

IN THE INCOME TAX APPELLATE TRIBUNAL  
Hyderabad 'A' Bench, Hyderabad

Before Shri Rama Kanta Panda, Accountant Member  
AND  
Shri Laliet Kumar, Judicial Member

ITA No.439/Hyd/2022		
Assessment Year: 2021-22		
ACIT,CC-2(2) Room No.616,6 <sup>th</sup> Floor Aaykar Bhawan Basheerbagh Hyderabad-500 004 PAN : AKEPG7452N	Vs .	Devender Rao Gourkanti H.No.8-2-293/82/NL/231 MLA MP Colony Jubilee Hills Hyderabad-500 033
(Appellant)		(Respondent)
Assessee by:	Shri H.Srinivasulu	
Revenue by:	Shri K.P.R.R.Murthy, Sr.AR	
Date of hearing:	20.03.2023	
Date of pronouncement:	31.05.2023	

ORDER

Per Shri Rama Kanta Panda (A.M.):

This appeal filed by the assessee is directed against the order dated 16.06.2022 of the Learned Commissioner of Income Tax (Appeals)-12, Hyderabad relating to AY 2021-22.

2. Facts of the case, in brief, are that the assessee is an individual and partner in M/s. Yashoda Helathcare Services Pvt.Ltd and derives partner's remuneration and interest on capital. He filed his original return of income on 28.12.2021 declaring total income of Rs.8,56,33,070/- A search and seizure operation u/s. 132 of the I.T. Act was conducted in the case of Yashoda Group on 22.12.2020, during which the case of the assessee was also covered. In response to notice u/s. 153A of the I.T.Act,the assessee filed his return of income admitting additional

income of Rs.5,07,48,000/- under the head “business & profession”

3. During the course of assessment proceedings, the AO observed that during the course of search proceedings, certain loose sheets were seized vide Annexure YSH/PDR/RES/01. Page number 38 of the Annexure YSH/PDR/RES/01 is a voucher which represents an amount of Rs.1,50,00,000/- paid to Dr. G. Abhinav in cash. Page number 37 represents the details of sale of land at Malakpet, Hyderabad wherein an amount of Rs.2,58,98,100/- was received in cash. Further a loose sheet numbered 31A represents Rs. 1,00,00,000/- in the name of Shri G. Devender Rao. On perusal of the above it was noticed that, a sum of Rs.5,08,98,100/- (Rs.1,50,00,000 + 2,58,98,100 + 1,00,00,000) are cash payments pertaining to various concerns and individuals of the group for the current financial year 2020-21, which are related to Shri G.

Devender Rao.

3.1 The AO further noted that when the assessee Shri Devender Rao Gorukanti was confronted with the above details of cash receipts/payments pertaining to current financial year 2020-21, he, in his sworn statement u/s 132(4), Prima facie stated that these payments and receipts are yet to be accounted in the books of accounts and accordingly admitted an amount of Rs. 5,00,00,000/- as his additional undisclosed income for the current year i.e. FY 2020-21 on account of seized evidences gathered during the Course of search and seizure proceedings.

4. The AO therefore, asked the assessee to support his claim of receipt of Rs.5,07,48,000/- from business. In response to the same, the assessee furnished a detailed note in respect of the above said issue which the AO has reproduced in the assessment order and which reads as under:-

“Thus the receipts mentioned above have been reflected in the regular books. The fact that the receipts form part of the regular income is clear from the following facts.

- The said income formed a part of his regular income for the previous year and was subject to advance tax which was paid before the end of the previous year as per provisions of the Act.

- It is not that after discovery of any incriminating evidence regarding real estate activities that assessee came forward and included the income in the regular return.
- The same amount was utilized for making certain payments.
- That it is a regular income is evidenced by books of account maintained by the assessee.
- Even during the current previous year 2021-22, the assessee continues the said business. The nature of business is not purchase and sale of land. The activities were in the area of acting as a facilitator in various land deals which is usual in this line of business.
- It is submitted that under Section 34 of Indian Evidence Act entries in books of account regularly kept in course of business are relevant whenever they refer to a matter into which the Court has to enquire. The principle underlying this provision is that the books of account regularly kept in course of business are presumed to be correct. There is a strong presumption that the transactions recorded therein are truthfully done. This also includes memoranda books if regularly kept in course of business. It was so held in the case of CIT Delhi v Woodwards Governors India P Ltd 179 Taxman 326 SC that accounts regularly maintained in the course of business are to be taken as correct.
- This would demonstrate that real estate income is a regular activity during the period. Hence the same cannot be equated with undisclosed income by any reckoning being a part of regular income.
- It is clarified that the provisions of section 115BBE which appear in Chapter VI [68, 69, 69A, 69B, 69C and 69D] cannot be applied in this case as the income falls under section 14 which appears in Chapter-IV. The income can only be assessed as business income. Hence the provisions of 115BBE shall not be applicable as there is a direct nexus between source of income and outgo of such income duly evidenced by books of accounts.”

5. However, the AO was not satisfied with the arguments advanced by the assessee. He noted that Shri G. Devender Rao (Director) takes care of all the financial activities of Yashoda Group. Yashoda Group, apart from providing healthcare services also invested in real estate through number of legal entities who are regularly filing returns of income. In the process of negotiating real estate transactions on behalf of the group companies, the assessee came to be associated with a number of persons within and outside Hyderabad who regularly transact in real estate. During the FY.2020-21, the assessee claimed that he had an opportunity to involve and negotiate number of real estate deals. For withdrawing

in this deal, the assessee has received Rs. 5,07,48,000/- through certain parties viz, Shri Bommanagiri Jaipal, Shri Circoori Prabhakar and Shri Srinivas Telugu as commission.

5.1 The AO further noted that subsequently, Shri Bommanagiri Jaipal, Shri Circoori Prabhakar and Shri Srinivas Telugu also filed affidavits individually supporting the contention of the assessee. On perusal of the affidavits filed by the above three persons, the AO noticed that all of them had stated that they know Shri Devender Gorukanti since several years and apart from hospital business he is involved in real estate business. He noted from the affidavits that Shri Devender Gorukanti used to participate and negotiate in real estate transactions, settlement of buying and selling of lands situated at Medchel, Velimela, Vikarabad etc., and later on withdrawn from the deal for which he has received certain amount as commission. However, he noted that the affidavits do not specify the quantum, mode of payment and dates of payment etc. Therefore, he was of the opinion that these are self-serving documents which cannot be relied upon.

6. In view of the above, the AO rejected the arguments advanced by the assessee and held that the assessee could not substantiate his claim that the sources for the expenses is from real-estate business. He, therefore, treated the amount of Rs.5,08,98,100/- as unexplained expenditure u/s. 69C of the I.T.Act and brought to tax the same as per the provisions of section 115BBE.

7. Before the Id.CIT(A), the assessee made elaborate arguments and made the following submissions which has been reproduced by the Id.CIT(A) in his order and which reads as under:-

"3.1 Before giving detailed submission on individual issues, the appellant submits it explanation as furnished before AO. The same will give an insight to the Hon'ble CIT(A) as to the state of affairs. The same is extracted below from the Para No.3.3 of the assessment order.....

4. Modus operandi of real estate business: As to the modus operandi of the business, it is submitted that the appellant in addition to

taking care of the financial activities of the Yashoda Group had also invested in Real Estate through a number of legal entities of the group who are regularly filing their returns on income. It is not as if the appellant was a stranger to the business. Being intimately associated with real estate business over the years, in the process of negotiating real estate transactions on behalf of the group companies and others the appellant came to be associated with a number of persons who regularly transact in real estate. During the Fin. Year 2020-21, the appellant had an opportunity to involve and negotiate a real estate deals involving certain parties from outside Hyderabad. During some of these negotiations, the appellant was persuaded to withdraw from the transactions in consideration for a lump-sum amount in different occasions and earned about Rs.5 Crores in various land deals. Hence, this amount received by the appellant, which could be in the nature of noncompetee fees and taxable under section 28 which has close nexus with real estate business. The amount was of Rs 5,07,48,000/- was accounted for in regular books of the appellant for the Fn.Year 2020-21 relevant to the Asst. Year 2021-22. This Income from real estate business was included in the return for Asst. Year 2021-22 and taxes were paid on the same before the end of the previous year. The fact of the matter was that the receipts of Rs 5,07,48,000/- has been reflected in the appellant's regular books and from the same, the appellant made the payments of Rs.5,08,98,100. Despite these documentary evidences by way of regular books and affidavits filed by some of the business associates through whom the income was earned, the learned AO glossed over these evidences merely on the ground that the same is not satisfactory without spelling out the reasons therefore. This makes the order infirm and not sustainable.

5. Income is regular source: It is submitted the income from the real estate business is formed a part of the appellant's regular income for the previous year and was subject to advance tax which was paid before the end of the previous year as per provisions of the Act. Even during the F.Y 2021-22 also, the appellant continues the said business and paid the advance tax on the said income.

6. supported by Books of account: The appellant recorded the income from the real estate activity in the regular books of account. The same are produced before the assessing officer during the course of hearing. It is submitted that, under Section 34 of Indian Evidence Act, entries in books of account, regularly kept in course of business are relevant. Whenever they refer to a matter into which the Court has to enquire. The principle underlying this provision is that the books of account regularly kept In course of business are presumed to be correct. There Is a strong presumption that the transactions recorded therein are truthfully done. This also includes memoranda books if regularly kept In course of business. It was so held in the case of CIT Delhi vs Woodward's Governors India P Ltd 179 Taxman 326 SC that accounts regularly maintained in the course of business are to be taken as correct. This would demonstrate that real estate Income is a regular activity during the period. Hence the same cannot be equated with undisclosed income by any reckoning being a part of regular income. Despite this regal stipulations supported by the decision of the Apex Court, the learned AO, without bringing any cogent adverse evidence against the appellant simply ignored the submissions with a general observation that the same is not satisfactory. Therefore, the best evidence which appellant could adduce is its books supported by affidavits from his business

associates.....

From the facts of the case at hand, it is clear that the AO has acted unreasonably in rejecting the genuine explanations offered by the appellant in respect of the source of income without any enquiry for the source of income and application thereof. Such recourse primarily hedged on surmises, conjecture, assumptions, presumptions. The addition so made is unsustainable in the eyes of law and thus deserves to be quashed".

8. Based on the arguments advanced by the assessee, the Id.CIT(A) directed the AO to tax the amount of Rs.5,08,98,100/- under normal provisions of the I.T.

Act by observing as under:-

6.3 I have carefully considered the submissions of the appellant, the order of the Assessing Officer, the evidence filed by the appellant's AR. Briefly the facts are, consequent to the search & seizure operation conducted in the case of Yashoda group on 22.12.2020, certain loose sheets were found and seized, which represent cash receipts/payments of Rs.5,08,98,100/- pertaining to various concerns related to the appellant. The appellant has admitted cash receipts/payments of Rs.5 crores in the sworn statement u/s. 132(4) as additional undisclosed income for the current

AY and has declared an additional income of Rs.5,07,48,000/- under the head "Business & Profession" in the ITR filed on 28.12.2021 in response to the notice u/s. 153A of the Act. During assessment proceedings, the appellant was asked to support his claim of receipt of Rs.5,07,48,000/- from business. In response, the appellant submitted that he had invested in real estate through number of legal entities and had an opportunity to involve and negotiate number of real estate deals. For withdrawing in these deals, the appellant has received Rs.5,07,48,000/- through certain parties viz, Shri Bommanagiri Jaipal, Shri Circoori Prabhakar and Shri Srinivas Telugu as commission. The above three persons have also filed affidavits individually supporting the contention of the appellant. However, the AD observed that these affidavits do not specify the quantum, mode of payment and dates of payment etc., hence considered as self serving and were not relied upon. Therefore, in absence of sources for the expenses, the AO considered the amount of

Rs.5,08,98,100/- as unexplained expenditure u/s 69C of the Act and taxed this amount as per the provisions of section 115BBE. The appellant is aggrieved and is in appeal.

6.4 During the course of appellate proceedings, the AR of the appellant submitted that during the year, the appellant had an opportunity to involve and negotiate real estate deals and during these negotiations, the appellant was persuaded to withdraw from the transactions in consideration for a lump-sum amount in different occasions and earned about Rs.5 crores in various land deals. Hence, this amount could be in the nature of non-compete fees and taxable u/s 28 of the Act which has close nexus with real estate business. The appellant has recorded the income from real estate activity in the regular books of account and paid advance tax on the said income. The real estate activities were further

confirmed by certain parties by filing affidavits and the appellant has offered this additional income for taxation for the current AY. The AR further submitted that the provisions of section 68, 69, 69A, 69B, 69C and 690 cannot apply to this case as the additional income can only be assessed as business income. Hence, the AR requested not to apply the provisions of section 115BBE on the amount of Rs.5,08,98,100/-.

6.5 I have considered the submissions of the AR and the order of the AO. It is seen that the appellant has filed his return of income in response to the notice u/s.153A for the current year on 28.12.2021, admitting additional income of Rs.5,08,98,100/- as income from real estate business. The AO taxed this income as per the provisions of section 115BBE of the Act. Now, the question is whether this additional business income attracts the provisions of section 115BBE of the Act or not. To answer this, the provisions of sections 115BBE of the Act are reproduced as below:

11588E(1). Where the total income of an assessee –

- a. includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 690 and reflected in the return of income furnished under section 139; or
- b. determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 690, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of-
  - i. the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and
  - ii. the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

Notwithstanding anything contained in this Act, no deduction in respect of any Expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of subsection (1).

On plain reading of Section 115BBE of the Act, it is seen that the said section is attracted when the total income includes any income referred to in Sections 68, 69, 69A, 69B, 69C or 690 in the return of income or determined as such by the Assessing Officer. In other words, there are two conditions when Section 115BBE is invoked. Firstly, return of income furnished should contain income in the nature of Sections 68, 69, 69A, 69B, 69C, 690 or secondly, the income is determined as deemed income under those sections by the AO during the assessment proceedings. Applying it to the facts of the present case, the assessee has declared in the return of income the additional income as business income which falls under Section 28 of the Act. On the other hand, the AO has treated the additional income as unexplained expenditure u/s 69C of the Act and invoked section 115BBE of the Act. Now, the question is whether this additional income can be treated as unexplained expenditure u/s 69C of the Act or not. To answer this, the provisions of section 69C of the Act are reproduced as below:

69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year:

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

6.6 On perusal of Section 69C of the Act, it is seen that the said section is attracted when an assessee has incurred any expenditure and offers no explanation about the sources for such expenditure or the explanation offered was not found to be satisfactory by the AO. In the present case, there is no expenditure incurred by the appellant and the appellant claimed to have received the additional income from the real estate activities and recorded this income as income from real estate activity in the books of account. During the current year, the appellant was involved in the real estate activities and this fact was mentioned in the sworn statement of the appellant dated 25.12.2020 during search, affidavit filed by the appellant on 26.02.2021 and affidavits filed by the other parties who were also involved in real estate business. These statements and affidavits cannot be ignored. The AO has not brought out any material on record to controvert these evidences. The AO has accepted the return of income of the assessee wherein the additional income was declared as business income and no new additions were made. The higher tax rate u/s.115BBE is not applicable to business income declared u/s.28 of the Act. Since the additional income is not covered under the provisions of Section 69C of the Act, the provisions of Section 115BBE are not attracted.

6.5.2 Reliance is placed on the decision of Hon'ble Chandigarh Tribunal in case of Bajaj Sons Ltd. Vs DCIT 128 taxmann 406, (24-05-2021) in which the question of invoking the provision of section 115BBE of the Act on the surrendered income to cover any discrepancy and thereby accessing such income at higher rate of tax as against the normal rate of tax applicable to the business income was discussed. It was held that if no discrepancy is pointed by the AO, the provisions of sections 68, 69, 69A, 69B, 69C or 69D are not attracted to levy tax under section 115BBE of the Act. For ready reference, the operative portion of the ratio is reproduced below:

"We find that a separate surrender of Rs. 97.11 lacs has been made by Shri 5B Bajaj Director of the assessee company on account of unexplained cash found during the search action. However, so far as the surrender of Rs. 15 lac to cover any discrepancy is concerned, the AO has not pointed out any unexplained credit in the books of account, any unexplained investment, any unexplained money, bullion or jewellery, any unexplained expenditure or any amount of loan repaid in the assessment order in this respect. Therefore, the provisions of Section 68, 69, 69A, 69B, 69C and 69D are not attracted on the surrendered amount of Rs. 15 lacs. The said amount of Rs. 15 lacs was offered in case any discrepancy is found in the books of account. However, in actual neither any unexplained investment nor any unexplained expenditure or otherwise any unexplained asset was found during the search action so far as the



aforesaid surrender of Rs. 15 lacs was concerned. In these circumstances, the aforesaid surrender of Rs. 15 lacs can be said to have been offered to cover up the discrepancies in respect of likely disallowances of claims, if any, relating to its business income.

9. In view of this, since the aforesaid surrender is not covered under the provisions of Section 68, 69, 69A, 69B, 69C and 69D, the provisions of Section 115BBE are not attracted in this case."

In view of the above reasons, the AD is directed to tax the amount of Rs.5,08,98,100/- at normal provisions of the IT Act. Accordingly, the grounds related to this appeal are ALLOWED.

9. Aggrieved with such order of the Id.CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. The Ld CIT(Appeals) erred both in law and on facts of the case In granting relief to the assessee.

2. On the facts and in the circumstances of the case, and 10 law, whether the Id. CIT(A) is correct in directing to treat the amount Rs.5,08,98,100/- as business Income when the same was admitted by the assessee as additional income to explain the unaccounted expenditure Incurred 10 cash as recorded In the material seized during search and seizure operation

3. On the facts and in the circumstances of the case, and in law, the Id CIT (A) erred in not appreciating that the amount of Rs 5,08,98,100/- was rightly taxed u/s. 115BBE towards unexplained expenditure as on the date of the search neither the unaccounted cash payments, nor the Income claimed to have been earned from land deals were recorded in the regular books of accounts of the assessee.

4. On the facts and in the circumstances of the case, and in law, the Id CIT (A) erred in holding that the additional income of Rs. 5,08,98,100/- was earned from business when assessee could not produce specific details of the business such as details of the land dealt with, location, persons involved and terms of the deals.

5. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary.

10. The Id.DR strongly opposed the order of the Id.CIT(A) in directing the AO to treat the amount of Rs. 5,08,98,100/- as business income as against unexplained expenditure treated by the AO u/s. 69C r.w.s. 115BBE of the Act. He submitted that the assessee in the instant case could not explain properly, the names of the persons who had given the facility charges, the date of payment and the mode of payment etc., The affidavits of the persons do not specify the quantum, the mode

of payments and the dates of payments and therefore, these are only self serving documents. Since the assessee in the instant case did not substantiate with evidence to the satisfaction of the AO regarding the sources of expenses found in the seized material as from real estate business, therefore, the Id.CIT(A) without appreciating the facts properly directed the AO to treat the amount of Rs.5,08,98,100/- as business income which is not in accordance with law and contrary to facts. He accordingly submitted that the order of the Id.CIT(A) be reversed and that of the order of the AO be restored.

11. The Id.counsel for the assessee on the other hand strongly supported the order of the Id.CIT(A). He submitted that the assessee during the course of search in the statement recorded u/s. 132(4) has declared the business income from real-estate. No evidence was brought on record to disprove the statements made by the assessee u/s. 132(4) which has got evidentiary value. He submitted that the AO in a summary manner and without conducting any enquiry rejected the various evidences filed by the assessee merely on the basis of surmises and conjectures. He submitted that the transactions are recorded in the regular books of accounts and the assessee has paid advance tax thereon.

Therefore, neither the provisions of section 69C nor the provisions of section 115BBE are applicable to the facts of the present case. He submitted that the assessee had explained the source of expenditure incurred which is reflected in seized material and the AO has not given any reasons for rejection of source of the income disclosed u/s. 132(4) from the real-estate business.

11.1 Referring to the provisions of section 115BBE, he submitted that the above provision is applicable when the source of income is not disclosed or source of expenditure is not disclosed. He submitted that the assessee in the instant case has disclosed the source of income and applied the real-estate income for meeting the outflow appearing in the seized papers. He submitted that the real-estate business income does not fall in the ambit of sections 68 to 69D. Therefore, the provisions of section 115BBE cannot be invoked. He submitted that the initial burden of proving the real-estate income is discharged by the assessee. The AO thereafter

did not make any enquiry and disbelieved the fact of receipt of business income from the real-estate. Referring to the copy of the assessment order, he submitted that the AO in the assessment order himself has accepted the fact that the Yashoda group is in the business of real-estate.

11.2 Referring to the following decisions, he submitted that the order of the Id.CIT(A) being in accordance with law should be upheld and the grounds raised by the revenue should be dismissed.

- i. Hon'ble Mardas High Court in the case of A.J.Ramesh Kumar Vs DCIT reported in 441 ITR 495
- ii. ITAT Chandigarh Bench in the case of Shri Bhuwan Vs DCIT, Ludhiana vide ITA No.1385/chd/2019,order dated 28.9.2020
- iii. ITAT Bangalore Bench in the case of Ragavs Diagnostic & Research Centre Pvt. Ltd. Vs ACIT vide ITA No.423/Bang/2022, order dated 09.09.2022.
- iv. ITAT Lucknow Bench in the case of Kanpur Organics Pvt. Ltd Vs DCIT reported in 78 ITR (Trib.) 120
- v. Hon'ble Rajasthan High court in the case of Principal Commissioner of Income Tax Vs Bajargan Traders C/o. Kalani & Co. CA, Jaipur, vide D.B.I.T.A No.258/2017,order dated 12.09.2017
- vi. Hon'ble AP High Court in the case of PCIT vs Deccan Jewellera P.Ltd, Deccan Tobacco Company, DTE Exports P.Ltd, reported in 438 ITR 131 (AP)
- vii. ITAT Surath Bench in the case of Shivam Developers Vs PCIT, 100 reported in ITR (Trib) 29.
- viii. Hon'ble Gujarat High Court in the case of Babulal K. Daga Vs CIT, Gujarat reported in 387 ITR 114(Guj)
- ix. ITAT Chandigarh Bench in the case of Gandhi Ram Vs PCIT, Chandigarh vide ITA 121/Chd/2021 order dated 04.08.2022
- x. Hon'ble Kerala High Court in the case of Lakshmi Hospital Vs CIT, reported in 347 ITR 367

12. We have heard the rival arguments made by both the sides, perused the orders of the AO and the Id.CIT(A) and the paper book filed on behalf of the

assessee. We have also considered the various decisions cited before us. We find the AO in the instant case made addition of Rs. 5,08,98,100/- u/s.69C r.w.s. 115BBE on the ground that certain loose sheets were found and seized during the course of search operation conducted in the case of Yashoda group on 22.12.2022 which represent cash receipts/payments of Rs. 5,08,98,100/- and the assessee could not explain the source of the above expenses. We find the Id.CIT(A) deleted the addition made by the AO, the reasons of which have already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the Id.CIT(A) on this issue. We find the AO in the instant case at para 3.4 of the order has mentioned that Yashoda group, apart from providing health care services, has invested in real-estate through number of legal entities who are regularly filing returns of income. Further, the assessee during the course of search proceedings, in his statement recorded u/s. 132(4) has stated that he has earned business income from real-estate. We find Shri Bommanagiri Jaipal, Shri Circoori Prabhakar and Shri Srinivas Telugu have filed their affidavits individually before the AO stating that the assessee Shri G. Devender Rao is into real-estate business since past 10 years and was involved in the real-estate settlements deals for purchase and sale of lands situated at Velimela, Vikrabad, Sangaraddy etc. We find the AO thereafter, has not conducted any further enquiry to disprove the various evidences filed by the assessee during the course of assessment proceedings as well as before the DDIT(Inv.). Further, the assessee has paid advance tax thereon prior to the date of search. Therefore, under these circumstances, once the assessee has proved the initial burden that he is engaged into real-estate business and has earned income from such real-estate, therefore, without making any further enquiry to disprove the various evidences filed before him, the AO could not have treated the amount of Rs. 5,08,98,100/- as unexplained expenditure. In our opinion, the provisions of section 115BBE are applicable when the source of income is not disclosed or source of expenditure is not disclosed. However, in the instant case, the assessee has disclosed the income after considering the expenditure and had paid advance tax thereon prior to the search. No new fact has surfaced during the course of search since the assessee has paid advance tax on such business activity prior to the date of search. Therefore, we find merit in the argument of Id.counsel for the assessee that the real-estate business income does not fall in the ambit of

sections 68 to 69D and therefore, the provisions of section 115BBE cannot be invoked. The various decisions relied on by the Id.counsel for the assessee also supports his case.

13. We find the Hon'ble Madras High Court in the case of A.J.Ramesh Kumar (supra) at para 7 of the order has observed as under:-

“7. Coming to the substantial questions of law relating to admissibility, relevancy and evidentiary value of statement obtained under section 132(4) of the Income-tax Act, 1961 this court is of the view that the same are no longer res integra. In the decision of the Supreme Court in the case of Bannalal Jat Constructions Pvt.Ltd. v. Asst.CIT reported in [2019] 413 ITR (St.) 322 (SC) ; [2019] 106 taxmann.com 128 (SC), after referring to the judgment of Pullangode Rubber Proudce co.Ltd. v. State of Kerala reported in [1973] 91 ITR 18 (SC), the legal position in relation to a statemetn under section 132(4) of the Income-tax Act, 1961 was set out as under:-

- (a) An admission is an extremely important piece of evidence though it is not conclusive.
- (b) A statement made voluntarily by the appellant could form the basis of assessment.
- (c) The mere fact that the appellant retraced the statement could nt make the statement unacceptable.
- (d) The burden lay on the appellant to show that the admission made by him in the statement earlier at the time of survey was wrong. Such retraction, however, should be supported by a strong evidence stating that the earlier statement was recorded under dress and coercion, and this has to have certain definite evidence to come to the conclusion that indicating that there was an element of compulsion for the appellant to make such statement.
- (e) However, a bald assertion to this effect at much belated stage cannot be accepted.

Applying the aforesaid legal proposition herein, we are of the opinion that once a statement is recorded, it is open to the Assessing Officer to rely and proceed on the basis that such statement is correct and represents the true state of affairs and the burden is on the deponent to demonstrate by letting cogent, convincing and material evidence that the statement was incorrect. Therefore, the statement made under section 132(4) of the Income tax Act, 1961 has a strong evidentiary value and is binding on a person, who makes it.

13. We find the Chandigarh Bench of the Tribunal in the case of Bhuwan Goyal (supra) while deciding an identical case at para 10 of the order has observed as under:-

10. We have considered the submissions of both the parties and perused the material available on the record. In the present case it is not in dispute that the assessee surrendered the income of Rs. 3.64 Crores in the statement recorded under section 132(4) of the Act the said surrender was made on the basis of the entries in the pocket diary found & seized during the course of search in which certain transactions relating to the Real Estate business were noted and profit as well as commission was earned thereon. The aforesaid

facts had been mentioned by the A.O. at page no. 4 of the assessment order dt. 30/12/2018 wherein copy of the show cause notice dt. 26/12/2018 has been reproduced. However the A.O. considered only an income of Rs. 2.64 Crore earned from the Real Estate Business but did not accept Rs. 1 Crore and added the same separately under section 69 of the Act. The A.O. charged the tax @ 60% under section 115BBE of the Act. The provisions contained in the said section i.e; 115BBE of the Act read as under:

115BBE. (1) Where the total income of an assessee, -

(a) Includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(b) Determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause(a), the income-tax payable shall be the aggregate of-

(i) the amount of income-tax calculated on the income referred to in clause(a) and clause(b), at the rate of sixty per cent; and

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause(i).

2. Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause(a) and clause (b) of sub-section (1).

From the aforesaid provisions it would be clear that the provisions of Section 115BBE (1)(a) of the Act are applicable to the income which is referred in section 68, 69, 69A, 69B, 69C or 69D reflected in the return of income furnished under section 139 of the Act. However, in the present case no such income was reflected in the return filed under section 139 of the Act rather the income was declared in the return filed under section 153A of the Act after the search. The assessee declared the income under section 132(4) of the Act and disclosed the same in the return of income filed under section 153A of the Act. The assessee explained the source of investment of Rs. 1.10 Crore in the reply to Question No. 11 which has been reproduced at page no. 8 of the impugned order by the Ld. CIT(A) and read as under:

“ Q. 11. Do you want say anything else ? Ans: yes, one agreement dated 05/04/2016 was found from residence at the time of search on 31/08/2016 which was executed by Mr. Sumit Thaper on my behalf and Sh. Hernek Singh S/o Sh. Daulat Singh for an amount of Rs. 1,10,00,000/-. Out of this amount of Rs. 10 Lacs was transferred from my bank account to Mr. Sumit Thaper which is duly accounted for (proof of this will be submitted later on) and rest of the amount has been paid in cash. The source of Rs. 1 Cr. Paid in cash are out of commission income and profit earned from real estate transaction in past. However no documentary evidence is available with me. Hence to BUY peace of mind and to avoid litigation. I hereby voluntarily offer Commission income as well as profit earned on real estate transactions as an additional income of Rs. 1 Cr. (One Crore) over and above my normal income for the F.Y. 2016-17 relevant to A.Y. 2017-18 subject to no penal action. I hereby reiterated that these transactions were entered by me in Individual capacity and nothing to do with the company i.e. M/s A.P. Refinery Pvt. Ltd.”

The said explanation given by the assessee to the Ld. CIT(A) has not been rebutted, therefore the provisions of Section 69 of the Act were not applicable as the business transactions were recorded in the books of account and the assessee either earned commission or profit on all those Real Estate transactions. The income earned from the Real Estate transactions was claimed to be utilized for making the investment in the property. In the present case it is not brought on record to substantiate that the said income was utilized by the assessee elsewhere and not in the investment of the property. Therefore we are of the view that the A.O. was not justified in taxing the aforesaid income of Rs. 1 Crore separately particularly when nothing is brought on record to substantiate that the assessee had made separate investment different from the income earned on real estate transactions recorded in the pocket diary found & seized during the course of search. Accordingly the impugned order passed by the Ld. CIT(A) on this issue is set aside and the A.O. is directed to tax the entire surrendered income of Rs. 3.64 at the normal rate of tax.

14. We find the Bangalore Bench of the Tribunal in the case of Ragavs Diagnostic & Research Centre Pvt.Ltd.(supra) while deciding an identical issue has observed as under:-

12. We will look at the provisions of section 69C which are as follows:- “69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year : Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.”

13. From the plain reading of the section, it is clear that when an assessee offers no explanation or the explanation offered is not satisfactory in the opinion of the AO, then the amount of such expenditure is to be taxed as income u/s. 69C of the Act. The satisfaction to be recorded by the AO should not be objective satisfaction exercised at his discretion, but a subjective satisfaction based on the facts of the case. It would then mean that justification for exercise of the power has to be found by the authority by making a subjective satisfaction on the basis of objective material and such satisfaction must be reflected in the reasons recorded in writing while exercising the power. (Vide: Dee Vee Projects Ltd. v/s. Union of India & Ors., Writ Petition No.2693/2021, dated 11.02.2022 (Bombay High Court)). In the present case, the assessee is in the business of running a diagnostic centre and the only source of income is the receipts from patients which is stated to be the source for unexplained expenditure. That being the case the AO has not brought any contrary material on record to state that the source for the expenditure was other than from business income and has formed the opinion based on conjectures and surmises. While exercising the quasijudicial functions, the administrative authorities have to reach satisfaction on the basis of material available and not on conjectures and surmises. The test of reasonableness has to be satisfied which in our view failed in the case under consideration. Therefore, we are of the view that the additional income offered cannot be taxed u/s. 115BBE and the impugned addition is hereby deleted. Accordingly the assessee is allowed to set off the current year loss against the additional income offered to tax as business income

15. The various other decisions relied on by the Id.counsel for the assessee also support his case to the proposition that provisions of section 69C r.w.s. 115BBE are not applicable to the facts of the present case. In view of the above discussion and in view of the detailed reasoning given by the Id.CIT(A) on this issue, we do not find any infirmity in his order directing the AO to tax the amount of Rs. 5,08,98,100/- under normal provisions of the Act. Accordingly, the same is upheld and the grounds raised by the revenue are dismissed.

16. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the Open Court on 31<sup>st</sup> May, 2023.

Sd/-

Sd/-

(LALIET KUMAR) JUDICIAL MEMBER	(RAMA KANTA PANDA) ACCOUNTANT MEMBER
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Hyderabad, dated 31<sup>st</sup> May,2023.

Thirumalesh/PVV sps

Copy to:

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3	Pr.CIT(Central), Hyderabad
4	DR, ITAT Hyderabad Benches



5	Guard File
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By Order