

IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT

[CONDUCTED THROUGH VIRTUAL COURT]

**Before: Shri Waseem Ahmed, Accountant Member  
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 71 /Rjt/2022  
Assessment Year 2017-18**

Uniroyal Sthaptya , Gondal PAN: AABFU3195P (Appellant)	Vs	Pr. CIT, Rajkot-1 (Respondent)
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**Assessee by: Shri Gaurang Khakhar, A.R.  
Revenue by: Shri Shramdeep Sinha, Sr. D.R.**

Date of hearing : 19-10-2022  
Date of pronouncement : 20-12-2022

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

This assessee's appeal for A.Y. 2017-18, arises from order of the Principal Commissioner of Income Tax, PCIT, Rajkot-1 dated 16-02-2022, in proceedings under section 143(3) of the Income Tax Act, 1961; in short "the Act".

2. The assessee has taken the following grounds of appeal:-

*“1) That on the facts and in the circumstances of the case, the Ld. CIT has erred in initiating and passing the order u/s.263 of the Income Tax Act, 1961.*

*2) That on the facts and in the circumstances of the case, the Ld. CIT has erred in setting aside the order passed u/s. 143(3) of the Income Tax Act, 1961 by the Ld. A.O.*

*3) That, on the facts and in the circumstances of the case, the Ld. CIT has erred in directing to examine the applicability of section 115BBE to discourse made during the survey.*

*4) That the order passed by the Ld. CIT u/s.263 of the I.T. Act, 1961 was arbitrary, bad in law and unjust.*

*5) That the assessee craves leave to urge such other ground or grounds before or at the time of hearing of appeal.”*

3. The brief facts of the case are that the assessee filed return of income for assessment year 2017-18 declaring total income of ₹ 92,76,250/-. The assessment was completed under section 143(3) of the Act on 28-12-2019 accepting the returned income filed by the assessee. Subsequently, Principal CIT initiated proceedings under section 263 of the Act by observing that the firm had disclosed survey income of ₹ 80,50,729/- (comprising of excess unexplained cash and bogus expenses) and since the unexplained cash comes under the purview of section 69A and unexplained expenditure comes within the purview of section 69C, the AO should have computed tax liability under section 115BBE of the Act @60% enhanced by applicable surcharge of 25% of such tax. However, the AO has not applied the correct provisions of law while finalising the assessment under section 143(3) of the Act. The principal CIT held that once additions have been made under the head of “income from other sources” by invoking the provisions of section

69A or 69C, the provisions of section 115BBE of the Act comes into play. Accordingly, Principal CIT set aside the assessment order on the ground that the same is erroneous and prejudicial to the interest of the Revenue.

4. The assessee is in appeal before us against the aforesaid order passed under section 263 of the Act, setting aside the assessment order. Before us, the counsel for the assessee submitted that firstly Principal CIT erred in observing that the AO did not make any specific enquiries in respect of this issue. The counsel for the assessee drew our attention to show cause notice dated 26-12-2019 issued by the AO seeking a specific explanation from the assessee as to why in the instant set of facts, since during the course of survey, excess cash was discovered amounting to ₹ 8,02,110/- and further, additions were made to the tune of ₹ 72,48,619/- being bogus expenses, why the provisions of section 69A and 69C should not be invoked and why income of the assessee should not be taxed under section 115 BBE of the Act. In response to the above show cause notice, the assessee filed reply dated 26-12-2019 as to why in the instant set of facts the provisions of section 69A and 69C are not attracted and hence the assessee is not liable to be taxed under section 115BBE of the Act of the Act. Accordingly, the first argument of the counsel for the assessee is that since the issue of taxability under section 69A/69C and consequentially applicability of section 115BBE of the Act were enquired into by the AO during the course of assessment proceedings, to which the assessee also filed a detailed reply, it cannot be said that the order is erroneous and prejudicial to the interests of the revenue. Secondly, the counsel for the assessee submitted that in the instant facts the survey was carried out on 27<sup>th</sup> September 2016, whereas applicability of

section 115BBE of the Act was amended w.e.f. 15-12-2016 and the same will not apply to search/survey conducted prior to 15-12-2016. In support of his contention, the counsel for the assessee placed reliance on several judicial dealing with this issue.

5. In response, DR relied upon the observations made by Principal CIT in the 263 order.

6. We have heard the rival contentions and perused the material on record. In our considered view, in the instant set of facts, it cannot be held that the order passed by the AO is erroneous and prejudicial to the interests of the Revenue. From the records, it is evident that the AO issued a specific show cause notice seeking explanation from the assessee as to why in the instant set of facts the provisions of section 69A/69C should not be invoked and consequently, why tax should not be imposed under section 115BBE of the Act of the act. Further, the assessee also filed a detailed reply in response to the aforesaid show cause notice and upon consideration of the same, the reply of the assessee was accepted by the AO. Further, we observe that the Indore ITAT in the case of **DCIT v. Punjab Retail private Ltd in ITA number 677/Ind/2019** has held that since applicability of section 115BBE of the Act of the Act was amended with effect from 15-12-2016, it will not apply to search/survey conducted prior to 15-12-2016. Further, the Gauhati Tribunal in the case of **Abdul Hamid v. ITO 83 ITD 711 (2020)** held that assessment order could not be held to be erroneous and prejudicial to the interest of the revenue on account of non-invocation of section 115BBE of

the Act. In the case of **Balvinder Singh v. PCIT in ITA number 570/Del/2022 dated 22-08-2022**, the Delhi ITAT observed as below:

9. *And amendment has not brought in section 115BBE of the Act w.e.f. 2017-18 but the same was not therein the Statute on the date of survey. Taking a leaf out of amended provisions, the PCIT was of the opinion that the tax rate should have been 60% instead of 30% because of which the assessment order has become prejudicial to the interest of the revenue.*

10. *The mode point is whether the amendment is prospective or retrospective, as on the date of survey, the amended provisions were not there in the statute. In our considered opinion, this is a highly debatable issue, which cannot be subject matter of exemption of jurisdiction under section 263 of the act. Moreover, a perusal of the assessment order clearly shows that the assessing Officer has nowhere invoked the provisions of section 68/69 of the act to impute the tax rate of section hundred and 15 BBE of the act.*

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13. **There is, therefore nothing stated in the pre-amended or post-amended provisions of section 115 BBE of the Act that where the assessee surrenders undisclosed income during search action for the relevant year, the tax rate has to be charged as per the provisions of section 115 BBE of the Act.** *Therefore, the applicability of the amended provisions which prompted the PCIT to assume jurisdiction under section 263 of the Act is highly debatable issue, and therefore,*

*in our understanding of the law, the PCIT has wrongly assumed the jurisdiction.*

6.1 In the case of **Gandhi Ram v. Principal CIT in ITA number 121/Chd/2021 [2022] (145 taxmann.com 109 (Chandigarh - Trib.)**, the ITAT Chandigarh held that where PCIT invoked his revisionary jurisdiction under section 263 on ground that income surrendered by assessee was covered as per provision of sections 68, 69, 69A, 69B, 69C and 69D read with section 115BBE, since PCIT himself was not clear about applicability of relevant provisions, assessment order passed by Assessing Officer after due application of mind and after duly examining all evidences on record assessing surrendered income as business income could not be held to be erroneous and unsustainable in eyes of law. While passing the order, ITAT observed as below:

*Firstly, how the PCIT has arrived at a conclusive finding that the discrepancies found, confronted and accepted by the assessee during the course of survey attract the deeming provisions of sections 68, 69, 69A, 69B & 69C is not apparent from the impugned order. Merely stating that excess cash is clearly covered under section 68 or 69A, excess stock is covered under section 69 or 69B, construction of shed/godown is covered under section 69B or 69C and advances made to Sundry Parties is covered under section 69, 69B or 69D is like an open ended hypothesis which is not supported by any specific finding that the matter shall fall under which of the specific sections and how the conditions stated therein are satisfied before the said*

*provisions are invoked. It is like laying a general rule, which is beyond the mandate of law, that wherever there is a survey and some income is detected or surrendered by the assessee, the deeming provisions are attracted by default and by virtue of the same, provisions of section 115BBE are attracted. The PCIT has to record his specific findings as to the applicability of the relevant provisions and how the explanation called for and offered by the assessee is not acceptable in the facts of the present case which is clearly absent in the instant case. Therefore, where the PCIT himself is not clear about the applicability of relevant provisions and in the same breath holding the Assessing Officer to task by not invoking the said provisions is clearly shooting in the dark which cannot be sustained in the eyes of law and the order so passed therefore cannot be held as erroneous in the eyes of law.*

6.2 Keeping in view of the above discussion, in our considered view, the order passed by the AO is not erroneous and prejudicial to the interests of the Revenue. The issue which was the subject matter of 263 proceedings has been specifically discussed by the AO during the course of assessment and therefore it is not a case where there has been no enquiry which has been made by the AO on the applicability of provisions of section 115 BBE of the Act in the instant facts or that there has been a non-application of mind by the AO during the course of assessment proceedings. Further, it is observed that the amendment to provisions of section 115 BBE of the Act came into effect after survey was conducted on the assessee, and consequently, in the

light of judicial precedents highlighted above, this is not a fit case for invoking the provisions of section 263 of the Act.

7. In light of the above discussion, the appeal of the assessee is allowed.

Order pronounced in the open court on 20 -12-2022

**Sd/-**  
**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 20/12/2022**

**Sd/-**  
**(SIDHHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

**आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Rajkot