

आयकर अपीलीय अधीकरण, न्यायपीठ – “A(SMC)” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A(SMC)” BENCH: KOLKATA
 (समक्ष) श्री ए.टी. वर्की, न्यायिक सदस्य)
 [Before Shri A. T. Varkey, JM]

ITA No.13/Kol/2020
Assessment Year: 2011-12

Rajendra Kumar Agarwal (PAN: ADAPA9461C)	Vs.	Income-tax Officer, Wd-46(1), Kolkata
Appellant		Respondent
Date of Hearing	01.07.2020	
Date of Pronouncement	03.07.2020	
For the Appellant	Shri Miraj D. Shah, AR	
For the Respondent	Shri Supriyo Pal, Addl. CIT, Sr. DR	

ORDER

This is an appeal preferred by the assessee against the order of Ld. CIT(A)-14, Kolkata dated 29-11-2019 for the assessment year 2011-12.

2. The main grievance of the assessee is that the assessee did not get proper opportunity at the assessment stage that is before AO and, therefore, the addition made was against the principles of Natural Justice. The facts discerned from a perusal of the assessment order is that assessee filed his return of income returning total income of Rs.1,31,818/- and the said return was processed u/s. 143(1) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”). Later on, based on an AIR information the AO reopened the assessment u/s. 147/143(3) of the Act by issuing notice u/s. 148 of the Act dated 30.03.2018, According to the AO, despite sending the notice by Speed Post as well as by e-mail, the assessee did not respond which persuaded the AO to issue a show cause letter dated 29.11.2018 as to why the proceedings u/s. 144 of the Act i.e. best judgment assessment should not be resorted to in his case. Since there was no response from assessee’s side, the AO was compelled to make an addition of Rs. 22 lakhs on account of unexplained cash credit and undisclosed interest income of Rs.4,13,338/- u/s. 144 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who noted assessee’s claim that the AO resorted to the addition based on the bank transaction to the tune of Rs. 22 lakhs and that the cash deposit

of Rs. 22 lakhs could not have been added by the AO because the deposit of cash was nothing but sale consideration received from retail trading, from which he received the commission income of Rs.8,39,500/- which according to him, was reflected duly in the return. The Ld. CIT(A) did not accept this contention on the reason that the entire deposit of Rs. 22 lakhs was made in cash and that the assessee failed to provide details of the consignor as well as according to Ld. CIT(A), the assessee failed to give justification for such a high commission @ 38.15%. The Ld. CIT(A) also noted that assessee could not provide any evidence in support of the sales made, therefore, he confirmed the addition of Rs.22 lakhs. In respect of addition of Rs.4,13,338/- on account of undisclosed interest, the Ld. CIT(A) noted that the AO had made a mistake in the assessment order regarding the figure of Rs.4,13,338/- instead of Rs.4,20,590/-, therefore, he confirmed the addition of Rs.4,20,590/-. Aggrieved, the assessee is before this Tribunal.

3. Having heard both the sides it is noted that the assessee's main grievance is that during the assessment stage, assessee could not participate before the AO and, therefore, relying upon the order of Hon'ble Supreme court [three Bench] decision in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) wherein the Hon'ble Supreme Court held that if the assessee did not get proper opportunity before the AO, the matter should be restored to the AO for fresh consideration since assessment should be framed by the AO. From a perusal of the assessment order itself, it is clear that the AO has passed the order u/s. 144 of the Act, which is the best judgment assessment since assessee did not participate in the assessment. However, the Ld. DR opposing the plea of the assessee contended that assessee got opportunity before the Ld. CIT(A) but failed before the First Appellate Authority and therefore, he should not be given another opportunity before the AO. It was brought to my notice by the Ld. AR that assessee had migrated to Mumbai and, therefore, did not receive the show cause notice issued by the AO dated 29.11.2018. From a perusal of form No. 36 filed before this Tribunal as per Rule 47(1) it is noted that the address for sending notice for assessee is C/o S. K. Garg, Advocate, Diamond Heritage, Room No. 1207A, 16, Strand Road, Kolkata-700 001 whereas in the AO's order address is given as 34, C. R. Avenue, Kolkata-700 012. It is noted that the AO has passed the best judgment assessment order u/s. 144 of the Act since assessee did not participate and since he migrated to Mumbai and did

not receive the show cause notice issued prior to action u/s. 144 of the Act. Therefore, assessee did not get proper opportunity before the AO. So relying on the decision of Hon'ble Supreme Court in Tin Box Company (supra) wherein it was held as under:

“Held, reversing the decision of the High Court, that once the Tribunal found that the Income-tax Officer had not given to the assessee proper opportunity of being heard, that the assessee could have placed the evidence before the appellate authority or before the Tribunal was really of no consequence for it was the assessment order that counted: that order had to be made after the assessee had been given a reasonable opportunity of being heard.”(emphasis given by us)

Respectfully following the judicial precedent as laid by the Hon'ble Supreme Court in Tin Box Company (supra), I am inclined to set aside the order of the Ld. CIT(A) and remand the issue back to the file of AO for fresh assessment after affording reasonable opportunity of hearing to the assessee and in accordance to law. Liberty is given to the assessee to file documents to substantiate his claim and file written submission if advised to do so.

4. In the result, the appeal of assessee is allowed for statistical purposes.

Order is pronounced in the open court on 3rd July, 2020.

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated :3rd July, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Rajendra Kumar Agarwal, C/o S. K. Garg, Advocate, Diamond Heritage, Room No. 1207A, 16, Strand Road, Kolkata-700 001
2. Respondent ITO, Ward-46(1), Kolkata.
3. CIT(A)-14, Kolkata (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy,

Assistant Registrar