

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 614/JP/2019
निर्धारण वर्ष / Assessment Year : 2010-11

Tulip Global Private Limited 305-III, Floor, Jaipur Tower, Opp. All India Radio, Mi Road, Jaipur.	बनाम Vs.	The DCIT, Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCT 8239 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vinod Kumar Gupta (C.A.)
राजस्व की ओर से / Revenue by : Smt. Rooni Pal (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 26/06/2020
उदघोषणा की तारीख / Date of Pronouncement: 30/06/2020

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 26.02.2019 of Id. CIT(A), Alwar for the assessment order 2010-11. The assessee has raised the following grounds:-

"1. Impugned assessment order passed and sustained by CIT(A) u/s 147/144 is bad in law and on facts being against the principal of natural justice and for many more other reasons.

2. Under the facts and circumstances of the case and in law, Ld. A.O. has erred in initiating proceedings u/s 148 and CIT(A) has erred by sustaining the same. The initiation of proceeding is illegal and unjustified.

- 3. Under the facts and circumstances of the case, the Ld. AO has erred by holding that the transaction with M/s Suruchi Trading is not genuine and CIT(A) has erred by sustaining the same. Finding is perverse, unjustified or illegal. The addition made is excessive, unjustified or illegal.*
- 4. Under the facts and circumstances of the case, the Ld. AO has erred in making addition of Rs. 11,671/- by alleging that commission was paid for acquiring bogus profit and CIT(A) has erred by sustaining the same. The addition made is excessive, unjustified or illegal.*
- 5. Under the facts and circumstances of the case, the Ld. AO has erred by passing order u/s 154 and enhancing income by Rs. 16,24,146/- from 11,671/-. The addition made is excessive, unjustified or illegal.*
- 6. Under the facts and circumstances of the case, the Ld. AO has erred in making addition of Rs. 16,24,146/- under the head of income from other sources by holding Rs. 15,92,300 as unaccounted money-commodity Profit and Rs.31846 as unexplained money-commission.. The addition made is excessive, unjustified or illegal.*
- 7. Under the facts and circumstances of the case, the Ld. AO has erred by determining total taxable income to be Rs. 14,75,60,373/-. The income determined is excessive, unjustified or illegal.*
- 8. Under the facts and circumstances and in law, Ld. CIT(A) has erred by deciding the appeal Ex-party and furthermore not considering the material available on record."*

2. The hearing of this appeal was concluded through video conference in view of the prevailing situation of COVID-19 pandemic. Though the assessee has raised as many as 8 grounds however, at the time of hearing the Id. AR of the assessee has confined his argument only on the issue of validity of reopening of the assessment raised in grounds No. 1 and 2 of the grounds of appeal. The Id. AR has referred to the reasons recorded by the Assessing Officer for reopening of the assessment and submitted that the Assessing officer has reopened the

assessment without any tangible material to form the belief that income assessable to tax on account of profit on speculative transactions on the commodities exchange has escaped assessment. He has appointed that the Assessing Officer has referred to the information received from the Investigation Wing, Ahmedabad and that too under Section 133A of the Act at the premises of NMCE wherein certain brokers/persons were found to be indulged in providing bogus accommodation entries of speculative profit and loss to the parties as per their need. The Id. AR has further submitted that the Assessing Officer has reopened the assessee on the borrowed satisfaction as the information received from the Principal Director of income tax Investigation Wing, Ahmedabad is the basis of reopening without any independent application of mind. Even the said information as referred by the AO in the reasons recorded does not reveal the involvement of the assessee in such transactions of bogus accommodation entries. He has further pointed out that the Assessing Officer has accepted the fact that the assessee has treated through Prakash Chand Jain and Ratan Lal Somani and therefore, the assessee has not entered into any transaction with the alleged brokers M/s Priyank Commodities, M/s Suruchi Trading and M/s Pioneer Trading which are found by the Department as involved in the activity

of providing bogus commodity entries for speculative profit and loss. Thus the Id. AR submitted that there is no direct and live linked between the reasons recorded and the formation to belief by the AO that the income assessable to tax on account of speculative commodity entries of Rs. 15,92,300/- has escaped assessment. In support of his contention, he has relied upon a series of decision and submitted that the reopening of assessment is bad in law and liable to be quashed. He has made a specific reference in para 4 and 6 of the assessment order and submitted that the Assessing Officer has accepted the fact that the assessee produce the contract note/bills regarding the transactions of purchase and sale of commodity in the speculative segment. Further, the AO has also accepted the fact that the assessee has not traded directly through these brokers namely M/s Priyank Commodities, M/s Suruchi Trading and M/s Pioneer Trading however, the AO has linked the alleged broker M/s Priyank Commodities, M/s Suruchi Trading and M/s Pioneer Trading as counter party brokers in arranging the affairs of misusing of National Multi commodity exchange platform.

2.1 The next contention of the Id. AR challenging the validity of reopening is that approval granted by the Pr.CIT U/s 151 of the Act is mechanical and without application of mind. He has referred to the

approval granted by Pr. CIT as placed at page 5 of the paper book and submitted that the Pr.CIT has just written as yes and sign below that which show that there is no application of mind by the Pr.CIT while granting approval for reopening of the assessment and reasons recorded by the AO. Even the Assessing Officer in the proposal form has mentioned Section 151(2) as relevant Section while seeking approval whereas the case in hand is arising from scrutiny assessment U/s 143(3) of the Act, therefore, the provisions of Section 151(1) are applicable. He has relied upon the decision of this Tribunal dated 06.12.2018 in case of M/s Angel Infrastructure Pvt. Ltd. vs. DCIT in ITA No. 464/JP/2018 and 761/JP/2018.

3. On the other hand, the DR has submitted that the Assessing Officer was having specific information regarding the bogus commodity entries received by the assessee on account of speculative profit. The AO has referred the transactions of the assessee carried out during the year under consideration which was found bogus commodity entries of speculative profit to be set off against speculative loss brought forward by the assessee. Thus, it is clear that by way of this bogus entries of speculative profit the assessee has controverted its uncounted income without paying income tax as speculative loss was adjusted against the

alleged profit. The Assessing Officer has clearly mentioned in the reasons recorded that the brokers M/s Priyank Commodities, M/s Suruchi Trading and M/s Pioneer Trading are counter party brokers in arranging such affairs of booking speculative profit and loss entries even if the assessee has not directly transacted with these broker and has transacted through its own brokers which does not make any difference about the transactions being bogus commodity entries speculative profit. Therefore, at the time of reopening of the assessment what is require is the formation of belief based on the prima facie reasons that the income assessable to tax has escaped assessment. The Id. DR has further submitted that the assessee has not bothered to appear before the Id. CIT(A) and the appeal was dismissed ex-parte impugned order when there was no attendance despite various opportunities were granted by the Id. CIT(A). Thus, the assessee cannot agitate his issue without raising the same before the Id. CIT(A). The assessee has not even appeared before the Id. CIT(A) hence, the Id. DR submitted that the objection raised by the assessee against the reopening of the assessment are not sustainable and liable to be rejected. The AO has given the correct details of transactions carried out by the assessee hence, the reopening is based on the Assessing

Officer's own satisfaction and not borrowed satisfaction. As regards the objections regarding the approval granted by the Id. CIT(A) U/s 151 of the Act the Id. DR has submitted that merely because the AO has mentioned Section 151(1) in the proposal form it does not vitiate approval granted by Pr.CIT as it is only typographical mistake and has no bearing on the reasons recorded. The proposal sent by the AO in the prescribed form contains the reasons recorded by the AO which were duly examined by the JCIT as well as Pr. CIT before granting approval. Only after recommendation of JCIT, the Pr.CIT on his satisfaction has granted the approval. Thus, there is no infirmity in the approval granted by Id. Pr.CIT U/s 151 of the Act. The Id. DR has relied upon the order of the Assessing Officer.

3.1 In the rejoinder, the Id. AR of the assessee has submitted that though the appeal of the assessee was dismissed by the Id. CIT(A) vide ex-parte order however, the legal issue raised by the assessee can be raised even for the first time before the appellate authority non appearing on behalf of the assessee before the Id. CIT(A) shall have no bar for raising and arguing this issue before the Tribunal. He has further submitted that what is proposed by the AO in the reopening of the

assessment treated speculative profit as income from other source and denied the benefit of setting off against speculative loss.

4. We have considered the rival submissions as well as relevant material on record. The assessee has challenged the validity of reopening of the assessment and Id. AR of the assessee has argued on the issue at length. At the outset, we note that the appeal of the assessee was dismissed by the Id. CIT(A) when nobody has attended despite several opportunities were given by the Id. CIT(A). The Id. AR of the assessee has submitted that this being a legal issue can be raised at any stage however, that would not mean that the assessee has got right to bypass the first appellate authority deliberately and then raise the issue before the Tribunal. Once, the assessee has filed an appeal and raised this issue before the Id. CIT(A) then the matter ought to have been decided by the first appellate authority., Therefore, the non adjudication of this issue by the Id. CIT(A) due to non appearance of the assessee would not give an absolute right to the assessee to raise these issued before the Tribunal without having benefit of finding of the first appellate authority. Further, we note that this is a mixed question law and facts. The legal issue can be decided only after considering the factual aspect of the transactions. The assessee has not produced the

relevant record and evidence to show that the transactions carried out by the assessee in the commodity exchange have no linked with the persons who were found to be indulged in providing commodity entries of bogus speculative profit and loss. Though the Assessing Officer given a finding that the transactions of the assessee has a nexus with those persons being counter party providing these transactions however, in the absence of the relevant record we cannot examine and give a conclusive finding on this issue which is factual in nature to the extent whether the finding of the AO is factual correct or not. Though the assessee claimed to have produced the relevant record before the AO however, in the absence of the same produce before us we cannot give a finding that the decision of the AO is perverted.

4.1 As regards the approval granted U/s 151 of the Act prima facie we find that the proforma proposal send by the AO for approval contains all the details as well as the reasons recorded by the AO which were also examined by the JCIT and recommended the proposal of the AO for issuing notice U/s 148 of the Act and thereafter the Ld. Pr.CIT has granted the approval. Therefore, we do not find any infirmity on the face of it however, the Id. CIT(A) has not decided this issue on merits

and dismissed the appeal of the assessee summarily in para 3.1 to 3.3

as under:-

"In this case, notices u/s 250 was issued to the appellant by fixing the hearing on 04-12-2018, 22-01-2019, 25-01-2019 & 22-02-2019. No one attended. Opportunity of being heard is central to any adjudication process but that does not absolve the appellant from non attendance and submission of evidences in support of ground of appeal despite repeated and several notices sent and served and not responded. An adjudication proceeding cannot be held in abeyance indefinitely on account of non attendance of the appellant or his AR. In this case the continued non responsive attitude of the appellant has left no option before me but to decide the appeal on the basis of evidences on record.

3.2 I have taken into consideration the facts of the case filed along with Form No. 35.

3.3 In absence of any submissions by the appellant in support of its claims, I have relied upon the facts mentioned in the assessment order. Accordingly, I do not see any reason to interfere in the assessment order. Hence, the appeal is dismissed."

Accordingly, in view of the above discussion as well as the appeal of the assessee was dismissed ex-parte due to non appearance of the assessee we set aside this issue to the record of the Id. CIT(A) for granting one more opportunities to the assessee of hearing and then decide the same on merits. We may clarify that when the assessee has not pressed other grounds raised in this appeal, therefore, only grounds

No. 1 and 2 of the assessee appeal are set aside to the record of the Id.
CIT(A) for fresh adjudication.

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

Order pronounced in the open court on 30/06/2020.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 30/06/2020.

*Santosh.

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

1. अपीलार्थी / The Appellant- Tulip Global Private Limited, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 614/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar