

आयकर अपीलिय अधीकरण, न्यायपीठ –“C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
[Before Shri P. M. Jagtap, Vice President & Shri A. T. Varkey, Judicial Member]

I.T.A. No. 354/Kol/2020
Assessment Year: 2011-12

Sudhir Desh Ahuja (PAN: ACNPA0705F)	Vs	Joint Commissioner of Income-tax, Range-30, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	09.08.2021
Date of Pronouncement	13.08.2021
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Shri Supriyo Pal, Addl. CIT

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)-8, Kolkata dated 24.02.2020 for AY 2011-12.

2. It is noted that there is a delay of 32 days in filing this appeal. After going through the reasons stated in the petition for condoning the delay and after hearing the Ld. DR, we are inclined to condone the delay and proceed to hear the appeal on merits.
3. At the outset, the Ld. AR of the Assessee Shri Subash Agarwal, Advocate submitted that though he has raised five (5) grounds of appeal the assessee is not pressing ground nos. 3 and 4 pertaining to notional rental income of flat at Bangalore and disallowance of social welfare expenses respectively and ground no. 5 is general in nature and so they are not pressed. So, there remains only two (2) grounds of appeal for adjudication. Ground no. 1 is against the action of the Ld. CIT(A) in upholding the action of the AO to add Rs. 19,04,784/- under suspense account.
4. The assessee is an individual who owns a proprietary concern viz. M/s. D. P. Ahuja & Co. which carries on the profession of patent and trade mark attorneys. And the assessee also has business of post production of films, income from capital gain and other sources.

The AO has disallowed an amount of Rs.19,04,784/- which was shown by the assessee under the head suspense account by holding as under:

"It is further seen from the balance sheet of M/s. D.P. Ahuja & Co as at 31st March 2011 that an amount of Rs 19,04,784.47 is mentioned as suspense (subject to pending adjustment) the counsel of the assessee during the course of hearing stated that this amount includes advance etc. Since advance itself has a component of income embedded in it as discussed above and which is accepted by the assessee also. Assessee in any case is following cash system of accounting. No further details are available on record regarding this hence this amount is also treated as a component of assessee's taxable income for the year and added to total income of the assessee.

Balance sheets submitted alongwith audit report have an element of finality in them and provides snapshot of assessee's performance at a specific point in time. On the other hand provisional balance sheets provide an interim snapshot that may be modified. Provisional means that something is conditional or interim or subject to change or alteration. Provisional also means that something serves a purpose for the time being. A balance sheet may be provisional due to pending adjustments to the net income statement that will impact earnings. However a balance sheet prepared and signed by the auditor and which is submitted along with the audit report and in compliance to statutory provisions is not expected to be provisional.

Hence this discussion along with the additions made in the previous years on the issue of advances lends credence to the belief that the assessee is not accounting his taxable income in a proper manner.

The amount of Rs 19,04,784/- is added to the total income of the assessee.

5. The assessee contended before the Ld. CIT(A) that first of all he did not get proper opportunity before the AO to explain about the suspense account. According to the assessee, the AO did not issue any show cause notice before making the addition. According to the assessee, on 29.03.2014 (Saturday) the assessee received a phone call from the AO to file the details of suspense account. Since the next day being Sunday (30th March, 2014) the assessee filed the details on 31.03.2014. However, according to the assessee, to his surprise the AO had already framed the assessment on 29.03.2014 without awaiting the reply of the assessee on this issue. Therefore, before the Ld. CIT(A) the assessee submitted all the evidence in respect of its claim of suspense account by filing statement showing the

details of suspense account (*placed at page 25 to 28 of the paper book*) as well as the statement showing the details of suspense account of Rs. 19,04,784/- (*page 25-26 of PB*); and the statement showing details of suspense account income offered in the subsequent years which are formed placed at Pages 27 and 28 of the paper book to the tune of Rs.16,50,203/-; and the details of the unidentified amount of Rs.2,54,581/- is found placed at page 29 of the paper book. However, according to the Ld. AR, the Ld. CIT(A) brushed aside the evidence produced in an arbitrary manner and confirmed the addition. According to the Ld. AR, without prejudice to the aforesaid submission to show that the assessee has already offered to tax Rs. 16,50,203/- in subsequent assessment years out of the addition made by AO in this relevant assessment year to the tune of Rs. 19,04,784/-, the balance amount is only to the tune of Rs. 2,54,581/-, and on merits regarding the suspense account maintained by the assessee, the Ld. A.R. submitted that the assessee has numerous clients all over the world in respect of his profession as a patent and trade mark attorney and the assessee had shown return of income showing a total income of Rs.22,35,63,349/-. It has been brought to our notice that the amount shown in the suspense account are those amounts deposited by the clients from various parts of the world and whose payers are not identifiable in the relevant year of deposits; and those un-identifiable payers whose receipts are shown in the suspense account maintained by the assessee, which practice assessee has been following for a long time; and whenever the assessee is able to identify the payer of the receipt, then the identified receipt is taken out of suspense account and duly offered to tax in that assessment year. And the assessee had shown in this assessment year in his suspense account an amount of Rs.19,04,784.47 out of which a sum of Rs.5,24,498.24 is the opening balance (*refer page 26 of paper book*). According to the assessee, an amount of Rs.16,50,203.71 out of the amount of Rs.19,04,784.47 was identified as on 29.11.2017 and offered to tax in the subsequent assessment years (*refer to pages 27 and 28 of the paper book*) which fact according to the Ld. AR can be verified by the AO. According to the Ld. AR, the details of the remaining amount of Rs.2,54,581/- are given at page 29 of the paper book and since the identity of the payers has still not been identified it is still shown in suspense account. According to the Ld. AR, as and when the identity of the payer is known/ascertained then the same will be offered to tax in the subsequent assessment years. According to the assessee, since the assessee has already offered out of Rs.19,04,784/-,

Rs.16,50,203/- to taxation if the addition is sustained in this assessment year it will amount to double taxation of the same receipt/income. We note that the assessee has been consistently following this practice of showing in the suspense account the receipts wherein the payers could not be identified. On perusal of pages 27 and 28 of the paper book (*payers identified subsequently to the tune of Rs. 16.50 lakhs*) it is noted that it is pertaining to AYs 2007-08 to 2010-11. It is noted that the assessee claims to have offered to tax Rs.16,50,203/- in subsequent assessment years (*out of Rs.19,04,784/- which was added by the AO in this relevant assessment year*). In such a scenario, we are of the opinion that in the peculiar facts of the case and taking into consideration the consistent practice adopted by the assessee and accepted by the department in earlier and subsequent years, the assessee's claim that it has offered for taxation in the subsequent assessment years the very same receipts it has shown in the suspense account to the tune of Rs.16,50,203/- out of Rs.19,04,784/- then the addition to that extent (Rs.16,50,203/-) would amount to double taxation of the same income, therefore, we set aside the impugned order and remand this issue back to the AO and direct that if the assessee has already offered for taxation Rs.16,50,203/- in the subsequent assessment years out of this amount added by the AO in this relevant assessment year to the tune of Rs.19,04,784/-, then addition of Rs.16,50,203/- need to be deleted. Coming to the balance amount of Rs.2,54,581/- the details of which are given in page 29 of the paper book, we note that these are receipts from FYs 2005-06 to 2010-11. This amount if the assessee has offered to tax in the subsequent assessment years then it should not be taxed and this also the AO need to consider afresh after verification and pass order in accordance to law.

6. Coming to the next ground of appeal of the assessee which is against the action of the Ld. CIT(A) in confirming the addition of Rs.18,74,907/- made by AO invoking section 14A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") read with Rule 8D of the Income Tax Rules, 1968 (hereinafter referred to as the "Rules").

7. The AO noted that the assessee has shown dividend from shares and mutual fund of Rs.2,13,68,176/- which was claimed by him as exempt. According to the AO, in the computation of total income the assessee has not computed and disallowed any expenditure u/s. 14A of the Act. According to the AO from the details of assessee's account he

discerned that the assessee has business as well as investment activity carried out during the year. According to the AO, the assessee has claimed all the expenses under the head business expenses; and against income from other sources all the expenses has been treated as business expenditure only. According to AO, the matter was discussed with the counsel for the assessee and then AO was of the opinion that the expenses incurred and claimed in respect of exempt income should be disallowed as per the provision of section 14A of the Act read with Rule 8D of the Rules. According to the AO, since the assessee has invested in instruments which have given rise to exempt income in the form of dividend and long term capital gain, the expenditure incurred in giving rise to the exempt income should be disallowed and, therefore, he was of the opinion that as per Rule 8D(iii) ½% of the average value of the investment should be added and, therefore, he made disallowance of Rs.18,74,907/- which was added to the total income. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) wherein the assessee has contended that he maintained separate income and expenditure account for exempt income. Explaining further the Ld. AR, submitted that the assessee has personal account maintained in respect of the exempt income received to the tune of Rs.2,13,68,176/- which is reflected in page 9 of the paper book wherein this dividend income has been credited and separate debit of expenses relating to portfolio management expenses to the tune of Rs. 39.18 lakhs has been made. However, it was pointed out by the Ld. AR that the expenses incurred for earning the exempt income has not been claimed as deduction by the assessee which can be seen from the computation of total income is placed at page 2 to 7 of the paper book. However, the Ld. CIT(A) was not convinced with the reply of the assessee and he was pleased to confirm the action of the AO by holding as under:

“I have examined the material on record, perused the case laws relied upon by the appellant and the order of the AO. First, let us deal with the issue of recording of satisfaction by an AO who dissents from the view put forth by the assessee. It is in fact imperative that the AO record his satisfaction that he does not agree with the view taken by the assessee. There is however no embargo to recording this view as part of the body of the order. The admonishment put forth by the plethora of judicial pronouncements is that the AO should not arbitrarily and without discussing the view of the assessee, summarily reject the latter's submissions and put forth a calculation of his own. He has to reject the assessee's submissions on cogent grounds showing his satisfaction - though, of course, these cogent grounds are open to judicial scrutiny. In view of the foregoing discussion, I find that the AO has recorded his satisfaction which the appellant himself has reproduced in his submissions. The same is not being repeated here for reasons of brevity. But I cannot agree with the contention of the appellant that the AO did not record his reasons,

Now coming to the merits of the issue, The undisputed fact is that the appellant maintains two separate books of account. One for his business and the other for his investment activity. In fact the AO has observed this when he says that expenses have been debited to the business side of the accounts. The appellant earns about 22.36 crores from his professional and business activities and about 2.14 crores from his investment related activities. Thus the income from the investment activity amounts to about 10% of the income from business and profession. The income from the investment activity has arisen on account of investments in shares and mutual funds cumulatively amounting to over Rs 50 crores. At the same time the turnover for business and profession come to about Rs. 54.38 crores. Thus, the two amounts, viz. the business receipts from which the business income is derived and the amount of investments, from which the investment income is derived, are comparable to each other. The appellant has produced the balance sheet, P & L account etc for these two activities. It is clear from these that the direct expenses attributable to business and investment activities have been respectively debited to the appropriate books. The aberration is however observed when we observe the indirect expenses, viz. the administrative and other such expenses that cannot be directly attributable to any particular form of income are all debited to the P & L account for business and profession. When quizzed about this, the appellant had no unequivocal reply except to say that may be the appellant operated the investment activities from his home and not from the premises from where his professional related activities were being conducted. This is difficult to believe with a person who is finding it difficult to keep his affairs in order in the sense that he frequently has to place large amounts of money in suspense account since he has such a large number of clients. The appellant is a successful professional who has to give his undivided attention to his profession, which admittedly is conducted from his office premises. Where does he get the time and the logistics support needed to handle a portfolio of almost 51 crores spread across several equities and several mutual funds. The idea rebels against the preponderance of probability. It is difficult to believe. The appellant has not explained how this is managed if at all this is his argument, which he incidentally has not taken clearly. In these circumstances I find it difficult to diverge from the opinion and the inferences drawn by the AO that this was a fit case for application of 14A read with Rule 8D.

As regards the appellants submission that relief has been allowed by other CiT(A) in this case, it can only be said that the entire argument narrated above is based on facts and perhaps some hitherto unknown facts were perhaps brought to the notice of the other authorities which the appellant has committed to done in the present appeal. Based on the present set of facts I find myself incapable of drawing any other inference than the one mentioned supra. The ground stands dismissed.”

8. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is in appeal before us.
9. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee has prepared separate income and expenditure account (personal) where dividend income of Rs.2,13,68,176/- (refer page 9 of paper book) which assessee claimed as exempt. According to Ld. AR, even though the portfolio management expenses of Rs.39,18,761/- has been debited as expenses relating to portfolio management expenses, this expenses has not been claimed as deduction in the computation of total income which fact has not been verified by the AO or the Ld. CIT(A). According to Ld. AR, the assessee has incurred expenses of only Rs.39,18,761/- for earning exempt income and

the assessee has not claimed any deduction of the same in its revised computation of total income which is placed from pages 2 to 7 of the paper book. Therefore this issue need to be examined by AO afresh, for that we set aside the impugned order of Ld. CIT(A) and remand this issue back to AO with a direction to verify this fact and the AO to examine the claim of the assessee that expenditure to the tune of Rs. 39,18,761/- which was incurred for earning the exempt income has been suo-moto disallowed by the assessee while computing the computation of total income. So assessee claims is that no more disallowance u/s 14 of the Act is warranted. So in this background the AO has to examine the account of the assessee and if he is not satisfied with the correctness of the claim of the assessee, then he has to record the same and thereafter, only he can invoke rule 8D of the Rules. In other words while doing this exercise if the AO rejects the claim of the assessee with regard to the expenditure as shown by the assessee to have been suo moto disallowed in relation to earning of exempt income, then the AO has to indicate cogent reason for not accepting the claim of the assessee. It is clarified that the AO cannot brush aside the claim of the assessee and straight away embark upon computing disallowance under Rule 8D of the Rules. Therefore, this issue is remanded back to the file of AO for fresh adjudication in accordance to law.

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

Order is pronounced in the open court on August, 2021.

Sd/-
(P. M. Jagtap)
Vice President

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

Dated: August, 2021

Jd, Sr. PS

Copy of the order forwarded to:

1. Appellant- Shri Sudhir Desh Ahuja, Unilux House, 14/2, Palm Avenue, Kolkata-700 019.
2. Respondent – JCIT, Range-30, Kolkata
3. CIT(A)-8, Kolkata (sent through e-mail)
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata