

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI A. M. ALANKAMONY, AM &
Ms. KAVITHA RAJAGOPAL, JM**

आयकरअपीलसं./ I.T.A. No. 308/Mum/2014
(निर्धारणवर्ष / Assessment Year: 2006-07)

Mamania Family Trust, B-Wing, 13 th Floor, Peninsula Business Park, Senapati Bapat Marg, Lower Parel (W) Mumbai-400 013	बनाम/ Vs.	ACIT, Cen. Cir -41, 6 th floor, R. No. 656, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAAAM-1339-D		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	None
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri C. T. Mathews, Ld. DR
सुनवाईकीतारीख/ Date of Hearing	:	14.03.2022
घोषणाकीतारीख / Date of Pronouncement	:	16.03.2022

आदेश / ORDER

Per Kavitha Rajagopal, Judicial Member:

The present appeal has been filed by the assessee as against the order of Ld. CIT(A) dated 09.12.2013 arising from the order passed by the AO relevant to assessment year (AY)

2006-07. The following grounds raised in the appeal are as under:-

1. On the facts and in the circumstances of the case and in law the Learned CIT (Appeals) erred in confirming the Status of your appellant as AOP and not Individual.

2. On the facts and in the circumstances of the case and in law the CIT (Appeals) erred in not considering various Apex court and Supreme court ruling confirming the status of the private family Trust as Individual on a ground that such decision had been rendered in wealth tax cases and hence not acceptable in case of assessment under Income Tax act.

3. On the facts and in the circumstances of the case and in law the CIT (Appeals) erred in treating some of the expenses incurred as fringe benefit provided, which are outside the preview of Fringe Benefit as specified in section 115WB of the IT Act.

4. On the facts and in the circumstances of the case and in law the CIT (Appeals) erred in not confirming the facts that re-assessment proceedings purely on the basis of Audit objection is change of opinion and hence reassessment proceedings u/s.115WH is to be quashed

5. On the facts and in the circumstances of the case and in law the CIT (Appeals) erred in not considering Clarification, nature of expenses and evidence produced on a ground that the said have not been produced before AO during the assessment proceedings.

6. Your Appellants crave leave to add to, alter or amend the aforesaid grounds of Appeal as they may be advised from time to time.

Additional Grounds:-

1. On the facts and in the circumstances of the case and in law the C.I.T.(A) erred in findings that there was proceedings u/s.115WE(1) of the Act, hence re-assessment is correctly done, having failed to appreciate the fact that there was no Return of Fringe Benefit (Form No. 3B) was filed by your appellant, hence question of proceedings u/s. 115WE(1) of the Act doesn't arise. The Return of Fringe Benefit (Form No. 3B) was filed by your appellant after issuance of reassessment/reopening notice by the AO. Hence, re-assessment order passed be set aside and treated as null and void.

2. On the facts and in the circumstances of the case, where there is no assessment order passed, there cannot be a notice for re-assessment/reopening inasmuch as the question of re-assessment arises only when there is an assessment in the first instance and hence, re-assessment order passed be set aside and traded as null and void.

2. At the outset, it is noticed that none appeared on behalf of assessee in spite of calls and even no application for adjournment was moved. On the other hand, Ld. DR was present in the court and was ready with arguments. Therefore, we have decided to proceed with the hearing of the case ex-parte with the assistance of the Ld. DR and the material placed on record.

3. The facts leading to filing of the appeal briefly stated are that the assessee engaged in the running of a plastic industry at Daman, was assessed u/s 143(3) on 24.11.2008 at total income at Rs. 76,94,480/- as against the returned income of Rs. NIL. Subsequent to this, the assessment was reopened on the

reasoning that the assessee is AOP/BOI by its status as it was running a plastic industry. It was stated that the assessee has provided facility like staff welfare expenses of Rs. 4,22,899/-, travelling & Conveyance expenses of Rs. 4,85,780/-, vehicle expenses of Rs. 23,25,760/-, postage & telephone expenses of Rs. 1,32,090/- and contribution to PF of Rs. 18,72,502/-. The assessee was then required to file its return of fringe benefit u/s 115WD, but failed to do so for the year under consideration. In response to the notice u/s 115WH of the Act dated 27.03.2012, the assessee vide letter dated 18.07.2012 requested to treat the original return filed u/s 139(1) of the Act as revised return. As the issue involved was fringe benefit tax, assessee's original return of income as revised return of income was not accepted. The AO then insisted the assessee to file return of fringe benefit in Form 3B which was then filed on 05.10.2012 declaring total value of fringe benefit at Rs. NIL. Subsequently, the assessment was completed u/s 115WE r.w.s 115WG of the Act determining the total value of fringe benefits at Rs. 25,45,810/-. The AO also concluded the status of assessee as AOP trust as against the contention of assessee that the trust is a private discretionary trust which ought to be regarded as an individual and not AOP and does not attract levy of FBT. The AO relied on the allotment of PAN to the assessee indicating the status as AOP. The assessee also alleged that the AO has not considered the deed of trust where assessee is a private discretionary family trust settled pursuant to an indenture dated 03.02.1999, where the beneficiaries of the trust are the two trustees, their respective

spouses and their lineal descendants and the spouses of such lineal descendants as well as the Hindu Undivided Families of the lineal descendants. The beneficiaries of the Trust do not come together with the object of carrying on business nor have they authorized the trustee to carry on any business. It was stated that the trustee derived their authority to carry on business not from the beneficiaries but from the settlor under the terms of the deed of trust.

4. It was contended that the beneficiaries are mere recipient of income earned by the trust and are not together for a common purpose. The assessee, therefore, stated that it has to be treated as 'individual and relied on various decision that individual does not mean single living human being but would include in its ambit a BOI constituting a unit.

5. The AO categorically stated that the assessee is carrying on the business activities under the name and style of M/s Apollo Plastics and the contention of the assessee that though the status of assessee is AOP Trust, it should be treated as an individual was not accepted by the AO. In this regard, the AO levied FBT in respect of the fringe benefit provided by the assessee to its employees.

6. The assessee also relied on the CBDT circular No. 6/2012 [F.No. 133/44/2012-SO(TPL)], dated 03.08.2012, which mention that status of private discretionary limit held in law as that of an 'individual'. The assessee further stated that even if it was to be

treated as beneficiaries then such beneficiaries will come under the ambit of 'individual' and Hindu Undivided Family both of which are excluded from the definition of term 'employer' u/s 115WA(1) for which FBT for certain expenses incurred for the benefit of privilege of employees will not be justifiable. The assessee also challenged the grounds of re-assessment on the ground of change of opinion based on audit objection and relied on various decisions. The assessee stated that since there was no scrutiny assessment u/s 115WE(3), the AO has no opportunity to form an opinion. These contentions were rejected by the AO and FBT was levied. Aggrieved by this, the assessee was in appeal before the Ld. CIT(A).

7. The Ld. CIT(A) has given a detail findings for each of the grounds of appeal raised by the assessee. The Ld. CIT(A) relied on the decision of **Rajesh Jhaveri Stock Broker Pvt. Ltd. (2007) 291 ITR500 (SC)** wherein it was held that process u/s 115WE(1) of the Act will not amount to application of mind and the consequent reopening u/s 115WG cannot be said to be change of opinion. The Ld. CIT(A) also justified the AO's view that during earlier proceedings also the charging of FBT was raised by the erstwhile AO and was decided to consider this issue separately and the same was not concluded. Therefore, we are of the considered view that the justification of the Ld. CIT(A) in holding the re-assessment as valid is not disputed.

8. With regard to the substantial issue of treating the assessee as AOP as against the status of a private discretionary trust as

‘individual’, we are of the considered view that the Ld. CIT(A) has rightly decided the issue in the light of various judicial decisions. The Ld. CIT(A) has interpreted the meaning of AOP on a comparison with the Hon’ble Supreme Court decision in the case of **CIT vs. Indira Balkrishna (39 ITR 546) (SC)** with that of the subsequent amendment by explanation to section 2(31) wherein the AOP can be formed without the common objective of deriving income, profits or gains, thus concluding that private discretionary trust will come under the purview of AOP. In addition to this, the proviso to section 164(1) also states that under the circumstance provided therein, the income of the discretionary trust shall be assessed to tax as AOP. The Ld. CIT(A) has also rejected the submission of assessee that the departmental circular referring to the discretionary trust as ‘individual’ is also not very relevant in view of the explanation provided to section 2(31) of the Act and the said circular merely refers to the difficulty in accepting the return by existing e-filing software if the status of private discretionary trust is shown as ‘individual’ is also not disputed.

9. The Ld. AR has submitted a copy of the latest judgment of Madras High Court in CIT, Chennai vs. Shriram Ownership Trust, Chennai (2020) 122 taxman.com 155 (Madras), where the facts of the case are not identical with the present appeal before us and the said decision does not hold good for this case. Apart from this, there is no other material on record to take any other view than that of Ld. CIT(A)’s findings.

10. In view of the above observation, we decline to interfere with the findings of the Ld. CIT(A).

11. In the result, the appeal filed by the assessee is **dismissed**.

Orders pronounced in the open court on 16.03.2022.

Sd/-
(AM Alankamony)
Accountant Member
मुंबई Mumbai; दिनांक Dated : 16.03.2022
Sr.PS. Dhananjay

Sd/-
(Kavitha Rajagopal)
Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai