

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.2703/Del/2009
Assessment Year : 2005-06**

Shri Ajay Kumar Agarwal, Prop. Medicine Corner, 15-C, New Mandi, Muzaffarnagar.	Vs.	ITO, Ward- 1(2), Muzaffarnagar.
PAN : AGOPA4052C		
(Appellant)		(Respondent)

Assessee by : Shri V. K. Tulsian, Adv.
Department by : Shri R. C. Dande, Sr.DR
Date of hearing : 03-08-2017
Date of pronouncement : 01-11-2017

ORDER

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 31.03.2009 of CIT(A), Muzaffarnagar relating to assessment year 2005-06.

2. Facts of the case, in brief, are that the assessee is an individual and had filed his return of income on 31.10.2005 declaring income of Rs.1,00,940/-. In response to notice u/s 143(2) and 142(1), the AR of the assessee appeared before the Assessing Officer from time to time and filed requisite details. During the course of assessment proceedings, the Assessing Officer noted that AIR information from M/s Ganga Merchantile Urban Co-operative Bank Ltd., Muzaffarnagar was received, according to which, there were cash deposits of

Rs.45,44,870/- on various dates in Account No.3424 which is in the joint names of the assessee Shri Ajay Kumar Agarwal and his wife Smt. Alka Agarwal. On the basis of the information received as above the cases of the assessee as well as his wife were taken up for scrutiny. During the course of her assessment, the wife of the assessee pleaded ignorance about the transactions done through this Bank Account and in her statement recorded on oath she stated that whatever transactions were done through this bank account are known to her husband only and she has only signed the cheques at the behest of her husband. The Assessing Officer observed that the assessment in the case of Smt. Alka Agarwal has been completed at an income of Rs.45,44,870/- on protective basis and substantive assessment was advised to be completed in the hands of the assessee.

3. The Assessing Officer recorded the statement of Shri Ajay Kumar Agarwal during the course of assessment proceedings. In response to Question No.3, he also confirmed that whatever transactions made in the said account are known to him only and are not known to his wife. Regarding the deposit of cash on various dates in the said account, the assessee replied in response to Question No.4 that he gave the list of 30 persons who have deposited cash in his bank account for purchase of shares in different companies. He further submitted that he has subsequently transferred the shares to these persons. In

reply to Question No.4, he also stated that he is doing this type work since last four years and earns commission of about Rs.500/- per Rs.1,00,000/- on account of purchase and sale of shares. To ascertain the authenticity of the contention made by the assessee, the Assessing Officer issued summons to the 30 persons whose details were given by the assessee and directed them to attend his office on 28.12.2007. The Assessing Officer further observed from the confirmation letters filed by those 30 persons that their signatures on the confirmation letters and signatures made on IT Acknowledgements are different. He, therefore, was of the opinion that the confirmatory letters do not appear to have been issued by the persons who have filed their returns, photocopies of which were filed by the assessee during the assessment proceedings. For the above proposition, the Id. Assessing Officer referred to section 73 of the Evidence Act. The Assessing Officer discussed the confirmation and the opinion of the ITO, Ward 1(1) before whom those persons were assessed in the assessment order and came to the conclusion that the amount deposited in the bank account amounting to Rs.45,47,000/- is nothing but the income of the assessee. Despite giving specific opportunity to the assessee to produce the above 30 persons, the assessee failed to produce the above 30 persons. Therefore, invoking the provisions of section 69A, the Assessing Officer made addition of Rs.45,44,870/- as unexplained investment in bank account which was not

recorded in the books of account. The Assessing Officer accordingly completed the assessment u/s 143(3)/144 of the I.T. Act determining the total income at Rs.45,44,870/-.

4. Before the Id. CIT(A), the assessee challenged the ex-parte assessment order passed by the Assessing Officer on the ground that the same is highly arbitrary and unjustified. It was argued that the notice u/s 142(1) and queries dated 28th December, 2007 have never been served on the assessee and, therefore, proper opportunity of hearing has not been granted. An affidavit was also filed to substantiate that no assessment order was served on the assessee and he came to know about the finalization of the assessment order only when the notice of demand u/s 221(1) was communicated to him through public announcement. It was therefore argued that the belated filing of appeal may be condoned.

5. Ld. CIT(A) held that since the order was sent through Registered Post to the registered address, therefore, the service is treated as proper. In any case he observed that the Assessing Officer had got the orders and demand notices served also by way of affixture on the last known address i.e. 15-C, New Mandi, Muzaffarnagar. However, it was learnt that the assessee had sold this property and has gone to an unknown place. Ld. CIT(A) observed that the said property was attached u/s 281B holding the sale as invalid. It was at the time of recovery

matter being pursued by the TRO that the assessee suddenly appeared personally and applied for copies of assessment and penalty orders. Therefore, ld. CIT(A) held that delay in filing of the appeal was because of mala-fide reasons created by the assessee himself. He knew that the assessment proceedings are going on and the statement has been recorded and he was in rough waters because of his nefarious cash transactions of share applications had been detected by the Department. He absconded from his residence and thus deliberately avoided being served with the legal orders. He, therefore, held that it is not a fit case for condonation of delay in filing of the appeal. He accordingly treated the appeal as inadmissible at this juncture itself because of unreasonable and mala-fide delay in filing of the appeal.

6. Ld. CIT(A), however, proceeded to decide the appeal on merit on the ground that even if the delay in filing is ignored still the assessee does not have any merit. He observed that when the assessee appeared before him personally with his counsel, he apprised him about the ingredients of section 68/69 of the I.T. Act and burden on him to prove the genuineness and source of the cash/ funds aggregating to Rs.45,44,870/-. He was also apprised as to how conformity letters filed, allegedly received from 30 parties were apparently manipulated/ forged. He was also apprised as to why in such suspicious circumstances, it is imperative for him to produce those 30 persons, before the

Assessing Officer or before him so as to support his claim that he was only a conduit for share investments. However, the assessee admitted that he will not be able to produce any of these 30 parties for verification/examination. Ld. CIT(A), therefore, held that in absence of any plausible explanation from the side of the assessee the source of funds of Rs.45,44,870/- remains unexplained. He however noted that the Assessing Officer has added the same u/s 69A. Although, the assessee has not challenged the addition on that account, he held that it is his duty to rectify the same. According to him, although reference made to a wrong section/provision by itself does not vitiate any assessment. According to him, the correct provision under which the same should have been added is u/s 69 of the I.T. Act. Further, in view of various decisions, the addition could have been made u/s 68 of the I.T. Act. Relying on various decisions, he held that the amount of Rs.45,44,870/- is to be added to the total income of the assessee either u/s 68 or u/s 69 of the I.T. Act. The relevant observations of the ld. CIT(A) at page 10 of the order read as under :-

“7.5 Thus, the amount of Rs.45,44,870/- is clear-cut addable as assessee’s income from undisclosed sources, either under deemed provisions of section 68 (if these cash deposits are considered as cash credits in the books of the assessee, since he has admitted to have received these cash amounts from 30 creditors) or under deemed provisions of section 69 as the assessee is found to have made investment which are not recorded in the books nor declared in his income-tax return.

Thus, the assessee’s appeal is worth dismissal even on merits.

8. In view of the above, the appeal is dismissed both for reasons of unreasonable delay in filing of the appeal and also on merits.”

7. He accordingly dismissed the appeal filed by the assessee on merit as well as on account of delay in filing of the appeal before him.
8. Aggrieved with such order of the Id. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds :-

“1. Whether the Ld.CIT(A) was justified by not condoning the delay when actually there was no delay after receiving the order nor any objection from the Ld.AO for late serving the Assessment Order.

2. Whether the Ld.CIT(A) was justified to adjudicate on the appeal despite the fact that the appeal was inadmissible at the first stage by which condonation was not granted.

Without prejudice.

3. Whether the Ld.CIT(A) was justified to uphold addition of Rs.4548470/- just in an arbitrary manner and not sure whether it will fall u/s 69A or 68 or 69.

4. Whether the Ld.CIT(A) was justified to uphold the additions despite the admitted facts that there was no adverse material on record as regards the persons who deposited money for the purchase of shares.

5. Whether the Ld.CIT(A) was justified to uphold the order when there were no disputes that the share transactions took place.

6. Whether the Ld.CIT(A) was justified by upholding the additions just on assumptions and presumptions and pressing merely on difference in the signatures by the investors on the confirmations.

7. Whether the Ld.CIT(A) was justified by upholding the additions just by adding u/s 69A under the presumption that money belonged to the appellant while the statement recorded by the AO clearly says that the appellant owned no sizable asset.

That the appellant craves leave to amend, alter or to raise any other ground at the time of hearing.”

9. Ld. counsel for the assessee vehemently challenged the order of the Id. CIT(A). So far as the dismissal of the appeal on account of delay is concerned, Id. counsel for the assessee submitted that due to harassment by the Department, the assessee had left the place and there was no proper service of the assessment order on the assessee. Further, as borne out from the order of the Id. CIT(A),

the order was served through affixture. He submitted that the assessee came to know about the passing of the order only when the notice of demand u/s 221(1) was communicated to him through public announcement. Thereafter, the assessee obtained certified copies and filed the appeal and, therefore, in the interest of justice the delay in filing of the appeal should have been condoned.

10. So far as the merit of the case is concerned, ld. counsel for the assessee strongly challenged the order of the CIT(A) in confirming the addition made by the Assessing Officer. Referring to the decision of the Hon'ble Supreme Court in the case of Mohinder Singh vs. Chief Election Commissioner reported in AIR 1978 SSC 851, he submitted that the Hon'ble Supreme Court in the said decision has held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by the additional grounds later brought out. He submitted that in the instant case the assessee had given explanation that the amount so deposited were received from 30 persons for purchase of shares through the assessee and he was getting only commission. Referring to page 35 to 64 of the Paper Book, he drew the attention of the Bench to the details of deeds of share transfer. He submitted that the transfer of shares to the transferee

should not be proved to be false and untrue merely because the signatures did not tally. The same cannot be a ground to hold that the assessee has deposited his own money. He further submitted that out of amounts so received an amount of Rs.6,00,000/- has been refunded by Cheques during the year itself which has been ignored by the lower authorities. He submitted that had the assessee been the owner of so much money he would not have discontinued his business and left the place. He accordingly submitted that the order of the Id. CIT(A) be set-aside and the addition made by the Assessing Officer which has been upheld by the Id. CIT(A) should be deleted.

11. Ld. DR on the other hand heavily relied on the order of the Id. CIT(A). So far as dismissal of the appeal on account of delay in filing of the same is concerned, he submitted that the Id. CIT(A) has given justifiable reasons for not admitting the same. Therefore, the same should be upheld. So far as the merit of the case is concerned, he submitted that cash has been found to have been deposited in the bank account of the assessee for which the Assessing Officer invoked the provisions of section 69A. He submitted that the Id. CIT(A) after pointing out the mistake committed by the Assessing Officer has held that the same amount is taxable either u/s 68 or 69 of the I.T. Act. He submitted that the assessee is required to explain the source of such deposit beyond reasonable doubt. In the instant case, the assessee has not proved the same. Mere receipt

of commission from share trading account cannot justify the cash credit. The Id. DR relied on the decisions in the case of Nipun Builder and NR Portfolio Pvt. Ltd. and various other decisions. He submitted that in the instant case the assessee has not proved the identity of the persons. The assessee has expressed his inability to produce those persons. Therefore, under the facts and circumstances of the case, the addition made by the Assessing Officer and upheld by the Id. CIT(A) should be sustained.

12. Ld. counsel for the assessee in his rejoinder submitted that the decisions relied on by the Id. DR are not applicable to the facts of the present case since the same relate to share capital/share application money. In the instant case, the assessee had categorically stated that he was receiving commission for purchase of shares on behalf of different persons. Merely because those persons have not shown such shares in their statement of affairs/Balance Sheet as investment the same cannot be a ground to disbelieve the same. He accordingly reiterated that the addition made by the Assessing Officer and upheld by the Id. CIT(A) should be deleted.

13. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and the Id. CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case made addition of

Rs.45,44,870/- to the total income of the assessee u/s 69A of the I.T. Act on the ground that the assessee was unable to explain the source of above deposit in the bank account maintained jointly with his wife with M/s Ganga Mercantile Urban Cooperative Bank Ltd., Muzaffarnagar. It is pertinent to mention here that the assessment order was passed u/s 144/143(3). The submission of the assessee during the course of assessment proceedings that the assessee was doing share trading for different persons since last 3 to 4 years and was getting about 500 rupees for Rs.1,00,000/- for purchase of shares was not accepted by the Assessing Officer on the ground that signature on the conformity letters produced by the assessee are different from the signatures as per the income-tax acknowledgements and the assessee did not produce the persons before him for his examination despite being asked. We find since there was delay in filing of the appeal before the Id. CIT(A), he treated the appeal as unadmitted on account of delay. The submission of the assessee that the order was never served on him and he came to know the same only after the notices were communicated to him through public announcement system was rejected on the ground that the assessee was deemed to have been served the order when the same was sent through RPAD in his last given address and further the order was also served through affixture on the last known address which property the assessee subsequently had sold. Considering the totality of the facts of the case and in

the interest of justice, we are of the considered opinion that the Id. CIT(A) should not have dismissed the appeal on account of delay in filing of the same. In any case, since he has decided the appeal on merit also, we hold that the delay in filing of the appeal has to be condoned and the order of the Id. CIT(A) on this issue is reversed and the appeal is directed to have been admitted.

14. Now, coming to the merit of the case is concerned, we find the Assessing Officer made the addition u/s 69A of the I.T. Act. According to the Id. CIT(A), the same should have been added either u/s 68 or 69 of the I.T. Act. A perusal of the Paper Book filed on behalf of the assessee shows that he had filed the share transfer forms before the Assessing Officer and the Id. CIT(A), apart from filing of the conformity letters along with acknowledgements of income-tax return. Although the Assessing Officer has noticed that the signatures on the confirmation letters and the signatures on income-tax return acknowledgements are different, however, nothing has been brought on record to show that the share transfer forms containing the name of shares of the companies and number of shares etc. filed by the assessee are wrong or untrue or false. Merely because those investors have not shown such shares as investment in their statement of affairs or Balance Sheets, the same in our opinion cannot be a ground to make the addition in the hands of the assessee especially when he was stating from the beginning that he was getting only commission for buying

shares on their behalf. We also find some force in the argument of the Id. counsel for the assessee that had the assessee been the owner of so much money he would not have absconded from his place. Considering the totality of the facts of the case, we are of the considered opinion that the addition of the cash deposit in the bank account by the Assessing Officer and upheld by the Id. CIT(A) under the facts and circumstances of the case is not justified. However, since the assessee was indulging in such activities for which he was getting some commission, such commission income has to be brought to tax in the hands of the assessee. Although, the assessee had stated to have earned about Rs.500 towards purchase of shares of Rs.1,00,000/-, the same cannot be accepted outright. Considering the totality of the facts of the case and in the interest of justice, we are of the considered opinion that earning of 2% commission for purchase of shares worth Rs.1,00,000/- in the present set of facts and circumstances of the case will meet the ends of justice. Since the total amount deposited is Rs.45,44,870/-, therefore, applying the rate of 2% for every Rs.1,00,000/- purchase of shares, the amount comes to Rs.90,897/-. The order of the Id. CIT(A) is accordingly modified and the Assessing Officer is directed to substitute the figure of Rs.90,897/- as against Rs.45,44,870/-. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

15. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on this 01st day of November, 2017.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 01-11-2017.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi