

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 4004/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2009-10)

Dr. Surendrakumar G. Patva C/o. Shind & Co., 19/146 Anand Nagar, Vakola Bridge, Santacruz (E), Mumbai-400 055	बनाम/ Vs.	ITO-16(3)(3), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AHJPP 8546 N		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से/Respondent by	:	Smt. Bharati Singh
सुनवाई की तारीख / Date of Hearing	:	03.11.2015
घोषणा की तारीख / Date of Pronouncement	:	20.11.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-7, Mumbai (‘CIT(A)’ for short) dated 27.02.2015, dismissing the Assessee’s appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 (‘the Act’ hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 27.12.2011.

2. We shall proceed ground-wise. The facts in relation to Ground 1 are that the assessee, a doctor by profession, was during the course of assessment proceedings

observed to have received cash loans aggregating to Rs.9,56,665/- during the relevant year in various sums ranging from Rs.15,000/- to Rs.19,500/-. On being called upon to explain, the same were stated to be from friends and relatives. However, the same were not supported by confirmations. The names and addresses of the creditors were also not furnished. The credits were under the circumstances treated as unexplained. No improvement in its case could be effected by the assessee in appeal. Though the assessee claimed a different aggregate sum, the same stood in fact confirmed by the Assessing Officer (A.O.) vide his order u/s.154 dated 17.01.2012, stating the figure of Rs.9.57 lacs to be correct, i.e., based on the cash book as produced, bearing receipts from 10.8.2008 to 31.03.2009. Further, it was observed by the Id. CIT(A) that though the names of the creditors were submitted, their addresses, PAN, confirmations, were not. Even no document to evidence their creditworthiness had been furnished. The addition u/s. 68 of the Act was, accordingly, confirmed, and against which the assessee is in further appeal.

3. The parties have been heard, and the material on record perused.

The assessee's only case before the Tribunal was that the cash loans received were in fact at a much lower sum of Rs.3,85,430/-. The papers submitted in support of the claim are not certified as true copies, being, in fact, not in the form of a paper-book. Further, a perusal of the same as well as that filed before the first appellate authority, reveal different figures being claimed as the amount of cash loans, viz. at Rs.3,55,330/- as per the memo of appeal before the Id. CIT(A); Rs.4,59,500/- per the statement of cash loans received from 10.08.2008 to 05.01.2009 (adduced now); and at Rs.3,85,430/-, per the summary of cash-book (adduced now). It has already been explained that the documents being relied upon cannot be said to form part of the record, being not per a paper-book, i.e., containing documents before the authorities below nor certified for being true copies. In fact, all that the assessee, to substantiate its claim, was required to do was to produce the A.O.'s letter dated 20.12.2011 (to

him), calling for the explanation for the credits (refer page 2 of the assessment order), as well as the assessee's reply thereto in-as-much as, the difference being substantiate, this would be the first objection that the assessee would have raised in the matter. The A.O. has already confirmed per s. 159 order (supra) the figure adopted in assessment to be in terms of the cash-book produced before him during the assessment proceedings. The assessee's balance-sheet (as on 31.03.2009) (now produced), assuming the same as filed along with the return of income, itself shows the unsecured loans as well as the deposits from the patients to be at Rs.15.96 lacs and Rs.5.8 lacs (as on 31.3.2009) respectively. The addition u/s.68 is under the circumstances confirmed; the parameter of section 68 being clearly unsatisfied. I decide accordingly.

4. The second disallowance agitated in appeal is in respect of interest expenditure, claimed in the sum of Rs.13,80,027/-, on proportionate basis, at Rs.80,774/-. The reason for the disallowance is the investment by the assessee in Sushila Hospital (Rs.1.28 lacs) and by way of loans and advances (at Rs.5.45 lacs), on which no income is generated, even as they are financed by borrowed funds, applying interest @ 12% p.a. In appeal, the assessee explained that the amounts were already advanced for the purchase of surgical instruments, on which therefore no interest could be charged. The same did not find favour as the contention was not substantiated with any evidence. In further appeal before this tribunal, no improvement in its case could be made by the assessee. The amounts, it is stated, had been advanced in earlier years. In that case, there would definitely be some correspondence for/or follow-up by the assessee seeking reasons for or to expedite the delay in the purchase, which would substantiate its claims and, besides, also reveal the reason for the non-supply of goods. The purpose of advance to Sushila Hospital is also not spelled out. It is only where the advance is shown to be for the purpose of assessee's business or profession, that interest attributable thereto could not be allowed. The assessee's case is wholly unevicenced. Under the circumstances, interference is declined. I decide accordingly.

5. The third and the final ground of appeal relates to the disallowance of consultation fees in the sum of Rs.1,05,300/-, paid to three doctors, in excess of Rs.20,000/- each (refer pg. 2 of the assessment order). The same stands disallowed for non-deduction and deposit of tax at source (TDS), and confirmed by the Id. CIT(A) for the same reason. The assessee's only case before the tribunal is that the amount stood paid during the year, so that no amount was payable as at the year-end and, therefore, section 40(a)(ia) shall not apply, relying on the decision in the case of *Merilyn Shipping & Transports v. Addl. CIT* [2012] 136 ITD 23 (Vish) (SB).

6. The parties have been heard, and the record perused. The default in the non-compliance of the TDS provision, i.e., in first deducting tax at source then depositing the tax, is admitted. Section 40(a)(i) only introduces a timing effect, so that on the deduction of tax and its deposit, the corresponding amount would stand to be allowed as deduction for that year, i.e., the year of deposit/payment (refer: *Tube Investments of India Ltd. vs. Asst. CIT* [2010] 325 ITR 610 (Mad)). The assessee's reliance in the case of *Merilyn Shipping & Transports* (supra) is of little consequence in view of the decisions by the Hon'ble Courts, as in the case of *CIT vs. Crescent Export Syndicate* [2013] 216 Taxmann 258 (Cal) and *CIT vs. Sikandarkhan N. Tunvar* [2013] 357 ITR 312 (Guj), overruling *Merilyn Shipping & Transports* (supra). The matter stands also discussed at length by the tribunal, as in the case of *Raviraj Relempaadu* [2014] 29 ITR 387 (Mum.)(Trib.) and *ITO vs. Pratibhuti Viniyog Ltd.* (in ITA No. 1689/Mum/2011 dated 22.08.2014), also discussion and distinguishing the decision by the Hon'ble Allahabad High Court in the case of *CIT vs. Vector Shipping Services* [2013] 85 CCH 201 (All); the issue of 'paid' and 'payable' being not before the Hon'ble Court. The assessee fails on the relevant ground.

7. Vide its fourth and the last ground, the assessee contest the levy of interest u/s. 234B of the Act. The same, as is well settled, is mandatory and consequential and, accordingly, there is no merit in the assessee's case. I decide accordingly.

8. Before parting with this order, it is observed that the assessee's appeal before the Id. CIT(A) was delayed by a period of over two months. The said delay was not condoned by the Id. CIT(A) in the absence of any explanation for the delay by the assessee (refer para 4 of the impugned order), but who nevertheless proceeded to decide the appeal, i.e., without prejudice. *The assessee's, who has not agitated this aspect of the matter before this tribunal, appeal is therefore not maintainable.* In fact, the said action of the Id. CIT(A) is not approved of in-as-much as it is only upon admission of appeal that he would assume jurisdiction to adjudicate the same. This aspect of the matter, i.e., of the first appeal being delayed and not condoned, was not brought to the notice of the Bench during the hearing of the instant appeal, and only came to notice only subsequently at the time of dictation of this order. It is unfortunate that neither party brought this to the notice of the tribunal, which accordingly proceeded to hear the appeal on merits. The objection to the action of the Id. CIT(A), as afore-stated, would accordingly obtain for the tribunal as well. However, in-as-much as the appeal was heard on merits, oblivious of the said fact, it is under the circumstances only considered it proper that, similarly, a decision be retained on the merits of the case as well, i.e., under the peculiar circumstances of the case, which would though only be without prejudice in-as-much as the jurisdiction issue of the maintainability of the appeal shall prevail.

9. In the result, the assessee's appeal is dismissed.

परिणामतः निर्धारिती की अपील खारिज की जाती है ।

Order pronounced in the open court on November 20, 2015

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 20.11.2015

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**