrendered income was nothing but a business income from the real estate business of the said proprietary.

3.2 Notably, statement of husband of the assessee Shri Shankar Singh Shekhawat recorded on dt. 4th July, 2016 under s. 133A during the survey are worth noting. The relevant extracts of the same are as under :

15 उपर्युक्त प्रश्न संख्या 12 एवं 13 जिसमें मैसर्स जयदीप कंस्टकशन के संबंध में Rs. 17149950 की Property Adv. and Construction की अलेखांकित एवं अघोषित पाई गई राशियों के संबंध में आप क्या कहना चाहते हैं ?

उत्तर मेरी पत्नी (रेखा शेखावत) स्वामिलव वाले उपर्युक्त फर्म कि वित वर्ष 2015–16 के लिए मेरे द्वारा Rs. 17149950 की स्पष्ट की गई एवं स्वीकार की गई आय/ विनियोग की राशि को गत वर्ष 2015-2016 की अलेखांकित एवं अघोषित आय स्वेच्छा से स्वीकार करता हूँ एवं मेरी कर निर्धारण वर्ष 2016-2017 की दाखिल की जाने वाली विवरण में दिखाए जाने वाली मेरी उक्त गत वर्ष 2015- 2016 को नियमित आय में अतिरिक्त रूप से आप के रूप में जोड़ कर उस पर लगने वाले कर की राशि स्वेच्छा से जमा कराने के लिए स्वैच्छिक,स्वतन्त्र सहमति देता हूं। इस प्रकार मेरे कर निर्धारण वर्ष 2016-2017 की विवरणीत कुल आय मेरी नियमित आय में Rs. 17149950 को जोड़कर उस पर लगने वाले कर चुकाकर स्वयं कर निर्धारण में मेरी आयकर विवरणी भर दूंगा।

प्रश्न17 मैं आपको रेडियंट 2015 डायरी जिसके कवर पर रामलेटन मित्रा लिखा हुआ है, जिसमें 1 जनवरी 2015 से 24.06.2016 की अवधि के लिए आपके द्वारा निर्माण कार्य की सामग्री की खरीद का दैनिक आधार पर ब्यौरा लिखा हुआ है इसी डायरी 26 दिसंबर के पृष्ठ पर 2016.17 प्रो० जयदीप कंसट्रक्शन के नीचे Property Advance Rs.19,15,000/- लिखा हुआ है। कृप्या स्पष्ट करें यह विवरण किस संबंध में है?

उत्तर उपर्युक्त डायरी में 26 दिसंबर के पृष्ठ पर जो विवरण लिखे हुए है ये विवरण मेरी पत्नि श्रीमति रेखा शैखावत के एकल स्वामित्व की व्यवसायिक संस्था मै. जयदीप कंसट्रक्शन के संबंध में लिखे हुए है जो कि मेरी पत्नि द्वारा चालू वित वर्ष 2016.17 की प्रथम तिमाही के दौरान Rs. 19,15,000 रुपये की उसके व्यापार में निर्माण व्यापार के कार्यों हेतु प्लॉट आदि संपत्तियों उसके द्वारा खरीदने के उद्देश्य से कई व्यक्तियों से चालू वित्त वर्ष की प्रथम तिमाही की अवधि के दौरान अग्रिम साई पेटे तथा उसके द्वारा संपत्ति खरीद के प्रतिफल के भुगतान की राशियों के संबंध में है जोकि कई कच्ची परचीयों, नोटबुक्स, स्लिप्स, डायरी आदि में लिखी हुई थी, को जोड़कर यहाँ लिखी गई है।

प्रश्न 19 उपरोक्त प्रश्न संख्या 17 में, मै० जयदीप कंसट्रक्शन की एकल स्वामिनी मेरी पत्नि है की चालू वित्त वर्ष 2016 -17 के लिए मेरी पत्नि 19,15,000 रु की स्पष्ट की गई एवं स्वीकार की गई है. उक्त राशि आय विनियोग की अघोषित राशि है को चालू वित्त वर्ष 2016-17 की प्रथम तिमाही की अलेखांकित एवं अघोषित आय है, को इच्छा से स्वीकार करते हुए चालू वित्त वर्ष की इस प्रथम तिमाही की इस स्वीकृत आय पर अग्रिम कर राशि जमा कराने के लिए मेरी स्वैच्छिक,स्वतन्त्र सहमति प्रदान करते हुए इस पर लागू कर की राशि के चैक स्वैच्छा से जारी करके आपको सुपुर्द कर रहा हूँ।

कृप्या 15 सितंबर से पहले मेरी चालू वित्त वर्ष की अवधि कीआय के उपर कर जमा कराना समझा जाये।

3.3 *Accounting* : It is submitted that income so surrendered in shape of the unrecorded trade advances and cash-in-hand were entered in the regular books of accounts and the unrecorded cash together with the recoveries made from the unrecorded debtors, both, taking together constituted sufficient cash balance including the declared cash balance in the day-to-day maintained cash book. Thus, the bank deposits from 9th Nov., 2016 onward were made out of the same. The recoveries made from the debtors and the unrecorded cash were entered in the cash book (PB 16-17) and other accounts during the relevant assessment year. These accounting entries were certainly before the AO who duly examined, which furnished a strong ground to him to take a decision that it was a business income only and s. 115BBE was not applicable.

