

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 395/DEL/2020 (A.Y 2016-17)

Deepak Ummat, R/o. 101, Tribhuvan Complex, Mathura Road, New Delhi – 110 065. PAN No. AAMPU4516H (APPELLANT)	Vs.	DCIT, Circle : 62 (1) New Delhi. (RESPONDENT)
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Assessee by :	Shri Sameer Malhotra, Advocate;
Department by:	Shri Yogesh Kumar Nayyar, Sr. D. R.;

Date of Hearing	03.11.2022
Date of Pronouncement	09.11.2022

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee for assessment year 2016-17, against the order of the Id. Commissioner of Income Tax (Appeals)-20, New Delhi [hereinafter referred to CIT (Appeals) dated 31.10.2019.

2. The assessee has raised the following grounds:-

“1. THAT the addition made by the Ld. A.O. for Rs.3,72,718/- and confirming the addition by the Ld. CIT (A)-20 is against the facts and circumstances of the case and is uncalled for and unjustified. Also, the Ld. CIT (A)-20 in merely one hearing after listening to the arguments of the counsel of the appellant, without responding to the arguments, not asking questions/ making queries passed the order.

2. THAT since it's an order passed on account of notice issued to the assessee u/s 143(2) of the Act, therefore passing an order u/s 144 of the Act is unjustified, since the assessee doesn't fall under provisions of sub section 3 of section 144 where it is crystal clearly envisaged as, 144(3) When an assessee after filing a return fails to comply with the terms of a notice as given in section 143 (2) for production of evidence or documents. The Ld. CIT(A)- 20 has also not considered the same while passing the Appellate order u/s 250 of the Act.

3. THAT on the opening of the assessment order the Ld. AO alleges that- 'notice u/s 142(1) was issued on 04/09/2018 fixing the date of hearing on 13/09/2018. Neither anybody attended nor any reply was filed by the assessee in response to the notice'. Whereas, the counsel of the assessee Sh. Sameer Malhotra, Advocate appeared and was told by the Ld. AO to file a letter for opting for manual assessment, which the Ld. AO is confirming in PARA 3, that the letter to the same effect was filed on 24/09/2018. Even in the later part of the assessment order the Ld. AO is nowhere denying that the assessee or the counsel of the assessee did not cooperate during the assessment proceedings. Therefore passing an

order u/s 144 is unlawful, unjustified and passed in hurry and in a casual manner. In the similar manner the Ld. CIT(A)- 20 has hurriedly passed the order, confirming the addition made by the Ld. AO without affording sufficient opportunity to the assessee.

4. *THAT the Ld. AO as well as the Ld. CIT(A)- 20 has failed to appreciate that the share trading done during the year under appeal is all 'Intraday', and not 'Inter-day'. Difference between 'Intraday' & 'Interday' trading is reproduced hereunder:*

"With an intraday trade, you take a position in a stock, futures or currency pair after the markets open and close the position before the markets close on the same day. With interday trading, you keep trading positions open at least through the Close of the markets and overnight".

5. *The Ld. AO has grossly erred in making the addition @ 5% of Rs. 1,21,62,142/-, over presumption of "Inter-day" trading. On one hand, the Ld. AO has appreciated and given due credit of information regarding derivatives and losses of Rs. - 2,35,389/- and on the other hand, he has made an addition @ 5% on the basis of Inter-day sales. It is to be observed that there cannot be any addition on the basis of an ad-hoc percentage. There is no scientific basis or any method to help in assuming and estimating the percentage. Thus, the method applied is completely arbitrary. The assessee has made no transactions related to securities/equity on 'Inter-day' basis during the year under appeal. No element of share trading in the bank statements filed during assessment proceedings. The share brokerage company has made intraday share trading only. Although the portfolio from M/s Bonanza Portfolio Limited denotes a loss of Rs. 2,35,389/- during the year, copy of which was*

filed during assessment proceeding vide letter dated 02/11/2018. The assessee has not taken credit for the said loss mentioned above, in the return of income, which is evident from the computation of income placed on assessment record. The above said loss incurred by the assessee was paid to the brokerage company in the preceding year. The above facts were neither called for by the Ld. CIT(A)-20 neither considered while passing the Appellate order u/s 250 of the Act.

6. THAT copy of Ledger account from M/s Bonanza Portfolio for the year under assessment is available on assessment record vide letter dated 21/11/2018. Also, the assessee is not liable to Audit u/s 44AB because the turnover for the year under appeal before your honor does not exceed Rs. 1cr. The total turnover of shares during the year is Rs.3,74,020/94 only, evident from the Folio Statement and contract notes emailed during the assessment proceedings, vide letter date 19/11/2018, which the Ld. AO has not acknowledged in the impugned assessment order. This shows his bias towards the assessee. All the trading done during the year is 'intra-day'. Also, the assessee is not liable to audit because he has incurred loss of Rs.2,35,389/-. Neither the Ld. AO nor the Ld. CIT(A)-20 consider the facts of the case before passing the impugned assessment and appellate orders respectively.

7. THAT no Show cause notice was issued during the assessment proceedings by the Ld. AO to the assessee before making the addition and passing the impugned assessment order. The fact was laid down in the grounds of appeal vide form- 35 before the Ld. CIT(A)-20 but were not considered while passing the appellate order.”

3. Brief facts of the case are that, the return of income declaring income of Rs. 77,66,460/- was filed by the assessee. The case of the assessee was selected for limited scrutiny and a notice u/s 143(2) of the Act was issued. During the course of assessment proceedings the representative of the assessee has participated and ultimately the assessment order u/s 144 of the Act came to be passed by the A.O. by making an addition of Rs. 3,72,718/-.

4. As against the assessment order dated 23/12/2018 passed u/s 144 of the Act, the assessee has preferred an appeal before the CIT(A). The Ld.CIT(A) has dismissed the appeal vide order dated 31/10/2019.

5. Aggrieved by the order dated 31/10/2019, the assessee has preferred the present appeal.

6. The Ld. Counsel for the assessee submitted that the Ld. CIT (A) has erred in making addition of Rs. 3,72,718/- on account of share trading @ 5% of total sale of Rs. 1,21,62,142/- over the presumption of "inter-day" trading. The Ld. Counsel for the assessee further submitted that though the Assessee's representative has participated in the assessment proceedings, the Ld. A.O. has erroneously passed order u/s 144 of the Act. Further submitted that, once the assessee participated in the assessment proceedings, files the return and complies with the notices, the A.O. cannot pass the Assessment order u/s 144 of the Act. Therefore, the Assessment order and the Order of the CIT (A) are liable to be set aside.

7. Per contra, the Ld. DR has drawn our attention to the assessment order and submitted that the assessee has been provided with several opportunities to produce information regarding turnover/sales of the shares, but even after availing the opportunities the AR of the Assessee has show inability to produce the details of the share transaction, therefore the Ld. A.O. has rightly passed order u/s 144 of the Act.

8. We have heard the parties, perused the material on record and gave our thoughtful consideration. It is not in dispute that the representative of the assessee has participated in the assessment proceedings and the assessment order has been passed u/s 144 of the Act. The moot question is that in what circumstances the Assessing Officer can pass Best Judgment Assessment u/s 144 of the Act?. For the ready reference the Section 144 of the Act is reproduced hereunder:-

“144. Best judgment assessment

(1) ¹] If any person-

(a) fails to make the return required ² under sub- section (1) of section 139] and has not made a return or a revised return under subsection (4) or sub- section (5) of that section,] or

(b) fails to comply with all the terms of a notice issued under subsection (1) of section 142 ³ or fails to comply with a direction issued under sub- section (2A) of that section], or

(c) having made a return, fails to comply with all the terms of a notice issued under sub- section (2) of section 143, the ⁴ Assessing] Officer, after taking into account all relevant material which the ⁵ Assessing] Officer has gathered, ⁶ shall, after giving the assessee an opportunity of being heard, make the assessment] of the total income or loss to the best of his judgment and determine the sum payable by the assessee ⁷] on the basis of such assessment: ⁸ Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment: Provided further that it shall not be necessary to

give such opportunity in a case where a notice under sub- section (1) of section 142 has been issued prior to the making of an assessment under this section.]

(2) ⁹ The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988 , or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]

9. In the present case on hand, the Ld. Assessing Officer has issued notice u/s 142(1) of the Act and the representative of the assessee had filed written reply and again filed part replies but did not produced the information regarding the share turnover/sales. The Ld. A.O. has asked the assessee to file remaining information/details on 02/11/2018. On 02/11/2018, again a part reply has been filed. The Ld. A.O. has once again asked the representative of the assessee to file remaining reply and ultimately on 20/12/2018 the representative of the assessee stated that 'share broker is not providing any information regarding turnover/sales etc., thus it cannot be submitted". Since the assessee has submitted his inability to produce the details and has not filed the details sought by the A.O., the Ld. A.O rightly invoked the Section 144 of the Act and passed the Best Judgment Assessment and the said action of the A.O. cannot be found fault with.

10. The Ld. Counsel for the assessee has vehemently submitted that he has sent an e-mail to the Ld. A.O. comprising of 2000 pages attaching all the documents regarding turnover/sales etc of the share transaction which has not been verified by the A.O. But the said fact cannot be corroborated with any of

the documents on record and even before us the assessee has not produced any such documents to verify. In view of the same, we are of the considered opinion that if the matter is remanded to the file of A.O. to verify the documents produced by the Assessee and passed appropriate fresh Assessment order after hearing the assessee, the substantial justice would be rendered. Accordingly, we direct the A.O. to consider the documents produced by the Assessee and pass the Assessment Order in accordance with law after hearing the Assessee.

11. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 09th **November 2022.**

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER
Dated : 09/11/2022

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

R.N, Sr. PS

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

