

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 108/Asr/2017
Assessment Year: 2008-09

Sh. Gautam Seth
Prop. M/s Seth Telecom,
Jalandhar Road, Batala,
Punjab

Vs. Income Tax Officer Ward 1,
Batala

[PAN: BGXPS 1095K]
(Appellant)

(Respondent)

Appellant by : Sh. Mrs. Rano Jain, Adv. &
Sh. Avish Majhajan, CA

Respondent by: Smt. Rajinder Kaur, CIT DR

Date of Hearing: 04.05.2022

Date of Pronouncement: 12.07.2022

ORDER

Per Anikesh Banerjee, JM:

The instant appeal was filed by the assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals)-1, Amritsar [in brevity the CIT(A)], bearing Appeal No. 28/2016-17 dated 30.11.2016 u/s 250(6) of the Income Tax Act, 1961 [in brevity the Act], in respect of Assessment Year 2008-09. The impugned order was generated from the order of the Ld. Income Tax Officer,

Ward-1, Batala [in brevity the A.O.] passed u/s 143(3)/148 of the Income Tax Act, dated 31.03.2016.

2. During the appellate proceedings, the assessee raised the following grounds of appeal:

- “1. *That the additions/ disallowances made by the Assessing Officer (“AO”) and upheld by the CIT(A) are illegal and bad in law.*
2. *That in view of the facts and circumstances of the case, the CIT(A) has erred on facts and in law in upholding the addition of Rs. 2,97,65,273/- as expenditure out of undisclosed sources.*
3. *The addition made by the AO is illegal, bad in law and against the principles of natural justice and without granting a proper opportunity to the appellant to be heard.*
4. *That in the view of the facts and circumstances of the case, the CIT(A) has erred on facts and in law in upholding the addition of Rs. 2,97,65,273/- invoking provisions of Section 40A(3) without appreciating the fact that the provision of 40A(3) is not applicable where the Gross Profit Ratio is estimated u/ s. 44AF.*
5. *That the AO and CIT(A) has erred on facts and in law in making an addition of Rs. 14,88,263/- u/s. 44AF without appreciating the fact that the transaction of purchase with M/s. Shivam Communication is already in dispute and the same has been held as forged transaction by the Civil court in Assessee’s own case.*
6. *That the AO has collected all the material and evidence at the back of the appellant and the same was neither confronted properly to the appellant and neither photocopies of the same were supplied to the appellant.*
7. *That the AO has made additions based on evidence that he himself doubts and hence the additions made are illegal and bad in law.*
8. *That the assessment order and CIT(A) order have been passed without due application of mind and a judicious examination of the evidence and material on record.*

9. *That the Additions/ Disallowances made and observations made are unjust, unlawful and based on mere surmises and conjectures. The additions/disallowances made cannot be justified by any material on record and in any case they are excessive.*
10. *That the explanation given and the evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the additions made cannot be justified in view of the said material and explanation.*
11. *That the AO erred in law and on facts in charging interest u/s 234B of the IT Act. The AO has failed to appreciate the evidence and documents placed on record by the assessee.*
12. *That the AO erred in law and on facts and circumstances of the case in initiating penalty u/s 271(l)(c) , 271B and 271A without appreciating the facts and circumstances of the case.*

The above objections are without prejudice to each other. The assessee craves leave to alter, amend or withdraw all or any objections herein or add any further grounds as may be considered necessary either before or during the hearing.”

3. The assessee also filed the additional ground which is annexed as follows:

“Ground 10: *“That notice issued u/s 148 and the reassessment order passed u/s 143(3) r.w.s. 147 are illegal bad in law and without jurisdiction. The initiation of re-assessment proceedings is illegal and bad in law. ”*

Ground 11: *“That the reassessment order passed u/s 143(3) r.w.s. 147 and the additions made therein are illegal bad in law and without jurisdiction as no notice u/s 143(2) has not been served within the prescribed time as per the provisions of law”*

The relevant facts are already on record and no new fact is required to be investigated. The above noted ground goes to the root of the matter. It is therefore humbly requested that the same may kindly be admitted and adjudicated. Reliance is placed on the decision of Hon'ble Supreme Court in the case NTPC 229 ITR 383 (SC). ”

4. Brief fact of the case is that the assessee is a trader filed return u/139(1) of the Act. In this u/s 148 was issued by the Ld. AO for undisclosed transaction amount to Rs.2,97,65,273/- related to purchase from M/s Shivam Communication, near National Motor Garage, Jalandhar Road, Batala for the year 01.04.2007 to 31.03.2008. Also, the purchase made from M/s A.V.I. Marketing, Hall Bazar, Amritsar amount to Rs. 25,79,058/- for the same period. In respect of purchase the Ld. AO also calculated the profit u/s 44AF @ of 5% on gross receipt amount to Rs.16,17,216/-. The assessee declared total income of Rs. 1,22,350/- in the return income filed u/s 139(1). The Ld. AO added back the purchase from M/s Shivam Communications amount to Rs.2,97,65,273/- u/s 40A(3) of the Act for purchase made through cash payment and also the net profit of Rs.14,88,263/- @ of 5% of Rs.2,97,65,273/-. Aggrieved, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) upheld the order of the Ld. AO. Being aggrieved, the assessee filed an appeal before us.

5. The Ld. counsel of the assessee vehemently argued and placed an additional ground before the Court. As per the argument of the Ld. counsel, no notice u/s 143(2) of Act was issued during the assessment proceedings. He relied on the order of the Commissioner of Income Tax v. Laxman Das Khandelwal 2019 (8) TMI 660 (SC), specific para is inserted as below:

“9. According to Section 292BB of the Act, if the assesses had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.”

Further relied on the order of CIT, Faridabad v. M/s Cebon India Ltd. 2012 347

ITR 583 (P&H), the relevant para is inserted as follows:

“5. We find that concurrent finding has been recorded by the CIT (A) as well as the Tribunal on the question of date of service of notice. Notice was not served within the stipulated time. Mere giving of dispatch number will not render the said finding to be perverse. In absence of notice being served, the Assessing Officer had no jurisdiction to make assessment. Absence of notice cannot be held to be curable under Section 292 BB of the Act.”

6. The Ld. DR vehemently argued but during the argument did not able to throw any light related to validity of notice u/s 143(2) of the Act related for assessment u/s 147/143(3) of the Act.

7. The Ld. counsel further argued that this additional ground was never taken before the ld. Assessing Authority or before the ld. CIT(A). The issue is taken first time before the ITAT. The Ld. counsel relied on the judgment of Hon’ble Supreme Court in the case of NTPC 229 ITR 383 (SC) for placing of additional evidence.

8. We heard the rival submissions and considered the documents available in the record. This additional ground is first time taken by the assessee before the ITAT. Considering the gravity of the fact, this issue should be reconsidered by the Ld. CIT(A) for adjudication. The respectful observation of apex court in the case of Commissioner of Income Tax v. Laxman Das Khandelwal, the non-issuance of the notice u/s 143(2) of the Act is not curable u/s 292BB of the Act. We directed for further adjudication of the issue before the Ld. CIT(A). Accordingly, we accept the additional ground of the assessee. The Additional Ground numbers 10 & 11 are setting aside before the Ld. CIT(A) for further adjudication related to issuance of notice u/s 143(2) of the Act. The assessee, in turn, is directed to substantiate its case. Needless to add that adequate opportunity of hearing shall be granted to the assessee.

9. In the result, the Additional Ground numbers 10 & 11 are allowed for statistical purpose.

10. Adjudication of the ground numbers 2-10 of the assessee. The assessee filed a paper book containing page no-1 to 52 which is kept in record. The reopening was made u/s 147 before that the statement was recorded on oath of the assessee and Sh. Kasturi Lal Seth father of the assessee (APB-Page-7 to 18). As per the statement, the ld AO asked that some of the payments to party were paid through

HDFC Bank in paper book page no. 11 Q. No. 9. In answer the assessee mentioned negative the reply of question no. 9 in paper book page 11 is extracted as follows:

“On some of the receipt’s cheque numbers have been mentioned issued by you as a token of payment made. These cheques are of HDFC Bank. I am showing you their receipts whether these cheques pertain to you. Please comments.

Ans. During the F.Y. 2007-08, I was not having any account with HDFC Bank. Therefore, I have not issued any cheque to M/s Shivam Communication during F.Y. 2007-08.”

11. The Ld. counsel further mentioned that the Ld. AO did not make any verification of the HDFC Bank. Before the investigation enquiry, in fact, no such enquiry was made till the finalization of the assessment order. Further mentioned in the financial year 2011-12 M/s Shivam Communication had forged one cheque issued by the assessee. The complaint was filed by M/s Shivam Communication against the assessee U/s 138 of Negotiable Instrument Act. But as per order of the Judicial Magistrate, Batala in an order dated 02.03.2015, Criminal Complaint no-362/2011 (APB page 43-52), the M/s Shivam Communication was held to be guilty of tempering the cheque. This order is before the date of reasons recorded. The Ld. counsel further mentioned that the Ld. AO during reasons recorded did not apply his mind. In this respect, the Ld. counsel argued that M/s Shivam Communication is nothing but a habitual offender.

12. The Ld. counsel further argued that the Ld. Joint Commissioner of Income Tax (JCIT) mechanically approved the reopening u/s 148. The Ld. JCIT only had

written 'valid reasons approved', even without putting the date on the same so the approval is mechanically in manner.

13. The Ld. DR further mentioned that after a detailed discussion with the Ld. JCIT made the approval. In the reasons recorded, the issue is fully described. So, the Ld. JCIT should not require a detailed descriptions which was already done by the Ld. AO in detailed manner. It is not a mechanically approval. The Ld. DR further mentioned that the assessee did not make any objection before the Ld. AO related to issuance of 148 notices. The Ld. DR relied on the order of the Ld. CIT(A) page no. 24 is extracted as follows:

“However, in the case under reference the assessee has made payments in cash to use the unaccounted money for business transactions. The conduct of the assessee is not bona fide and genuine as the assessee has not recorded the purchase from Shivam Communication in his books of accounts. The assessee and M/s Shivam Communication are in dispute and in the order of Judicial Magistrate 1st Class Batala it is clear that the assessee has had business relations with the Shivam Communications from the Year 2007(refer page 5 of the order). Now, the Assessee has denied any such dealings. The same clearly depicts that the assessee was having business transactions with M/s Shivam Communications and the assessee has used his unaccounted money in the business transaction. The conduct of the assessee cannot be held to be bonafide and genuine. The judgments relied upon by the counsel of the appellant are about the cases where the assessee has acted in a bona fide way and the presence of unaccounted money was not established.

Further the case laws relied upon by the Ld AO are squarely applicable on the case and the addition made by the AO on account of section 40A (3) is confirmed. The ground of the assessee is thus dismissed.

The appellant has further contented that no addition can be made in cases where profit is determined on estimate basis. In this case the assessee has suppressed the sales as well as purchases.”

14. We heard the rival submissions and relied on the documents available in the record. In fact, from the record of the assessee, M/s Shivam Communication is dubious in nature. As per the Ld. counsel, the assessee had not entered anything of all the transaction with the party during the financial year. In fact, any of the Revenue Authorities had not made any cross examination in between the assessee and the party. The documents relied on the Ld. AO was not properly verified through the cross examination. The reasonable opportunity of the assessee should not be denied. We decide that the matter should be returned back to the Ld. CIT(A) for further adjudication. Accordingly, we are setting aside the ground of appeal before the Ld. CIT(A) for further adjudication. On the other hand, the assessee should get a reasonable opportunity for redressal the grievance.

15. In the result, the Ground Nos.1, 11 & 12 of assessee are general in nature. The Ground Nos. 2 to 10 and additional Ground Nos. 10 & 11 of appeal of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 12.07.2022

Sd/-
(Dr. M. L. Meena)
Accountant Member

Sd/-
(Anikesh Banerjee)
Judicial Member

GP/Sr. PS

Copy of the order forwarded to:

- (1) The Appellant:
- (2) The Respondent:

- (3) The CIT(A),
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T
- (6) The Guard File

True Copy
By Order