3.4 The very fact that the subjected diary which included the details of the business transactions also included the relevant page/s relied upon by the Revenue, sufficiently proved that such noting related to unrecorded advances towards the purchase of plot, etc. and the stated cash was part of the real estate business. The unrecorded advances and cash remained mixed up with the other recorded advances and cash of the property business. The

AO duly verified and examined the documents and details filed before him these facts certainly influenced his decision making process. The AO after due application of mind accepted and assessed the income.

4. Legal position w.r.t. s. 115BBE :

4.1 At the outset it is submitted that s. 115BBE specifically refers to the income which are of the nature as referred in ss. 68, 69, 69A of the Act being the income from other sources. Therefore, subjected income has essentially to be classified under s. 14 of the Act as income from other sources and that is possible only when the income is not capable of being classified under any other head being income from salary, house property, capital gain, business or profession.

4.2 A combined reading of s. 14 with s. 56 of the Act makes is evidently clear that for the assessment of an income it must have to be classified under four heads of income as enumerated under s. 14 and if it doesn't fall under any specific head of income as per items A to E of s. 14, such income has to be assessed under the residuary head of income i.e., item F of s. 14. Therefore, income added under s. 68 or s. 69 etc. has to be given a specific head in terms of s. 14,

4.3 The Hon'ble Supreme Court in case of *Karanpura Development Co Ltd. vs. CIT (1962) 44 ITR 362 (SC)* held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon'ble Supreme Court in case of *Nalinikant Ambalal Mody vs. CIT (1966) 61 ITR 428 (SC)*, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4.4 It is submitted that whatever, was disclosed was nothing but additional income only and it cannot be termed as excess/undisclosed/unaccounted income for the simple reason that survey was carried out on 4th July, 2016 i.e., before close of the relevant previous year ending on 31st March, 2017 or in other words, during the currency of the previous year only. The assessee did not yet close the previous year's books of accounts therefore, unless completely prepared all transaction done, are accounted for and the accounts are completely prepared, it cannot be termed as excess-shortage/undisclosed/ unaccounted money, quantity, etc. Even the return of income was not filed by the assessee committing itself to a particular state of affairs. At the best it was only additional income stated during survey. Moreover, the assessee admittedly accounted for such income also in regularly maintained books of account and also declared the resultant income in its ROI. Therefore, once a comparison is made between the income

shown in the accounts and those in ROI, there will be no difference. Consequently, it cannot be said that there was some excess shortage/undisclosed/unaccounted income, etc.

5. Binding judicial guideline : The Hon'ble Rajasthan High Court as also Tribunals whose decisions are binding upon the AO as a juridical precedence have also been consistently holding so.

5.1 The Hon'ble Rajasthan High Court in case *of CIT vs. Bajargan Traders* in IT Appeal No. 258 of 2017, dt. 12th Sept., 2017 (DPB 1-5) has held that when the assessee is dealing in sale of foodgrains, rice and oilseeds and the excess stock which is found during survey is stock of rice, then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources. It was held as under :

'2.10. We have heard the rival contentions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814 towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transaction by debiting the purchase account and crediting the income from undisclosed sources. In the annual accounts, the purchases of Rs. 70,04,814 were finally reflected as part of total purchases amounting to Rs. 33,47,19,658 in the P&L a/c and the same also found included as part of the closing stock amount to Rs. 1,94,42,569 in the P&L a/c since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of Rs. 70,04,814 also found credited in the P&L a/c as income from undisclosed sources. The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss therefrom would be subject to tax as any other normal business transaction. Secondly, the unrecorded investment which has gone in purchase of such unrecorded stock of rice has been recorded in the books of accounts and offered to tax by crediting the said amount in the P&L a/c. Had this investment been made out of known source, there was no necessity for assessee to credit the P&L a/c and offer the same to tax. Accordingly, we do not see any infirmity in assessee's bringing such transaction in its books of accounts and the accounting treatment thereof so as to regularize its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future.

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 foodgrains, rice and oilseeds, 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.'

5.2 The Hon'ble Tribunal Jaipur, in its decision in the case of *Shri Ram Narayan Birla* in ITA No. 482/Jp/2015, dt. 30th Sept., 2016 (DPB 6-13) has held that unrecorded/excess investment or expenditure surrendered during the course of the survey has to be assessed as business income only and not under the head income from other sources. The Hon'ble Tribunal Jaipur followed the case of *Chokshi Hiralal Maganlal vs. Dy. CIT (2011) 141 TTJ (Ahd)(UO) 1*.

5.3 The Hon'ble Ahmedabad Tribunal in case of *Chokshi Hiralal Maganlal vs. Dy. CIT* (ITA No. 3281/Ahd/2009 asst. yr. 2004-05, dt. 5th Aug., 2011) held that for invoking deeming provisions under ss. 69, 69A, 69B and 69C there should be clearly identifiable investment or asset or expenditure (i.e., in our understanding not connected with business so as to make convenient to invoke aforesaid sections). In case source of investment or asset or expenditure is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be. separated from business then first what is to be taxed is the undisclosed business receipt. Only on failure of such exercise, it would be regarded as taxable under s. 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

5.4 In case of *Lovish Singhal vs. ITO* (ITA Nos. 142 to 146/Jodh/2018 for asst. yr. 2014-15, dt. 25th May, 2018) (DPB 14-32), the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the *Bajargan Traders* (supra), held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found under s. 69 of the Act and accordingly held that there is no justification for taxing such income under s. 115BBE of the Act.

5.5 There apart, there are many decisions available taking such a view in favour of the assessee on dt. 21st Feb., 2019 when the subjected assessment was framed by the AO. The above very relevant and crucial facts and the

legal position was well available before the AO and there is nothing on record to show that he did not consider the same.

5.6 Since the AO acted in accordance with the law prevailing on the date of the passing assessment order, hence, no fault can be found in his action and in particular, proceeding under s. 263 cannot be invoked in such a case. Kindly refer *CIT vs. G.M. Mittal Stainless Steel (P) Ltd. (2003) 179 CTR (SC) 553 : (2003) 130 Taxman 67 (SC) : (2003) 263 ITR 255 (SC)* (DPB 33-35), *CIT vs. Canara Bank (2021) 123 taxmann.com 207 (Kar)*.

In view of the facts and circumstances, judicial guidelines and the statutory provisions, the additional income declared during survey of Rs. 28,95,300 could not be subjected to s. 115BBE of the Act, hence there was no error in the assessment order.

6. *Substitution of opinion, not permissible- possible view taken by the AO*— Thus, the AO certainly did form an opinion by taking a conscious possible decision in view of the facts available on record, investigated by him and the available juridical guideline particularly those binding upon him. It is only after considering all the relevant aspects, the AO decided not to charge tax under s. 115BBE and to impose penalty under s. 271AAC of the Act. However, the impugned order shows that it is a case of substitution of opinion. From the factual and legal submission made hereinabove, it is evident that the AO has taken a possible view but it appears nothing but a case of substitution of opinion. However, the law is well settled that CIT cannot substitute his own opinion and if a legally possible view has been taken by the AO, the CIT cannot invoke revisionary powers.

7. Merely because the order is brief and cryptic, that does not render it to be erroneous and prejudicial to the interests of Revenue. The learned Principal CIT has no jurisdiction under s. 263 to revise the order of the AO simply because he has not made elaborate discussion in the order with regard to the reason mentioned in the CASS. Kindly refer *Ved Prakash Contractors vs. CIT (2016) 175 TTJ (Chd)(UO) 19* held as under :

'Revision—Erroneous and prejudicial order—Lack of proper enquiry—Order of the AO may be brief and cryptic but that by itself is not sufficient to brand the assessment order as erroneous and prejudicial to the interests of the Revenue—AO having considered all the issues, the exercise of power under s. 263 was bad in law—If an enquiry is made by the AO, the CIT would have no jurisdiction under s. 263 to revise the order of the AO on the ground that such enquiry is not adequate—Therefore, the order of the AO cannot be held to be erroneous and prejudicial to the interests of the Revenue simply because he has not made elaborate discussion in that regard in his order.'

8.1 It is not the case of CIT that there was a complete/total lack of inquiry : There is no such whisper in the impugned order. He himself stated that there was incomplete appreciation of facts and law, which implies that some enquiry was made but no proper enquiry was made as per CIT. However, law is well settled that the assessment order cannot be held to be erroneous simply on the allegation of inadequate enquiry unless there is an established case of total lack of enquiry. Kindly refer *CIT vs. Sunbeam Auto Ltd. (2009) 227 CTR (Del) 133 : (2009) 31 DTR (Del) 1 : (2011) 332 ITR 167 (Del)* wherein Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held that one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. Also kindly refer *CIT vs. Chemsworth (P) Ltd. (2020) 275 Taxman 408 (Kar)*.

8.2 Invoking of Expln. 2 to s. 263 is without jurisdiction : It is further submitted that in the entire show cause notice, there is no whisper of the invoking of Expln. 2 to s. 263, based on which now in the impugned order s. 263 at p. 4 Pr 6. the learned CIT has taken support of. In other words, without specifically confronting the assessee/noticee, of the proposed action even though mandatorily required, the learned CIT has acted against the interest of the assessee while invoking s. 263 by taking help of Expln. 2 of s. 263. The law is well settled that any proposed action which do not find place in the SCN under s. 263 or without specifically confronting the assessee of such proposed action before invoking s. 263, shall vitiate the entire proceeding and therefore, the resultant order under s. 263 has to be quashed. This aspect is directly covered by recent decision of Hon'ble Supreme Court in the case of *Principal CIT vs. Shreeji Prints (P) Ltd. (2021) 130 taxmann.com 294 (SC)* (DPB 43-48) wherein the Hon'ble Supreme Court held as under.

'Sec. 69, r/w s. 263, of the IT Act, 1961 Unexplained investments (Unsecured loans)—Asst. yr. 2013-14—Assessee-company had received unsecured loans from two different companies—CIT noting that said loans were shown as investment in assessee's name in balance sheet of respective companies exercised his revisionary powers and passed an order without giving an opportunity to assessee of being heard, invoking Expln. 2 to s. 263 —High Court by impugned order held that since AO has made inquiries in details and accepted genuineness of loans received by assessee, such view of

AO was a plausible view and same cannot to be considered erroneous or prejudicial to interest of Revenue—Whether SLP against said impugned order was to be dismissed—Held, yes (Para 21) (in favour of assessee)'

Since the facts are admitted and undisputed hence, the impugned order deserved to be quashed *in toto*.

8.3.1 Even the amendment [Expln. 2(a)] does not confer blind powers : It is held that despite there being an amendment, enlarging the scope of the revisionary power of the learned Principal CIT under s. 263 to some extent, it cannot justify the invoking of the Expln. 2(a) in the facts of the present case. Before referring to that Explanation, one has to understand what was the true meaning of the Explanation in the context of application of mind by a quasi-judicial authority.

8.3.2 In the case of *Narayan Tatu Rane vs. ITO (2013) 7 NYPTTJ 1493 (Mumbai)* it was held that newly inserted Expln. 2(a) to s. 263 does not authorize or give unfettered powers to CIT to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made. As submitted above here also the AO having already applied its mind (directly or indirectly), the assessment order was not erroneous.

9. Adverse observations and objections raised by the learned CIT :

9.1 No estoppel against law : Further, showing surrendered income under the head income From other sources is not a valid ground to invoke s. 263. One of the reasons adopted is that after making a surrender of the subjected income of Rs. 28,95,300 the same has been shown by the assessee under the head "income from other sources" in its ROI which required application of s. 115BBE of the Act.

It is submitted that the law is well settled that there cannot be any estoppel against the statute. Merely because the assessee has taken a mistaken view of the legal position by showing the income surrendered during the course of survey in a particular head of income numerated under s. 14 of the Act, is a highly technical task. Even a tax consultant/CA may not correctly decide what to talk of a poor ignorant and layman assessee. Acquiescence cannot take away right a party to which he is otherwise entitled to. No tax can be collected without the authority of law as guaranteed by Art. 265 of the Constitution of India. Therefore, even if the assessee has made some commitment, it cannot work as an estoppel and the assessee, if still feels aggrieved in any manner, can pursue legal remedy. Hence, showing income under a wrong head in the return of income cannot be taken as an admission.

9.1.1 Kindly refer *CIT vs. M. Pyngrope (1993) 109 CTR (Gau) 322 : (1993) 200 ITR 106 (Gau)*, wherein it was held that :

'Appeal (AAC)—Maintainability of appeal—Scope—Denial of liability by assessee within the meaning of s. 246(1)(c)—Has wide import and such denial may be by way of appeal—It is not necessary that assessee should have denied liability in return itself'

9.1.2 *CWT vs. Apar Ltd. (2002) 175 CTR (Bom) 312*, wherein it was held that :

'Appeal [CWT(A)] Maintainability of appeal—Intimation under s. 16(1)(a)(i)—Return filed under protest—Thereby assessee disputed his very liability to wealth-tax—AO could not have foreclosed assessee's right to appeal by issue of intimation under s. 16(1)(a)(i)—Appeal maintainable under s. 23(1A)(a)'

9.1.3 *Mayank Poddar (HUF) vs. WTO (2003) 181 CTR (Cal) 362* (DPB 36-39), wherein it was held that :

'Estoppel—Applicability of principle—Interpretation of statutes—Scope—There is no estoppels against statute property, though not taxable under the WT Act, included by assessee in taxable net wealth by misconception of law —Property does not become taxable.

.....

A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The department cannot rely upon any such admission or misapprehension if it is not otherwise taxable.' (Para 11)

9.2 The learned CIT in para 5.2 of the order without properly appreciating the context behind using the word black money, has misinterpreted the same to suit his purpose. The relevant para 3 of WS is self-explanatory.

9.3 *Surrendered income wrongly considered under ss. 68 and/or 69A as income of other sources* : If the totality of the facts and circumstances and the judicial guideline is considered, the additional income could not be considered of the nature described in the above provisions. Otherwise also on merits once such additional income has already been accounted for before/at the close of the year nothing remained undisclosed/unexplained.

10. *Contradictory approach of Revenue* : It is pertinent to note that the assessee lady had also declared Rs 1.71 crores in asst. yr. 2016-17 on similar facts and circumstances. The assessment was also framed for asst. yr. 2016-17 vide order under s. 143(3) dt. 31st Oct., 2018. However, no revisionary action under s. 263 is reported of similar nature where the CIT alleged and attempted to apply s. 115BBE. Similar surrender was made by

the husband also in asst. yrs. 2016-17 and 2017-18 and there also assessment was completed by order under s. 143(3), dt. 21st July, 2017 for asst. yr. 2016-17 but no action under s. 263 is reported there also.

11. *As regard initiation of penalty under s. 271AAC* : No doubt, the CIT concerned can examine the record of any proceedings and order passed consequent thereto can be set aside, if found erroneous and prejudicial to the interest of the Revenue. However, a bare perusal of the provision shows that penalty proceedings can be initiated by the concerned authority, i.e., the AO/CIT(A), only during the course of assessment (for appellate) proceedings (or appellate) and before the conclusion of such proceedings. Whereas the revisional jurisdiction of the CIT starts only after the conclusion of such proceedings, which result into assessment or appellate order. Therefore, as a sequel thereto, is not open to CIT to exercise the revisional powers to create non existent proceedings under s. 263 by holding the assessment proceeding as erroneous insofar as prejudicial to the interest of Revenue. Since s. 263 regulates the revisional powers of the CIT hence, the strict requirements of a jurisdictional provision cannot be compromised. In this case, the proceeding and consequent order is assessment order and not the penalty proceedings because the same were not existing hence no proceedings under s. 263 could be invoked.

11.1 The issue is covered by the binding decision in case *of CIT vs. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 27 Taxman 447 (Raj)* (DPB 40-42), holding that :

'In *J.K. D 'Costa's* case (supra), it was held that the CIT was not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings. The Supreme Court has dismissed the special leave petition in the said case in SLP (CIT) Nos. 11391 and 11392 of 1981, dt. 2nd March, 1984 (1984) 147 ITR (S) 1. As the position was concluded and settled by the Supreme Court, the question which was sought to be referred could not be said to be a substantial question of law arising out of the Tribunal's order. It was only a question of academic nature.'

11.2 Very recent case laws are *Shri Nandkumar Bhalchandra Bhondve* in ITA No. 943/Pune/2014, dt. 17th Aug., 2016 and in *Easy Transcription & Software (P) Ltd. vs. CIT (2017) 185 TTJ (Ahd) 504 : 2017) 156 DTR (Ahd) (Trib) 265* held as under :

'Revision—Jurisdiction of CIT—Jurisdiction to direct AO to initiate penalty proceedings under s. 271(1)(c)—It is not open to CIT to exercise the provisional powers to create a non-existent proceeding under s. 263 by holding the assessment as erroneous in so far as prejudicial to the interest of Revenue—Sec. 263 is a substantive provision and howsoever clear the

legislative intent may be, the requirements of a substantive provision cannot be bypassed as the legislative *casus omissus* cannot be supplied by interpretational fiat—Arriving at 'satisfaction' is the foundation of initiation of proceedings under s. 271(1)(c) which was to be recorded by AO in the course of assessment proceedings—Consequently, once the assessment is concluded, the CIT becomes *functus officio* as regards initiation of penalty under s. 271(1)(c)—Non-initiation of penalty proceedings under s. 271(1)(c) while framing assessment is not a good ground for invoking revisional powers under ss. 263 and 271(1)(c) read in conjunction with s. 263, gives an unmistakable impression that while in the wake of amendment under s. 271(1)(c) w.e.f. 1st June, 2002, it may be lawful for the Administrative CIT to impose penalty, that by itself would not be sufficient to hold that the CIT is entitled to exercise revisional powers by treating the assessment order as erroneous and prejudicial to the interest of Revenue—CIT is not competent to direct the AO to redo the assessment with a view to initiate and levy penalty under s. 271(1)(c) in respect of erroneous claim of deduction under s. 10B.'

Detailed submissions on this aspect (in Para 3) were made before the learned CIT wherein, the decision in *Keshrimal Parasmal* (supra) was cited but there appears no reference and no consideration at all of these submissions and the learned CIT still directed the AO to initiate penalty proceeding under s. 271AAC of the Act which is in utter disregard of the decision of the Hon'ble High Court.

12. Lastly, the issue of charging interest under s. 234B consequential to application of s. 115BBE could not be raised in the proceedings under s. 263.

In view of the above legal and factual position, the proposed action under s. 263 is completely beyond the s. 263 and therefore, the impugned order deserves to be quashed."

2.4 During the course of hearing, the learned Departmental Representative strongly relied upon the order of the learned Principal CIT and submitted that he has rightly invoked the provisions of s. 263 of the Act.

2.5 We have carefully considered the finding recorded in the impugned order passed under s. 263, the rival contentions raised by both the parties as the material placed on record as well as gone through the judicial pronouncements. The bench notes that the prerequisite for exercise of jurisdiction by the learned Principal CIT under s. 263 of the Act is that the order of the AO is established to be erroneous insofar as it is prejudicial to the interest of the Revenue. The Principal CIT has to be satisfied of twin conditions, namely (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If any one of them is absent i.e., if the assessment order is not erroneous but it

is prejudicial to the Revenue, s. 263 cannot be invoked. This provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous as also prejudicial to Revenue's interest, that the provision will be attracted. An incorrect assumption of the fact or an incorrect application of law will satisfy the requirement of the order being erroneous. The phrase 'prejudicial to the interest of the Revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of the order of the AO cannot be treated as prejudicial to the interest of the Revenue. It is pertinent to mention that if the AO has adopted one of the two or more courses permissible in law and it has resulted in loss of revenue, or where two views are possible and AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order and it is prejudicial to the interest of the Revenue, unless the view taken by the AO is totally unsustainable in law. In this regard, we draw strength from the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC) . We also draw strength from the decision of the Hon'ble Supreme Court in the case of CIT vs. Max India Ltd. (2007) 213 CTR (SC) 266 : (2007) 295 ITR 282 (SC) wherein it was held that :

"The phrase 'prejudicial to the interests of the Revenue' in s. 263 of the IT Act, 1961, has to be read in conjunction with the expression 'erroneous' order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interests of the Revenue. For example, when the AO adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the AO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law."

It is also noteworthy to mention that one of the prerequisites before invoking s. 263 and the allegation of the learned Principal CIT is that there has been incorrect assumption of facts and law by the AO. However, despite our deep and careful consideration of the material on record including the finding recorded in the subjected assessment order dt. 25th Feb., 2019 and in the findings recorded in the order under challenge, we do not find any incorrectness and incompleteness in the appreciation of facts made by the AO. Hence, we do not agree on this aspect to this extent with learned Principal CIT. However, we now proceed to consider whether the AO has also incorrectly appreciated and assumed the law while making the subjected assessment to be termed as erroneous and prejudicial to the interest of the Revenue. The facts are not disputed that the assessee was engaged in the real estate business through her proprietary M/s Jaipdeep Construction, purchasing and selling of plots, lands, construction of properties and the

like. A survey under s. 133A was carried out on dt. 4th July, 2016, during the course of which, statements of the husband of the assessee lady Shri Sankar Singh Sekhawat were recorded under s. 133A/131. Shri Sankar Singh Sekhawat is also engaged in the similar type of real estate business in its property namely, M/s Rajshree Properties at Kota. Shri Sankar Singh Sekhawat admitted unrecorded income in the case of his wife/assessee of Rs. 28,95,300 for financial year 2016-17 (asst. yr. 2017-18) which consisted of the property advances of Rs. 19,15,000 and cash of Rs. 9,80,300 and there was no other known or unknown source of business. We further note that subsequent cash recoveries were made from such trade advances and the cash of Rs. 9,80,300 so admitted were incorporated in the regularly maintained books of accounts. Perusal of the cash book placed on record at p. 17 of the paper book filed by the assessee it is noticed that the assessee has credited on dt. 4th July, 2016 the cash declared in survey of Rs. 9,80,300 and credited to her capital account and constituted a part of the closing balance of cash-in-hand on that day of which was thereafter carried forward to 5th July, 2016 as opening balance. Similarly, property advance of Rs. 19,15,000 was also credited to the capital account and debited to advance for property declared (in 2016-17) (PB 15). Later on, cash recovery is made therefrom on 3rd Nov., 2016 which was debited in the cash book and credited to the said advance account (PB 15-16). We also note that the available cash thereafter was used by the assessee in its day-to-day transactions related to real estate business including the bank deposits made from 9th Nov., 2016 and onward. On the other hand, the capital account of assessee has been credited with the same amount of additional income of Rs. 28,95,300. Thus, the net effect of such accounting entries passed, the treatment is that the unrecorded trade advances and cash in hand were brought in the books of accounts and formed part of business assets and thereafter used in its day-to-day business activities. We have also meticulously gone through the questions and answers raised during the survey in which the authorised officer asked regarding the property advances made by the assessee through its proprietary M/s Jaideep Constructions of Rs. 1,71,49,950 in financial year 2015-16 relating to asst. yr. 2016-17 in question No. 15 with reference to earlier questions 12 and 13 and in reply thereto Shri Shekhawat, while admitting the additional income to that extent in its regular income for asst. yr. 2016-17. He was also confronted with the impounded material Radiant 2015 Diary, starting from 1st Jan., 2015 and the contents thereof were referred to, which shows the purchase of the building material on day-to-day basis. The details of the purchase of construction material on day-to-day basis and on page 26th December the entry of property advanced of Rs. 19,150,000 was mentioned under the heading Prop. Jaideep Constructions. In reply to which Shri Shekhawat stated that such details related to said propriety of his wife (the

assessee) given on account of the construction activities and purchase of plot as advance (Sai). Thus, the impounded material as also the very questions which were raised and the answers given show that the additional income declared on account of advances and the cash found emanated from and related to the real estate business only. It is imperative to mention that as claimed above, in asst. yr. 2016-17 also, the assessee lady has admitted the additional income of Rs. 1.71 crore and the assessment of that year was completed under the scrutiny in the order dt. 31st Oct., 2018 passed under s. 143(3). In the similar case of Shri Shekhawat also admitted additional income in asst. yrs. 2016-17 and 2017-18, where also assessment were completed under scrutiny under s. 143(3) on 21st July, 2017. However, such contentions were not controverted by the learned Departmental Representative. Moreover, it is clear from a bare reading of the order under challenge that the learned Principal CIT has not disputed rather admitted these facts in para 5 that this income pertains to recovery of cash amounts of advances made by the assessee to the other persons for purchase of land/plots. Hence, the undisputed facts indicate that the additional income so admitted was in the normal course of real estate business. Thus, undisputedly the assessee is engaged in the real estate business and there is no undisclosed or unknown source of income and the source of additional income so admitted is also clearly identifiable and related to the regular business of real estate. These facts are evidently clear to bring home the point that such additional income clearly falls under s. 14 r/w s. 28 of the Act. The residuary provision under s. 56 which is titled as income from other sources, comes into the picture only and only when any item of income does not clearly fall under any specific head of income as per items A to E of s. 14. But where such income finds place under a particular head being business or profession, then there is no scope of invoking s. 56 in the context of s. 14. On the other hand, a clear reading of s. 115BBE provides that it is only such income which is of the nature of s. 68/69A and so on with reference to which only s. 115BBE could be invoked. When the additional income is clearly identifiable and related to the real estate business it is certainly assessable as business income and cannot be considered as income falling under s. 68/69A of the Act as held by the learned CIT. The learned CIT also failed to appreciate that the survey was carried out in the mid of the previous year where accounts were yet to be closed on 31st July, 2017. Unless the previous year comes to an end and the accounts are finalized and produced before the AO, the assessee placing reliance thereupon for the purpose of computation of income, it cannot be said conclusively that some item of receipt is in the nature of unexplained cash credit under s. 68 or unexplained money under s. 69A of the Act. In view of the above deliberation, we are fortified in our view by certain decisions on the point of invoking s. 115BBE in similar situation. The

Hon'ble Rajasthan HC in the case of *CIT vs. Bajargan Traders* in IT Appeal No. 258 of 2017, dt. 12th Sept., 2017 (copy of which was supplied by the learned Authorised Representative) has held that when the assessee is dealing in sale of foodgrains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources. The finding of Tribunal Jaipur Bench in the case of *CIT vs. Bajargan Traders* (supra) is as under :

"We have heard the rival contentions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814 towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transaction by debiting the purchase account and crediting the income from undisclosed sources. In the annual accounts, the purchases of Rs. 70,04,814 were finally reflected as part of total purchases amounting to Rs. 33,47,19,658 in the P&L a/c and the same also found included as part of the closing stock amount to Rs. 1,94,42,569 in the P&L a/c since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of Rs. 70,04,814 also found credited in the P&L a/c as income from undisclosed sources. The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss therefrom would be subject to tax as any other normal business transaction. Secondly, the unrecorded investment which has gone in purchase of such unrecorded stock of rice has been recorded in the books of accounts and offered to tax by crediting the said amount in the P&L a/c. Had this investment been made out of known source, there was no necessity for assessee to credit the P&L a/c and offer the same to tax. Accordingly, we do not see any infirmity in assessee's bringing such transaction in its books of accounts and the accounting treatment thereof so as to regularize its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future. 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 foodgrains, 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.

Further, the Co-ordinate Bench in the case of *Shri Ram Narayan Birla* in ITA No. 482/Jp/2015, dt. 30th Sept., 2016 has held that unrecorded/excess investment or expenditure surrendered during the course of the survey has to be assessed as business income only and not under the head income from other sources, following the case of *Chokshi Hiralal Maganlal vs. Dy. CIT (2011) 141 TTJ (Ahd)(UO) 1*, which 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 s. 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 s. 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."

Similar view has been expressed by the Tribunal Jodhpur in case of *Lovish Singhal vs. ITO* (ITA Nos. 142 to 146/Jodh/2018 for asst. yr. 2014-15, dt. 25th May, 2018) applying the ratio propounded in case of *Bajargan Traders* (supra) holding that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found under s. 69 of the Act and accordingly held that there is no justification for taxing such income under s. 115BBE of the Act. Although there are several decisions but we do not wish to multiply the same. It is further noted that the decision of the Hon'ble jurisdictional HC in the *Bajargan Traders* (supra) was rendered on dt. 12th Sept., 2017. Similarly the decision of the Hon'ble Tribunal Jaipur in *Shri Ramnarayan Birla* (supra) was rendered on 30th Sept., 2016 (and there may be some more decisions which were passed) and were available much earlier to 4th July, 2016, when the assessment order was passed. Since, the AO acted in accordance with the law prevailing on the date of the passing assessment order hence, no fault can be found in his action and in particular, proceeding under s. 263 cannot be invoked in such a case as was held in *CIT vs. G.M. Mittal Stainless Steel (P) Ltd. (2003) 179 CTR (SC) 553 : (2003) 130 Taxman 67 (SC) : (2003) 263 ITR 255 (SC)* (DPB

33-35) (copy placed at DPB 33-35). Also refer *CIT vs. Canara Bank (2021) 123 taxmann.com 207 (Kar)*. Further, we find that in the case of *Narayan Tatu Rane vs. ITO (2013) 7 NYPTTJ 1493 (Mumbai)* held that newly inserted Expln. 2(a) to s. 263 does not authorize or give unfettered powers to CIT to revise each and every order, if in his (subjective) opinion, same has been passed without making enquiries or verification which should have been made. As noticed above in this case also the AO having already applied its mind (directly or indirectly) and the learned CIT(A) (sic-Principal CIT) without appreciating the existing binding judicial pronouncements and also ignoring the directly relevant facts, was not justified in expecting the AO to apply s. 115BBE as also s. 271AAC by merely imposing and substituting his own opinion, which is not the legislative intent even behind the said Explanation. hence, there was no error in the assessment order. One more aspect taken note and made a basis by the learned Principal CIT is that the assessee, while showing the additional income so admitted in its return of income in the computation of its total income shown under the head income from other sources. Although he has not very clearly made this fact as a basis of finding error in the assessment order yet however, the law, on this aspect is very well settled that there cannot be any estoppel against statute. It cannot be denied that showing income, in a particular head of income enumerated under s. 14 read with various other heads, is a highly technical task and even the tax consultants and chartered accountants may not correctly decide the proper classification under which head such income to be declared and/or assessed. Therefore, merely because the assessee had taken the mistaken view of the correct legal position by wrongly showing such additional income under head income from other sources, of the surrounding circumstances and the binding decisions of Hon'ble Rajasthan High Court and Tribunal, Jaipur. Such an acquaintance cannot take away the right of a party to which he is otherwise entitled to, or in other words, to be assessed as business income. Law is also, well settled that, no tax can be collected without the authority of law as guaranteed by Art. 265 of the Constitution of India. Therefore, even if the assessee has made some commitment but later on found wrong in law, it cannot work as an estoppel and the assessee, if still feels aggrieved in any manner, can pursue legal remedy. Hence, showing income under a wrong head in the return of income cannot be taken as an admission. We are fortified in our view by various decisions of different Hon'ble High Courts in the cases of—

(i) *CIT vs. M. Pyngrope (1993) 109 CTR (Gau) 322 : (1993) 200 ITR 106 (Gau)*, wherein it was held that : "Appeal (AAC)—Maintainability of appeal—Scope—Denial of liability by assessee within the meaning of s. 246(1)(c)—Has wide import and such denial may be by way of appeal—It is not necessary that assessee should have denied liability in return itself."

(ii) *CWT vs. Apar Ltd. (2002) 175 CTR (Bom) 312*, wherein it was held that : "Appeal [CWT(A)]—Maintainability of appeal—Intimation under s. 16(1)(a)(i)—Return filed under protest—Thereby assessee disputed his very liability to wealth-tax—AO could not have foreclosed assessee's right to appeal by issue of intimation under s. 16(1)(a)(i)—Appeal maintainable under s. 23(1A)(a)"

(iii) *Mayank Poddar (HUF) vs. WTO (2003) 181 CTR (Cal) 362* (DPB 36-39), wherein it was held that : "Estoppel—Applicability of principle—Interpretation of statutes—Scope—There is no estoppel against statute—Property, though not taxable under the WT Act, included by assessee in taxable net wealth by misconception of law—Property does not become taxable.

.....

A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable."(Para 11)

It is thus, held that the additional income was in the nature of business income and do not fall under s. 68 and/or s. 69 of the Act and consequently therefore, s. 115BBE could not have been invoked. In view of the above discussion, therefore, we are of the considered view that the learned Principal CIT was not at all justified in invoking the provisions of s. 263 by wrongly/incorrectly holding that the subject assessment order under s. 143(3) dt. 25th Feb., 2019, was passed without considering that the income declared under the head of other sources of Rs. 28,95,300, being recovery of cash amount of advances paid for purchase, comes under purview of ss. 68 and 69 of the Act and thus, the tax under s. 115BBE was to be paid, as against the tax at normal rates. The assumption of jurisdiction under s. 263 was contrary to the law and facts on record. Hence, the proceedings initiated under s. 263 of the Act and the impugned order dt. 25th Feb., 2019 are hereby quashed. Thus, ground of appeal Nos. 1, 2 and 4 are decided in favour of assessee and against the Revenue.

3.1 In ground No. 3, the assessee has challenged the assumption of jurisdiction under s. 263 for not initiating penalty proceedings under s. 271AAC of the Act. The learned CIT held that the additional income was also subject to penalty under s. 271AAC of the Act and accordingly set aside the subject assessment order.

3.2 After hearing both the parties and perusing the materials available on record as well as judicial pronouncements cited by both the parties, we at the outset have no hesitation to hold that the issue involved is no more *res integra* in as much as the Hon'ble Rajasthan High Court in the case of *CIT vs. Keshrimal Parasmal (1985) 48 CTR (Raj) 61 : (1986) 27 Taxman 447 (Raj)* , held as under :

"In *J.K. D 'Costa's* case (supra), it was held that the CIT was not entitled to set aside the assessment order passed by the ITO on the ground that there was no mention of initiation of penalty proceedings in the order and that he could not direct the ITO to make fresh assessment to initiate penalty proceedings. The Supreme Court has dismissed the special leave petition in the said case in Special Leave Petition (Civil) Nos. 11391 & 11392 of 1981, dt. 2nd March, 1984, *(1984) 147 ITR (St.) 1*. As the position was concluded and settled by the Supreme Court, the question which was sought to be referred could not be said to be a substantial question of law arising out of the Tribunal's order. It was only a question of academic nature."

There are several other decisions cited by the learned Authorised Representative of the assessee for which no contrary decision was brought to our notice. Hence, we are of the considered view that the learned Principal CIT acted beyond jurisdiction in holding that the additional income was subject to penalty under s. 271AAC of the IT Act. Thus, ground No. 3 of the assessee is allowed.

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