

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

**BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No.6745/Del/2014
(Assessment Year: 2009-10)

Shri Sunil Saini, 270-A, Hari Nagar, Ashram, New Delhi - 110 014. PAN: ABVPS9700R	Vs.	ITO, Ward : 32 (1), New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri R S Singhvi Shri Rajat Garg CAs
Revenue by:	Ms. Aman Preet, Sr. DR
Date of Hearing	04/11/2020
Date of pronouncement	31/12/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

- 01 This appeal is filed by the assessee, Shri Sunil Saini, against the order of the Id. CIT(Appeals)-26, New Delhi, dated 25.09.2014 for the Assessment Year 2009-10.
- 02 The assessee has raised effectively three grounds of appeal against the various additions as under:-

“ 1(i). That on the facts and circumstances of the case, the CIT(A) was not justified in confirming addition of Rs. 16,80,531/- as unexplained income relating to deposits in the account with ICICI Bank.

(ii) That the finding and conclusion of the authorities below is without proper appreciation of facts and opportunity to the assessee.

2(i) That CIT(A) has also erred in confirming addition of Rs. 43,74,830//as income from undisclosed sources.

(ii) That whole basis of addition is illegal, arbitrary and without proper appreciation of facts.

3(i). That CIT(A) has also erred in making enhancement to the extent of Rs. 69,52,368/- on the basis of application of provisions of sec. 40a(ia)/40A(3) of the Income Tax Act, 1961.

(ii) That the above said enhancement is illegal, arbitrary and without jurisdiction.

(iii) That lower authorities have recorded specific finding that the books of accounts were not maintained and provisions of sec. 145(3) are applicable and as such it is not open to consider any disallowance in terms of provisions of sec. 40a(ia)/40A(3).

(iv) That even otherwise, there is no case of violation of provisions of sec. 40a(ia)/40A(3) of the Income Tax Act, 1961.

(v) That the provisions of sec. 40a(ia)/40A(3) have been applied on illegal and arbitrary basis and without proper appreciation of facts and opportunity to the appellant.

4. That the orders of the lower authorities are not justified on facts and same are bad in law. “

- 03 Brief facts of the case shows that assessee is an Individual and is carrying on the business income from hiring charges, advertisement and rent a cab business. He also earned interest income and the accounts are audited under Section 44AB of the Income Tax Act, 1961 (the Act). In the profit and loss account assessee shows income for hiring receipts. The assessee filed its return of income on 30th September, 2009 declaring total income of Rs. 5,01,650/-. The case of the assessee was selected for scrutiny.
- 04 The assessment under Section 143(3) of the Act was passed by the Id. Income Tax Officer, Ward 32 (1), New Delhi, on 20th December, 2011 wherein an addition of Rs. 16,80,537/- was made on account of cash deposit in ICICI Bank and further addition of Rs. 43,74,830/- was made on account of undisclosed sources of the income. The addition of Rs. 43,74,830/- was made for the reason that according to Assessing Officer the assessee has made an investment of Rs. 66,57,017/- and has only earned income of Rs. 6,01,650/-. Therefore, assessee has not shown income of Rs. 60,55,367/- out of which an addition of Rs. 16,80,537/- is already made on account of cash deposit in ICICI Bank. Therefore, the balance addition of Rs. 43,74,830/- was made.
- 05 Assessee aggrieved with the order preferred an appeal before the Id. CIT (Appeals) who dismissed the appeal of the assessee as per order dated 25.09.2014 confirming both the additions. The Id. CIT (Appeals) further stated that as the assessee is into the business of rent a cab and turnover is also more than the limit prescribed under Section 44AB of the Act, the assessee is required to deduct tax at source on the payments made and thus there is a default of TDS also. He held that assessee has paid hire charges of Rs. 12,48,500/-, advertisement expenses of Rs. 46,23,279/-, commission expenditure of Rs. 19,03,597/- and interest expenses of Rs. 3,00,692/-. These expenditure are disallowable under Section 40a(ia) as well as under Section 40A (3) of the Act. Consequentially he held that the Assessing Officer should make a disallowance of Rs. 69,52,362/-. He further held

that the Assessing Officer shall give consequential effect to this enhancement made. For this enhancement he also initiated the penalty proceedings under Section 271(1)(c) of the Act. Thus, assessee aggrieved with the above order has preferred this appeal before us.

06 We have heard the learned authorised representative submitted a detailed paper book containing 34 pages. He referred to the assessment order passed Under the wealth tax act u/s 16 (3) of the act for assessment year 2008 – 09 in case of the assessee wherein the cash on hand as on 31st of March 2008 of ₹ 5,598,734/- has been assessed to the wealth tax. Therefore the contention was that the above amount should be granted as source to that extent is available with the assessee for making an investment in the various assets. He further stated that the learned and CIT – A has made the announcement to the total income of the assessee without issuing any notice u/s 251 (2) of the act. He otherwise submitted that when the assessee has been assessed on the best image business by finding out the difference between the amount of investment made with the amount of source available with the assessee for making such investment, the disallowance cannot be made for non-deduction of tax or for provisions of Section 40 A (3) of the act.

07 The learned departmental representative vehemently supported the orders of the learned lower authorities. He submitted that for the purpose of making the enhancement the learned CIT – A has held the hearing 24 times and therefore it cannot be stated that the assessee has not been granted any opportunity as provided u/s 251 (2) of the act.

08 We have carefully considered the rival contention and perused the orders of the lower authorities. The facts stated in this case earlier clearly shows that there was a cash deposit in the bank account of the assessee amounting to ₹ 1,680,531 and assessee has also made credit card payment of ₹ 1,069,179/- to the HDFC bank Ltd and Citibank. The assessee is engaged in the business of renting of cabs in the name of Mrs Suneel Saini and has five bank accounts. In these five bank account he has deposited the total sum of ₹ 20,125,182/-. During the course of assessment proceedings assessee has filed the copy of the bank statement and the narration of the entries in respect of bank accounts and how the money has been deposited. However assessee did not disclose the ICICI bank wherein he has cash deposited of ₹ 1,680,531. The learned assessing officer, further noted that the balance sheet as at 31st of March 2008 the assessee has shown cash in hand of ₹ 5,590,857, to verify this the learned AO asked for the copy of the well tax return and copy of the cash book. The assessee did not file the same however the assessment assessment year 2008 – 09 was completed u/s 143 (3) of the act. It was noted that the assessee

is engaged in the business of plying of 2 light vehicles and filed return of income u/s 44AE and the gross total income offered is only ₹ 4,078,347 and therefore there was no requirement to maintain the books of accounts. Further for the assessment year 2009 – 10 it was submitted that assessee has five bank accounts, AO noted that all of them are old bank accounts and therefore he held that assessee is not maintaining the true books of accounts and also not showing true income. Therefore he rejected the books of accounts and proceeded to make the assessment as per information available on record. Thereafter the learned assessing officer proceeded to list out the assets available with the assessee. He found that assessee has made an investment of ₹ 6,657,017/- during the year and assessee has shown only the income of ₹ 601,650, therefore the assessee has not shown the source of investment in the assets acquired of ₹ 6,055,367/-. Therefore he made the two additions of the above sum. The first addition was cash deposited in the ICICI bank account of ₹ 1,680,537 and the second addition was the balancing sum amounting to ₹ 4,374,830/- (6,055,367- 1,680,537). The learned and CIT – A confirmed the above addition and further stated that as the assessee is required to get the accounts audited as the turnover of the assessee has exceeded the prescribed limit, even otherwise the expenditure incurred by the assessee are covered by the provisions of Section 40 (a) (ia) as well as Section 40 A (3) and therefore the expenditure shown by the assessee of higher charges of ₹ 1,248,500, advertisement expenses of ₹ 4,623,279/-, commission expenses of ₹ 1,903,597 and interest expenditure of ₹ 300,692 are required to be disallowed. He held that this is the enhancement of the income made by him and directed the learned assessing officer to give the consequential effect to this enhancement. Consequently the penalty was also initiated in respect of income of ₹ 1,127,000/- u/s 271 (1) (c) of the act. Before us the learned authorised representative has stated that the assessee has been assessed u/s 16 (3) of the act for assessment year 2008 – 09 wherein the assessment order Under the wealth tax act 1957 was passed and the net wealth of the assessee has been assessed at ₹ 5,598,734 wherein the cash held by the assessee as on 31st of March 2008 i.e. the valuation date for assessment year 2008 – 09 has been accepted by the revenue. He stated that assessee was having the net wealth of cash in hand of ₹ 5,598,734 and the commercial vehicles of ₹ 1,473,088/- as on that date. This amount has been accepted by the revenue in the wealth tax act and consequential penalty proceedings Under the well tax act have also been initiated u/s 18 (1) (C) of the act. He therefore the contention of the learned authorised representative is that assessee must be granted the credit of the opening cash in hand available with him as on 31st of March 2008 of ₹ 55,98,734.

On careful perusal of the assessment order passed Under the wealth tax act by the income tax officer Ward 54 (2), New Delhi for assessment year 2008 – 09 the argument of the learned authorised representative is found correct. The assessee has been charged wealth tax on this sum of ₹ 5,598,734 being cash in hand as on 31st of March 2008. Therefore, for the purpose of making addition in assessment year 2009 – 10 assessee must be granted credit of utilisation of the above sum of ₹ 5,598,734/-. The learned assessing officer has made the addition of ₹ 6,055,367/- for not showing the source of the investment made by the assessee. Therefore, we direct the learned assessing officer to restrict the addition to the extent of only the difference between the unexplained investment of ₹ 6,055,003 and and 67 and the cash available as on the first day of the accounting year to the assessee of ₹ 5,598,734/-. Thus the learned AO is directed to retain the addition of only ₹ 456,633/- out of the total addition made of ₹ 6,055,367/-. Thus assessee gets relief of ₹ 5,598,734/-.

- 09 Coming to the issue of the enhancement made by the learned CIT – A , we find that necessarily the learned CIT – A has got the powers to make an enhancement to the total income of the assessee when an appeal is pending before him. Such powers are provided to him according to the provisions of Section 251 of the income tax act. However before making any enhancement to the total income of the assessee who is in appeal before him, the learned and CIT – A in terms of the provisions of Section 251 (2), shall not and hence an assessment unless the appellant had a reasonable opportunity of showing cause against such enhancement. Therefore, the learned CIT – A must first issue a notice to the assessee proposing the reasons and the amount of enhancement of the income of the assessee. In the present case the learned CIT – A has enhanced the income of the assessee without issuing any show cause notice. Therefore it is clearly in violation of the provisions of Section 251 (2) of the income tax act and therefore it cannot be sustained. Even otherwise the learned CIT – A has provided 24 opportunities to the assessee to hear him on the merits of the addition made by the learned assessing officer. However, for the purpose of making enhancement he did not issue a single notice as provided u/s 251 (2) of the act which clearly shows that enhancement cannot be sustained. Further the disallowance made by the learned assessing officer is for non-deduction of tax at source as well as for making payment in violation of the provisions of Section 40 A (3) of the act. The learned assessing officer has rejected the books of accounts of the assessee, which is been upheld by the learned CIT – A. Even otherwise when books of accounts have been rejected in toto by the learned assessing officer and same has been confirmed by the learned CIT – A also, the

income of the assessee has been assessed on the basis of total investment made compared with the amount of funds available with the assessee for making such investment, no disallowance u/s 40 (a) (ia) or u/s 40 A (3) of the act can be made. Even after granting the assessee the credit of the opening cash on hand available at the beginning of the year, the addition sustained by us also remains on the same basis. Therefore, assessee has not claimed any expenditure but is assessed on the basis of the amount available with him for making an investment during the year. Therefore, even otherwise the enhancement made by the learned CIT – A is not sustainable.

10 In the result appeal of the assessee is partly allowed.

Order pronounced in the open court 31/12/2020

-Sd/-
(H. S. SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 31/12/2020

MEHTA

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT, New Delhi