In the Income-Tax Appellate Tribunal,
Agra Bench, Agra

Before: Shri A.D. Jain, Judicial Member And
Shri Dr. Mitha Lal Meena, Accountant Member

ITA No.314/Agr/2015
Assessment Year: 2010-11

M/s Abhilasha Construction, 516, Shivaji Nagar, KanpurRoad,Jhansi. PAN:AAIFA 8776 F **(Appellant)**	vs.	JCIT, Range-6,Aayakar Bhawan, Jhansi **(Respondent)**

Appellant by	ShriAnurag Sinha, Advocate.
Respondent by	Shri Waseem Arshad, Sr. DR

Date of Hearing	11.09.2018
Date of Pronouncement	04.10.2018

ORDER

Per Dr. Mitha Lal Meena, A.M.:

This is assesse's appeal for assessment year 2010-11, raising the following grounds:

1. *BECAUSE, separate addition of Interest Income amounting to Rs. 22,84,374/- as directed by the Ld CIT(A) is bad in law and on facts having been made without any show cause Notice or without any opportunity of hearing to the 'appellant' by the Ld.CIT(A).*

2. *BECAUSE, Ld. CIT(A) has grossly erred on facts and in law in enhancing the Income of the 'appellant'*

without any show cause Notice or opportunity of hearing to the 'appellant'.

3. *BECAUSE, in view of the past and subsequent history of the case separate addition against Interest was not called for and the profit applied by the 'AO' and sustained by the Ld. CIT(A) relying upon the past history of the case in which years also Interest Income was treated as Business Income.*

4. *BECAUSE, no separate addition against interest can be made as the FDR's are pledged with the Government Department against security towards Tender and as such form parts of total business receipts.*

5. *BECAUSE, Ld. CIT(A) ought to have held 'appellant' eligible for statutory claim of Depreciation and deductions under section 40(b) of the Act even after application of profit rate.*

6. *BECAUSE, the 'appellant' denies liability of interest under section 234B of the 'Act'.*

7. *BECAUSE, while making and sustaining the assessment the 'AO' and 'CIT(A)' has made various observations which are contrary to facts on records.*

8. BECAUSE, assessment order to the extent making variation in the Income returned is bad in facts and in law.

The appellant reserves his right to add, delete, modify, alter or substitute any or all the grounds of appeal.

2. Facts in briefly as per the records are that the assessee 'Firm', is engaged in the business of Civil Construction, filed return of Income for A.Y 2010-11 declaring taxable income of Rs. 65,52,900/-.TheAO, rejected the books of account and applied N.P rate of 7.25% as against 5.98% shown by the assessee, which resulted into addition of Rs. 16,16,079/-.

3. In appeal before Ld. CIT(A), the assessee filed written submission dated 10.09.2014 (APB 12-18) which is reproduced in order passed by Ld CIT(A) dated 17.03.2015, solely contending that no addition was called for this year because the N.P rate is progressive as compared to past years. The Ld. CIT(A) concluded the order by observing as under:

"Considering the above facts & circumstances of the case and looking to the fact that the Ld. AR has failed to produce books of accounts as well as the details called for by me during the appeal proceeding, the correctness and completeness of books of accounts of the assessee (appellant) could not be established and hence, the AO has been found correct in rejecting the books

of accounts u/s 145(3) of the Act. After rejection of the books of account, income of the assessee is to be estimated to arrive at an amount of reasonable assessed income as held by the Hon'ble Apex Court relied upon by the AO in case of Kachwala Gems Vs. Jt. CIT (2007) 158 Taxman 71 (SC). Though the AO has applied an estimated net profit rate of 7.25% she has not given any basis of taking the above net profit. However, after discussing the matter with the Ld. AR and considering the net profit rate of 6.4% applied in case of the assessee (appellant) for A.Y. 2011-12, it has been agreed by the Ld. AR to take net profit of 6.5%. Therefore, the AO is directed to apply net profit rate of 6.5% on the turnover of the assessee from contract & freight receipt declared at Rs. 12,76,42,860/-. After going through the profit & loss account, it has been found that the assessee has declared other income of Rs. 22,84,374/- consisting of interest on Rs. 1,218/- included in the returned income of Rs. 76,38,028/- declared by the assessee. On these interest incomes the net rate of profit is not to be applied because for earning of these interest incomes no expanses have been incurred by the assessee. Therefore, while giving effect of this order, the AO shall apply the net profit rate of 6.5% only on contract and freight receipts of Rs. 12,76,42,860/- and other income of Rs. 22,84,374/- declared by the assessee from FDR Interest and Interest of Income Tax Refund should be assessed separately. In view of my decision, Ground No. 1 taken by the appellant challenging the rejection of books of accounts u/s 145(3) is dismissed and Ground No. 2 challenging the net profit rate at 7.25% is partly allowed."

4. The counsel for the assessee contended that while giving effect to the order passed by the CIT(A) as above, the AO, recomputed the income of the assessee by making separate addition of Rs. 22,84,374/- under the head 'Income from other sources' as directed by the Ld CIT(A),vide order dated 05.06.2015 passed under section 143(3)/251 of the Act.

5. The Ld A.R of the assessee, drawing our attention to its Synopsis dated 09.07.2017 contended that action of the Ld. CIT(A) deserves to be quashed. Legally no such addition could be made under the law by discovering a new source of Income not considered by the AO for the purpose of making an addition the first 'appellate' authority cannot, in exercise of its power of enhancement, seek to bring in for levy of tax something which was never under consideration by the 'AO'. If, the 'AO' during the course of framing of the assessment had not considered an item as income separately liable to tax, under the guise of power of enhancement the Ld CIT(A) cannot exercise his authority to bring to tax those items which come to his notice for the first time in the course of hearing of the appeal. Reliance was placed to 'CIT vs. Shapoorji Pallonji Mistry', (1962) 44 ITR 891 (SC) and 'CIT vs. Rai Bahadur Hardutroy Motilal Chamaria', (1967) 66 ITR 443 (SC), (APB-244-254). Reliance

was also placed on 'CITVs Union Tyres (1999) 240 ITR 556 (Del); CIT Vs Sardari Lal & Co. (2001) 251 ITR 864 (Del) (F.B) and thus, on the strength of above precedents submitted that Ld. CIT(A) was legally unjustified in issuing directions for making separate addition in respect of Interest Income failing to take note of the fact on records that no such addition was made by the AO and no such issue was under appeal for his consideration and thereby discovering a new source of Income. The action of the Ld. CIT(A), was therefore requested to be vacated.

6. It was also argued by the Ld A.R that the action of the Ld. CIT(A) is illegal as the Ld first appellate authority before making enhancement did not comply with the directory provision of section 251(2) of the Act and no Notice was issued to the 'appellant' to show cause as to why Interest Income be separately taxed under the head 'Income from Other Sources' when no such addition was made in the impugned assessment order and no such addition was ever made in past assessment. The Ld. CIT(A) while estimating the Income vide appellate order dated 17.03.2015 on Page-4, Para 5, while applying N.P rate of 6.5% has placed reliance to Assessment Order passed in subsequent A.Y 2011-12 where the AO made addition of Rs.4,00,000/- and as per Chart furnished in the Written Submission before the Ld CIT(A) after addition

of Rs.4,00,000/- N.P got worked out at 6.4%. Assessment order for A.Y 2011-12 was filed before Ld CIT(A) where it can be seen that in A.Y 2011-12 assessment got completed after making addition of Rs.4,00,000/- and that is how after assessment the N.P worked out to 6.4%. It was submitted, by referring to Assessment order for A.Y 2011-12 that when the Ld CIT(A) has placed reliance to the rate of 6.4% as got worked out after assessment in A.Y 2011-12, it includes Interest Income of Rs. 18,11,496/ as verifiable from Schedule-16 of the Balance Sheet for A.Y 2011-12 (APB-150) and therefore after having relied upon rate of profit worked out in A.Y 2011-12 the Ld CIT(A) was highly unjustified in directing separate addition against Interest Income in the year under consideration. Reliance was placed to Gajendra Nath Chhoker Vs ITO, Gwalior (2018) 91 taxman.com 184 (Agra-Trib.)

7. Lastly it was submitted that Interest on FDR's amounting to Rs.22,84,374/-has accrued on FDR's which are pledged as security with the contractee Departments in compliance with statutory requirement of such Government Departments and from whom assessee has derived business income. Reliance was placed to:

(a) CIT Vs M/s Gupta Construction Company, ITA No. 250 of 2013 (All. H.C)

(b) M/s Awasthi Traders, Etawah Vs CIT, Agra (2014) 5 TMI 1119 (All)

(c) Mahesh Chandra Contractor Vs ITO, Etawah (ITAT, Agra Bench)

(d) Sagamihara'sCIT (2012) 25 Taxman.com 117 (Patna)

(e)CIT Vs ChinnaNachimuthu Construction 297 ITR 70 (Karn.)

(f) ITO VsTahirAli (2001) 116 Taxman 226 (Jab) (Mag)

(g) Ganesh Builders Vs CIT (2013) 87 DTR (Jd)(Trib) 182

8. Per contra, the Ld D.R defended the action of the Ld. CIT(A) and submitted that as the N.P rate was applied by the AO only on the contract receipt amounting to Rs. 12,76,42,860/- and just by omission of interest Income which as per audited accounts was being shown in Profit & Loss Account amounting to Rs.22,84,374/-was omitted while computing total income in the assessment order and therefore the Ld CIT(A) was quite justified in directing the AO to make separate addition against Interest Income of Rs. 22,84,374/-. He also submitted that by virtue of the explanation in section 251(2) the Ld. CIT(A) was well within his power to have directed the AO to make separate addition notwithstanding the fact that such matter was not raised in appeal. The Ld D.R. also submitted that interest income as was shown by the appellant was rightly assessed as income from other sources.

9. We have heard the parties, perused the impugned order, given careful thought to the issue under consideration in the light of precedents cited by the parties and position of law. It is undisputed fact that issue of Interest Income was not subject matter of appeal before Ld CIT(A) and during the course of appellate proceedings, no show cause notice was given by the Ld CIT(A) to the assessee before giving direction for making separate addition in respect of amount of Rs. 22,84,374/-. In view of these undisputed facts we agree with the submission of the assessee that such direction which has resulted into enhancement of income cannot withstand and deserves to be quashed. ITAT Agra Bench in the case of 'Gajendra Nath Chhoker (supra)' had the occasion to deal with an identical situation where assessee therein had filed an application under section 154, contending that the assessment order passed contained certain mistakes in calculation of capital gains. The Assessing Officer found the said mistake to be correct. However, he noticed that in the computation of capital gains, as done by him, there were further mistakes. He corrected these mistakes and enhanced income. Before the CIT (A), the assessee contended that the AO had enhanced the income without allowing any opportunity to the assessee, which was not sustainable in law. The CIT (A) observed that

mistake as pointed out by assessee was such which required re-computation in entirety and if in the process of rectification being done as requested by the assessee, in ultimate analysis income got enhanced; he could not be heard to say that opportunity was not made available. The Bench while quashing the action held that the above observations of the CIT (A) are found to be clearly incorrect. The assessee cannot, through enhancement without notice, be reduced to a position worse than that he was in when he filed the application for rectification. Thus, section 154(3) provides, in very clear and unambiguous terms, that an amendment which has the effect of enhancing an assessment shall not be made under section 154, unless the Authority concerned has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard. Once the provision itself is clearly worded, the CIT (A) has evidently erred in going behind the same to seek the intention behind it. There is no scope for this in view of the unambiguous statutory mandate of the section. The legislature chooses its words with utmost care. The direct words employed in the section permit no other intendment to be read into it. The use of the word 'shall' make the compliance of the section statutorily mandatory. The CIT (A) has erred in terming the

assessee's legitimate grievance of non-compliance with the section to be a 'too farfetched 'interpretation of the provision, which `does not appear to be logical'. As noted, the clear mandate of the section leaves no room for any logic to be supplemented. The provision is entirely in conformity with the natural justice principle of audi-alterem-partem, i.e., opportunity of hearing must be provided to the affected/other party. The CIT (A) has also observed that the substance of the rectification application was that the capital gains had been erroneously computed. According to the CIT (A), since this was agreed to by the AO, the assessee cannot grudge that if ultimately the income would get enhanced, still he ought to be heard. This, once more, is without any reasoning. The assessee had filed the rectification application seeking relief. It was not a self-inculpatory application. The assessee was not inviting enhancement of his income thereby. Thus, if an enhancement was being contemplated by the AO, obviously that could not be done without notice taking the assessee by surprise and causing prejudice to the assessee. In view of the above, the grievance of the assessee was found to be justified. The order of the CIT(A) was reversed.

10. The facts of the case referred case are identical to the case on hands where assessee had filed an appeal before Ld CIT(A) seeking

reduction/relief in the income assessed by AO after application of N.P rate of 7.25% and the Ld CIT(A) ignoring the clearly worded sub-section (2) to section 251 of the Act which clearly mandates that the CIT (A) shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such enhancement, took the assessee by surprise by causing prejudice to its right by issuing directions in the appellate order that the Interest Income be assessed separately, which as demonstrated by the assessee with reference to order passed under section 143(3)/251 has resulted into enhancement of income. Therefore, considering the peculiar facts of this case and ratio laid down in the case of 'Gajendra Nath Chhoker(supra)',we expunge the direction of the Ld CIT(A) for making separate addition of Rs. 22,84,374/-.

12. There is equal force in the objection taken by the Ld A.R that addition of Rs. 22,84,374/-is legally unsustainable as while assuming jurisdiction u/s 251(2) of the Act the first appellate authority cannot discover a new source of Income, being income from other sources, as directed by him, which was not considered by the AO for the purpose of making an addition. In this regard authority is derived from the Hon'ble Delhi High Court judgment in the case of CIT Vs Union Tyres (1999) 240

ITR 556 (Del) held that though the first appellate authority is invested with very wide powers under section 251(1)(a). However, there is a solitary but significant limitation to the power of revision, viz. that it is not open to the Commissioner to introduce in the assessment a new source of income and the assessment has to be confined to those items of income which were the subject-matter of original assessment. The Full Bench of the Hon'ble Delhi High Court in the case of CIT Vs Sardari Lal & Company (2001) 251 ITR 864 (Del) (F.B) where the Hon'ble Full Bench observed that the question of first appellate authority's power to take into account a new source of income was referred for fresh adjudication and required a fresh look. The revenue, before the Hon'ble Court contended that proceedings before the first appellate authority cannot be restricted to only those matters considered and decided by the assessing authority. It has the power to enhance income which the Assessing Officer had failed and neglected to consider certain aspects and it has the power to adjudicate and decide everything necessary to ascertain the true and correct income of the assessee. On the other hand, the assessee contended that if such a view was taken, the provisions for reopening an assessment available under section 147/148 and/or setting aside of the order on the ground that it was prejudicial to

the interest of the revenue as available to the Commissioner under section 263 could be meaningless and purposeless. Hon'ble High Court after consideration of various decisions of the High Courts, as well as the Supreme Court, held that it is inevitable that whenever the question of taxability of income from a new source of income is concerned which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions a similar power is available to the first appellate authority. Respectfully following the judicial guidelines in the matter, we are of the firm opinion that the order passed by the Ld.CIT(A) besides being passed in violation of principles of natural justice, lacks for want of jurisdiction too as the Ld. CIT(A) exceeded his jurisdiction in giving direction in respect of a new source of income i.e 'Income from other sources' which was neither considered by the AO nor was subject matter of consideration in appeal before Ld. CIT(A).

13. Since, we have held above that the action of the Ld. CIT(A) is unsustainable in law therefore, the issue as to whether FDR's Interest is business income or income from other sources becomes academic in

nature and therefore, it is left open for adjudication in any other appropriate case.

14. Now dealing with the arguments raised by the Ld. Sr. D.R by mistake interest income was not added while computing total income in the assessment order dated 26.02.2013 and therefore the Ld CIT(A) was quite justified in directing the AO to make separate addition against Interest Income of Rs. 22,84,374/-. We are afraid that first of all this submission is in teeth of the Judgment by the Hon'ble Delhi High Court in Sardari Lal & Company (supra) wherein Hon'ble Full Bench has held that the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled.

14.1 The objection by the Sr. D.R is factually wrong too in as much as that the Ld CIT(A), decided the appeal after application of N.P rate @ 6.5% on the basis of assessment order dated 27.02.2014 for assessment year2011-12 passed by the Jt. CIT, Range-6, Jhansi (APB 156-161) wherein assessment was completed after making addition of Rs.4,00,000/- in Returned income of Rs. 21,63,110/- which gives N.P rate of 6.37% before interest and salary to partners. In this Returned Income of Rs. 21,63,110/-, Interest Income shown of Rs. 18,11,496/-

(APB- APB 146) is duly included. Thus, rate of 6.37% was arrived after including Interest income which got merged in Net Profit arrived in audited accounts.

14.2 Similarly in the year under appeal (A.Y 2010-11) interest income of Rs.22,84, 374/- is included in Net Profit of Rs. 61,59,407 (APB-46) and the AO in this year also made addition adopting the Return Income of Rs. 76,38,028/- which included Interest income of Rs.22,84,374/- shown by the assessee. Thus, Interest income in the facts and circumstances of the case and in view of the past and subsequent history of assessment and in the light of assessment order for A.Y 2011-12 already stood considered while working out the figure of addition as a result of application of N.P rate, therefore, do not warrant separate addition and it is not correct to project that the AO framing assessment omitted to make addition of Rs. 22,84,374/- in the year under appeal.

15. In the above view above discussion, we accept the grievance of the assessee as justified. Since, we have already expunged the directions issued by the Ld CIT(A) on the issue of the direction to the AO, the issue of separate addition in respect of 'other income' as to whether the FDR interest, in the facts and circumstances of the case

constitutes business income or not is left open to be dealt with in any other appropriate case.

16. In the result appeal filed by the assessee is allowed.

(Order pronounced in the open court on 04/10/2018)

Sd/-	**Sd/-**
(A. D. JAIN)	**(DR. MITHA LAL MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 04/10/2018

Aks

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

		Date	
1.	Draft dictated (DNS)	27/09/2018	PS
2.	Draft placed before author	04.10.2018	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk		PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		