

FIT FOR PUBLICATION

Sd/- Sd/-
(AM) (JM)

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'B': NEW DELHI)**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 6261/Del/2015
(Assessment Year: 2011-12)**

Dhruv Sachdeva, WZ-276, 3 rd Floor G-Block Jail Road Hari Nagar, New Delhi.	Vs.	ACIT Circle-27(1), New Delhi.
PAN No: BAVPS3244Q		
APPELLANT		RESPONDENT

Assessee by : Sh. Rajan Bhatia &
Sh. Sunil Dhamija, Adv.
Revenue by : Ms. Ashima Neb, Sr. DR

ORDER

PER: ANADEE NATH MISSHRA, AM

Assessee filed return of income declaring total income of Rs. 49,91,720/-. This was initially processed U/s 143(1) of Income Tax Act, 1961 ("I.T. Act", for short) wherein returned income was accepted. Subsequently, proceedings U/s 147 r.w.s. 148 of I.T. Act were initiated vide notice dated 28.03.2013. Assessment order u/s 143(3) of the Act, dated 27/03/2014 was passed wherein total income was determined at Rs.

1,01,74,431/- as against returned income of Rs. 49,91,720/-. The Assessing Officer made following additions in the Assessment Order:

- i) Rs. 48,19,659/- on account of Difference in TDS receipt.
- ii) Rs. 1,32,047/- on account of Telephone Expenses.
- iii) Rs. 84,700/- on account of car R& M expenses/Car repair & maint/Insurant/Depreciation on Car expenses.
- iv) Rs. 1,46,305/- on account staff welfare/misc. expenses/entertainment to customers.

2. The Assessee filed appeal before the Ld. CIT(A), in which the aforesaid additions/disallowances were contested. Vide order dated 28.09.2015, the Ld. CIT(A) confirmed the aforesaid additions of Rs. 48,19,659/- and allowed partial relief out of expenses related to Car and Telephone Expenses. The present appeal before us is against the aforesaid order dated 28.09.2015 of the Ld. CIT(A). The Assessee has taken the following grounds in the appeal:-

- “1. That the order of the Ld. CIT (Appeals) is bad both in law and on the facts of the case.*
- 2. That the action of the AO u/s 147/148 is bad in law and on facts. Section 147/148 is not applicable to the facts of the case.*
- 3. That the proceedings u/s 147/148 are time barred.*
- 4. That there was ‘No reason to believe’ to take action u/s 147/148. That the AO acted merely under “suspicion” and this vitiates the AO’s action. Further, there was no “nexus” between the primary facts and belief u/s 147/148 and this vitiates the action u/s 147/148.*
- 5. That the reasons to reopen were neither recorded nor supplied to the assessee and this vitiates the action taken.*
- 6. That the action of the AO is mechanical and suffers from non application of his own mind on the part of AO and this vitiates the action taken.*
- 7. That action & the proceedings u/s 147 suffer from material irregularity*

and are void ab initio as the AO has attempted to do indirectly what he would have done & failed to do directly and in particular.

a) The action of the AO is based on stale information.

b) is mere attempt to make further investigation.

c) is based mechanically merely on information received which information is also wrong and wholly vague.

8. *That the AO has acted without jurisdiction and AO's action u/s 147/148 is without any basis. In fact jurisdictional facts were absent to take / justify action u/s 147/148.*
9. *That when the time to issue 143(2) notice or complete the original assessment u/s 143(3) has not elapsed no notice u/s 148 can be issued.*
10. *That the AO erred in adding to income an amount of Rs.48,19,659/- on account of difference in TDS receipts by absolutely ignoring that the assessee is following Cash Method of Accounting which is well recognized as per section 145 of the I.T. Act, 1961 and CIT (Appeals) erred in upholding the same.*
11. *That the AO erred in by not allowing the assessee the Cash Method of Accounting being followed by the assessee regularly since the inception and thereby making a bogus addition of Rs.48,19,659/- and the CIT (Appeals) erred in upholding the same.*
12. *That the AO erred in treating the difference of receipts as Income (as shown / offered and available in Form 26AS) by not appreciating the fact that the assessee is following Cash Method of accounting regularly and consistently and CIT (Appeals) erred in upholding the same.*
13. *That the AO's order is absolutely defective and bad in law as it is against the spirit of Section 145 of the I.T. Act, which allows the assessee to follow either of the system of accounting viz. Cash System or Mercantile System and the CIT (Appeals) erred in upholding the same. The order of AO is mechanical, non reasoned & passed without affording a proper opportunity of being heard to the assessee.*
14. *That the AO's order is null and void as AO did not record any clear finding as to the defect in the system of accounting being followed by the assessee and the CIT (Appeals) erred in upholding the same.*
15. *That the income of Rs.48,19,659/- had not accrued to the assessee. The AO did not consider the submissions of the Appellant and the so called difference in TDS receipts amount is not taxable at all as the same has been offered for taxation in subsequent year following the Cash System of accounting and CIT(Appeals) erred in by upholding the same.*
16. *That it was not open to the AO to intervene and substitute the different*

method of accounting then the one which being followed by the assessee uniformly and regularly since the inception and CIT (Appeals) erred in by upholding the same.

17. *That the Ld. CIT (Appeals) erred in by applying Rule 37 BA of I.T. Rules, and by ignoring the fundamental fact that under the I.T. Act, it is the choice of the assessee to follow either of the system of accounting viz. Cash System or Mercantile System under section 145 of the I.T. Act, 1961, and rules are to be read in conjunction with the Act.*
18. *That the order of the AO is null and void in view of the legal precedents of the various courts in assesses favour and CIT (Appeals) erred in by not following / adhering to the same inspite of the written submissions.*
19. *That the AO erred in by disallowing 1/5th i.e. amounting to Rs. 1,32,047/- on adhoc basis out of the Telephone Expenses incurred by the assessee wholly and exclusively for the business purposes and CIT(Appeals) erred in by not quashing the entire amount.*
20. *That the AO erred in by disallowing 1/5th of the Car running & Maintenance, Insurance, Depreciation on Car amounting to Rs.84,700/- in a mechanical manner towards the personal usage by the assessee and the CIT(Appeals) not deleting the entire amount.*
21. *That the AO erred in by disallowing 1/10th of various Expenses (Accounting Charges, Business Promotion, Conveyance, Entertainment, Office repair & Maintenance & Staff Welfare etc.) amounting to Rs. 1,46,305/- on adhoc basis without any cogent evidence and the CIT(Appeals) erred in by upholding the same.*
22. *That the Order of AO is based on surmises and is absolutely mechanical in nature and further all relevant evidences were ignored while computing the assessment and the assessment framed is time barred, and CIT(Appeals) erred in by upholding the same.*
23. *That the AO passed the order absolutely mechanically without applying his mind and CIT(Appeals) erred in by upholding the same.*
24. *That the AO wrongly charged the interest u/s 234(A), 234(B), 234(D) totaling to Rs. 6,65,739/- (Rs. 54,506+Rs.5,76,524+ Rs.34,709), and CIT(Appeals) erred in by upholding the same.*
25. *The appellant craves to leave to add, to alter, and to delete all or any grounds of appeal.”*

2.1. Although the Assessee has taken numerous grounds in the appeal filed in Income Tax Appellate Tribunal (ITAT), broadly the grounds can be classified into the

following categories:

- i) Grounds related to initiation of proceedings U/s 147 r.w.s. 148 of IT Act.
- ii) Grounds related to merits of addition of Rs. 48,19,659/- on account of difference in TDS receipts.
- iii) Grounds related to merits of disallowances out of Car Expenses, Telephone Expenses and Staff Welfare Expenses.
- iv) Ground related to interest charge U/s 234A, 234B, and 234D of the Act.

For the sake of convenience we shall dispose off the grounds of each of the above categories in a consolidated manner, taking up each category of grounds one by one.

3. As far as grounds related to initiation of proceedings U/s 147 r.w.s. 148 of I.T. Act are concerned, the Ld. Counsel for Assessee drew our attention to the reasons recorded by the Assessing Officer for initiation of proceedings U/s 147 r.w.s. 148 of I.T. Act. The reasons recorded by the Assessing Officer are reproduced below for ready reference:-

"As per information in form 26AS available in this office, it revealed that Sh. Dhruv Sachdev has received gross receipts to the tune of Rs. 1,94,11,386/- from professional receipts during F.Y. 2010-11 relevant to the Assessment Year 2011-12 against his PAN: BAVPS3244Q. However, on perusal of Income-tax return for the A.Y. 2011-12, it is revealed that assessee has declared gross received of Rs. 1,38,40,587/- only for the F.Y. 2010-11 relevant to the A.Y. 2011-12. Therefore, facts are leading to conclusion that the assessee has not declared his income/receipts to the tune 55,70,799/- (Rs. 1,94,11,386/- minus 1,38,40,587/-) for A.Y. 2011-12 and has evaded tax liability on the income earned during this period.

Keeping in view the facts mentioned above, I have reason to believe that Income of Rs. 55,70,799/- chargeable to tax has escaped assessment for the A.Y. 2011-12 as defined under Section 147 of the I.T. Act, 1961 in case of Sh. Dhruv Sachdev. Therefore, I am satisfied and have reason to believe that it is a fit case for issuance of notice under 148 of the IT Act, 1961."

3.1. The Ld. Counsel for the assessee contended that the only reason recorded by Assessing Officer for initiation of proceedings U/s 147 r.w.s. 148 was mismatch between gross professional receipts as per Form 26AS and gross receipts disclosed by the Assessee in Return of Income. The Ld. Counsel contended that the Assessee follows cash system of accounting and not mercantile system of accounting; and therefore, it is to be expected that the gross receipts as per the form 26AS will not match with gross receipts recognized in accordance with cash system of accounting. However, the Ld. Counsel fairly conceded that the Assessee had claimed credit for prepaid taxes on account of TDS, even in respect of those professional receipts appearing in form 26AS which were not shown by the Assessee as professional receipt in the return of income for this year. Further, when pointed out by Ld. Departmental Representative appearing for Revenue, the Ld. Counsel for Assessee also conceded that the initiation of proceedings U/s 147 read with section 148 of I.T. Act are being contested by the Assessee for the first time before ITAT; and this issue was not contested either at the stage of assessment proceedings or at the stage of appellate proceedings before Ld. CIT(A). During the course of making submissions before us at the time of hearing, the Ld. Counsel for the Assessee decided not to press grounds related to initiation of proceedings U/s 147 r.w.s. 148 of I.T. Act. Therefore, grounds related to initiation of proceedings U/s 147 r.w.s. 148 of I.T. Act are hereby dismissed being not pressed.

4. As far as the grounds related to merits of aforesaid addition of Rs. 48,19,659/-

are concerned, the Ld. Counsel for the Assessee as well as the Ld. Departmental Representative were in agreement that the addition has resulted because of mismatch between gross professional receipts as per Form 26AS and the receipts shown by the Assessee in the return of income. The Ld. Counsel for the Assessee explained to us that because of cash system of accounting, which is being followed by Assessee regularly, part of the professional income has been disclosed in subsequent year(s); in the year in which the corresponding amounts of professional receipts were actually received by the assessee. Thus, although certain amounts appear in form 26AS for this year because tax was deducted at source, the income was shown in a subsequent year, based on cash system of accounting regularly followed by the Assessee. The Ld. Counsel drew our attention to the reconciliation filed by the Assessee before the Assessing Officer and before the Ld. CIT(A) wherein information was provided as to year in which income was shown by Assessee. The Ld. Counsel strongly contended that the income of the Assessee should be determined as per cash method of accounting, which is regular method adopted by the assessee. The Ld. Counsel for Assessee also relied on order dtd. 03-01-2018 of SMC Bench of ITAT in Assessee's own case, in ITA No. 6914/Del/2017 for A.Y. 2007-08. The Ld. Departmental Representative relied on the orders of the Assessing Officer and the Ld. CIT(A).

4.1. We have heard both sides and perused the materials on record. Before we decide this issue, law as it applies to facts of this case, needs to be understood. In the case of the Assessee i.e. the Payee, deductors have deducted tax at source U/s 194J and U/s 194A of I.T. Act. Under these provisions, the deductor is required to deduct

tax at source at the time of credit of the specified sum or income (as the case may be) to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier. Thus, the deductor is required to deduct tax at source at the time when the sum or income (as the case may be) is credited to the account of the payee, even if actual payment is made later. At times, a situation may arise, as has happened in the case of the Assessee, that actual payment of certain sum(s) or income (as the case may be) may be made to the payee (here, the Assessee) in a subsequent year although tax has been deducted at source by the deductor in an earlier year, because the sum or income (as the case may be) was credited by the deductor to the account of the payee, in such earlier year. In such situations, if the payee follows cash system of accounting instead of mercantile system, even though the sum or income (as the case may be) has been credited to the account of the payee and the corresponding amount has accrued as income of the payee in the earlier year, the payee does not recognize it as income of the earlier year, and offers it as income of the subsequent year (the year in which actual payment was received) in accordance with cash system of accounting. This is what has happened in the present case: though certain sums/income appear in form 26AS for this year (because tax was deducted at source in this year) the assessee has not offered it as income in the Return of Income because actual payment was not received by the Assessee in this year; and these amounts have been disclosed by the Assessee as income in a subsequent year, in the year in which it was actually received, in accordance with cash system of accounting.

4.2 We find that Ld. CIT(A) confirmed the aforesaid addition of Rs. 48,19,659/- made by the Assessing Officer by taking note of Rule 37BA of Income Tax Rules, 1962 ("I.T. Rules", for short) and upheld this addition on the ground that the Assessee had taken credit of the corresponding tax deducted at source. However, we are of the view that the Ld. CIT(A) has not interpreted the provisions of law correctly. As per Rule 37BA, credit for tax deducted at source and paid to the Central Government is to be given for the Assessment Year for which such income is assessable. However, **provisions under Rule 37BA of I.T. Rules do not authorize Revenue to bring such amounts to tax which are not assessable during the year on the basis of regular method of accounting followed by the assessee.** Section 145(1) of I.T. Act makes it abundantly clear that income chargeable under the head of "Profit and Gain of business or profession" shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the Assessee. **If the assessee has erroneously taken credit for prepaid taxes on account of tax deducted at source; then having regard to Rule 37BA of Income Tax Rules, Revenue will be justified in denying credit for such amount of prepaid taxes on account of tax deducted at source. However, Revenue cannot, merely because credit for tax deducted at source has been erroneously claimed by the Assessee, bring corresponding professional receipts to tax, if such receipts are otherwise not assessable as income in accordance with law.** We find that both sides, Revenue as well as Assessee, are in error of law. On one hand, the Assessee has erroneously claimed credit for prepaid taxes on account of tax deducted at source even in respect of

such amounts which are not assessable to tax in this year as per method of accounting regularly followed by the Assessee. On the other hand, Revenue has added certain amounts as income of this year, even though these amounts were not actually received in this year and were not, under cash system of accounting regularly followed by the Assessee, chargeable as income of this year, in view of unambiguous provisions prescribed U/s 145(1) of I.T. Act. The Assessee distorted the law by wrongly claiming credit for prepaid taxes on account of tax deducted at source; even though corresponding amounts are not offered as income, and thus the approach of the Assessee was to distort law. On the other side, the approach of Revenue was to wrongly invert the law by erroneously charging such amounts to tax which are not assessable as Assessee's income of this year under cash system of accounting regularly followed by the Assessee, merely because Assessee has claimed credit for tax deducted at source on corresponding amounts; instead of following the correct approach whereunder Revenue should have allowed credit for tax deducted as source in respect of such amounts only which are assessable as income of this year in accordance with cash system of accounting regularly followed by assessee. We disapprove the approaches of both Assessee and Revenue. **It is not permitted for anyone to either distort or to invert law.** Therefore, we set aside the orders of Ld. CIT(A) and the Assessing Officer and we restore this matter to the file of the Assessing Officer to re-compute the income of the assessee in accordance with cash system of accounting, which is the system of accounting regularly employed by the Assessee; and to give credit for prepaid taxes on account of tax deducted at source, as per law, having regard

to section 199 of I.T. Act r.w.r. 37BA of Income Tax Rules. Grounds related to merits of aforesaid addition of Rs. 48,19,659/- on account of difference in TDS receipts are hereby disposed off in accordance with these directions.

5. As far as grounds related to disallowance of expenses out of Car Expenses, Telephone Expenses and Staff Welfare Expenses are concerned; the Ld. Counsel for the Assessee failed to bring any materials for our consideration to prove that the disallowances confirmed by the Ld. CIT(A) were excessive, unreasonable, erroneous or against law. The Ld. Counsel for Assessee failed to make a case for any interference with the order of Ld. CIT(A) on these issues. Therefore, grounds related to disallowances out of Car Expenses, Telephone Expenses and Staff Welfare Expenses are hereby dismissed.

6. Ground related to interest U/s 234A, 234B & 234D of I.T. Act are consequential in nature. The Assessing Officer is directed to re-compute the interest under these sections of I.T Act as per law, at the time of giving effect to this order.

7. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 18/9/2018

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-

(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 18.09.2018
Pooja/-

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	14 /9/2018
Date on which the typed draft is placed before the dictating Member	17 /9/2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	18 /9/2018
Date on which the fair order is placed before the Dictating Member for pronouncement	18 /9/2018
Date on which the fair order comes back to the Sr. PS/PS	18/9/2018
Date on which the final order is uploaded on the website of ITAT	18 /9/18
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	