

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 446/JP/2022
निर्धारण वर्ष/Assessment Years : 2016-17

Rajesh Gupta 525, Shastri Nagar, Dadabari	बनाम Vs.	Income Tax Officer Ward 2(2), Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AIAPG 7254 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Vipul Jain (CA)
राजस्व की ओर से / Revenue by : Smt Chanchal Meena (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 29/03/2023
उदघोषणा की तारीख / Date of Pronouncement: 20/04/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 26/10/2022 [here in after (NFAC)/ Id. CIT(A)] for assessment year 2016-17 which in turn arise from the order dated 24.11.2018 passed under section 143(3) of the Income Tax Act, by ITO, Ward 1(2), Kota.

2. In this appeal, the assessee has raised following grounds: -

“1. The assessee is a salaried employee and he invested his savings in securities market for investment purpose. He is not a trader but he entered in securities market as an investor. Therefore, the income from securities transactions ought to be treated as capital gain/loss.

2. Travel, stay and food expenditure reimbursed, FD maturity receipts and transferred from own other bank account were added as income in assessment order. These receipts should not be included in the income.”

3. Succinctly, the fact as culled out from the records is that the assessee filed his e-ITR 05.08.2016 declaring a total income at Rs. 71,133/- and exempted income of Rs. 20,15,661/- for the year under consideration. Thereafter, the case selected for limited scrutiny assessment through Computer Aided Scrutiny Selection (CASS) for the issue that “Whether the investment and income relating to securities transactions are duly disclosed.” and notice u/s 143(2) of the Income-Tax Act, 1961 (the Act) issued on 16.08.2017 for 28.08.2017 duly served upon the assessee through his registered E-mail. Subsequently, notices u/s 142(1) of the Act issued on 21.07.2018 and 23.09.2018 for 06.08.2018 and 04.10.2018 respectively duly served upon the assessee through his registered E-mail. In response to those notices, the assessee did not comply with. Therefore, a summons u/s 131 of the Act issued on 29.10.2018 for 06.11.2018 duly served upon the assessee through his registered E-mail. Apropos to the issue raised before the relevant finding of the Id. AO is reiterated here in below:

"2. On examining of the information, material and documents furnished by the assessee in his e-ITR and during assessment proceedings, it has transpired that the assessee has claimed dividend receipts of Rs.13,830/- exempted which hold during his business activities as trading of shares in cash segment on the basis of aggregating of the both margins viz. positive & negative at Rs. 28,35,802 which has not declared in his ITR for the year under consideration. Thus, the assessee has neither disclosed his income in accordance to the provisions of section 44AD(1) of the Act nor got his accounts audited in terms of provisions of section 44AD(5) of the Act, so that he was being eligible to declare his income less than the prescribed rate of deemed income to be determined u/s 44AD(1) of the Act. For the same, the assessee has submitted his explanation which is reproduced as under-

"In reference to Turnover of equity shares Trading mentioned in reasons provided to us we wish to mention that. The above turnover was related to trading of shares and the net result of the same i.e. (49,320) showed in ITR of the assessee as capital gain."

2.1 After considering the contention of the assessee, it has noticed that the assessee has made trading activities in shares, but the aggregate sums of positive & negative margin of share transactions, he has not declared gross turnover of Rs. 28,35,802 in his ITR. Whereas, the assessee has done transactions as trading of shares to the tune of Rs. 28,35,802 for the year under consideration. The assessee has not explained with supporting evidences regarding his claim of capital gains of investment in shares. Therefore, the assessee's activity of share transactions are determined as trading of shares and applying the provisions of section 44AD(1) of the Act for the returned turnover of Rs. 28,35,802 and estimates a deemed income at Rs. 2,26,864 @ 8% of such returned turnover. Thus, the assessee has not disclosed his income from trading of shares of Rs.2,26,864 is hereby added to his total taxable income as undisclosed income of the assessee for the year under consideration.

3. During the course of assessment proceedings, it has transpired that the assessee has received credits in his AXIS Bank Account No. 911010009396867 to the tune of Rs. 3,37,731/- and in his SBI SB Account No.00000030469874280 to the tune of Rs. 12,68,656/- which are not part of receipts declared in his return of income and no explanation offered by the assessee. Therefore, the said receipts in aggregating of Rs.16,06,387/- are treated as unexplained investments u/s 69 of the Act in his bank accounts and the same is hereby added to his total taxable income for the year under consideration."

4. The assessee feeling aggrieved filed an appeal before the Id. CIT(A) / NFAC and the relevant finding of the Id. CIT(A) on the issue is reiterated here in below :

“Ground No.-1: The contention of the appellant is that the receipts in the bank accounts are FD proceeds, reimbursement from employer and transfer from another bank account. The details provided by the appellant is looked into and it is known that the fixed deposits proceeds and reimbursement from employer are not disclosed in return of income which is the obligation of the appellant and he is failed in this. The claim of transfer from one bank account to another bank account is also not correct. On comparing the both banks account provided by the appellant it is found that there are no similar transactions and the appeal on this ground is dismissed.

Ground No.-2: The appellant claim that the AO treated securities transactions as business activity and deemed its income under section 44AD. There is capital loss in the shares and thus the addition of Rs. 2,26,864/- should be deleted. From the appellant submission and facts of the case it is clear that the appellant has indulged in the activities of shares transactions and has not revealed the same in the books of account. It is the onus of appellant to maintain the books of accounts and get them audited and the appellant failed to do so. The appellant also failed to explain the source of income and to provide the supportive evidence, Hence, the appeal on this ground is dismissed.

Ground No.-3: The appellant claimed deduction of Life Insurance Premium u/s 80C of the Act of Rs. 1,35,000/- in his return of income but gross total income was only Rs. 71,133/- and deduction can not be claimed more than the gross total income. The Assessing Officer is directed to examine the facts of the case and allow the deduction claimed if appellant is eligible for full deduction as per the IT Act. Hence, the appeal on this ground is allowed.

6. In the result, the appeal is partly allowed.”

5. As the assessee could not filed any major relief from the order of the Id. CIT(A), the assessee has preferred this appeal before us on the grounds

as reiterated here in above. To support the various grounds so raised by the Id. AR of the assessee has filed the following written submission:

“1. The appellant has employed in World Health Organisation (a specialised agency of United Nations Organisation). As per Section 18 of the United Nations (privileges and immunities) Act, 1947, Officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations. Therefore, the salary income of the appellant was shown as exempt income in the income tax return.

2. Appellant filed return of income on 05.08.2016 for the AY 2016-17 declaring Gross Income of Rs. 71,133/- and Total Income as NIL.

3. The Ld. AO considering the securities transactions as business activities, added Rs. 2,26,864/- i.e. (2835802 X 8%) under section 44(AD)(1).

4. The Ld. AO has added reimbursement of expenses amount as income which are credited in the bank account Rs. 16,06,387/-

5. Total addition was made by the AO is Rs. 18,33,251/- and assessed total income of Rs. 18,33,250/-.

6. Aggrieved by the assessment order, the appellant filed appeal to the Ed. Commissioner of Income Tax (Appeals) on 24.11.2018 and the Ld. CIT (Appeals) confirm the addition and give partial relief to allow deduction u/s 80C to the extent of investment amount available under section 80C in his order dated 26.10.2022.

7. Now the appellant filed an appeal before your honour against the order of the Ld. CIT(Appeals) and I submit my written submission before your good self.

Submissions:

8. The World Health Organization often organizes medical camps and meetings for smoothly functioning its objectives regarding medical facility improvement in the country. The appellant as employee of the WHO, visited various places throughout the country for joining and engaging in those activities. For the very purpose, the appellant spent money for travelling and stay in hotel and other expenses. The employer transferred the money to the appellant's Axis Bank account no. 911010009396867 to reimburse the expenses. Total amount of reimbursement of expenses received in the bank account amounted Rs. 3,37,731/-. Details of such receipts are provided in separate sheet attached along with bank statement and vouchers. These receipts are not income but only the reimbursement of expenses and therefore, should be deleted.

9. The appellant received maturity amount of his fixed deposits made in Oriental Bank of Commerce in his SBI bank account no. 30469874280 as per below details:

17-06-2015	8,22,488/-
12-02-2016	<u>4,46,168/-</u>
TOTAL	12,68,656/-

The interest income of Rs. 45,665/- of the Fixed Deposits in OBC is duly shown in the Income Tax Return for the year. But the Ld. AO treated the whole amount of maturity receipt of Fixed Deposit as income and added to the appellant's income. These FDs were made in the erstwhile Oriental Bank of Commerce (OBC), Shivpuri Branch and now the bank is merged with Punjab National Bank (PNB). Certified Copies of Fixed Deposit Certificates are enclosed herewith. Statement of SBI bank account no. 30469874280 is attached herewith. These sums should also be deleted from income.

10. The total of addition made for receipts of reimbursement of expenses and fixed deposits maturity receipts are Rs. 16,06,387/- being (3,37,731 + 12,68,656) should be deleted. The Ld. CIT (Appeals) has erred in confirming the addition. The Ld. CIT (Appeals) mentioned in the order that since the appellant did not disclosed fixed deposits proceeds and reimbursement of expenses in the return of income which is the obligation of the appellant and he is failed in this, is not correct as the appellant is a salaried person and he is not required to prepare and file the Profit and Loss Account and Balance Sheet.

11. The appellant has invested money in the stock market. But unfortunately he suffered loss of Rs. 9,11,829.76/- on that investment. He purchased shares amounted Rs. 22,10,87,786.83/- and sold shares amounted Rs. 22,01,75,456.90/-. The Ld. AO has treated it as business activities not capital loss. Considering the total of positive and negative margin, the AO computed turnover of Rs. 28,35,802/- and income @ 8% has been calculated under section 44AD(1) i.e. Rs. 2,26,864/-. The money invested in the stock market is the appellant's own money which is accumulated from his savings of the previous years. It is not generated from borrowed money. Moreover, the appellant is a salaried person of WHO. He could not indulge in another business. Therefore, the transactions in stock market should be treated as investing activities rather than business activities. Hence, the addition of Rs. 2,26,864/- as business income should be deleted. Statement of Share transactions are attached herewith.

Therefore it is very humbly prayed that kindly delete the addition and allow the appeal of the appellant and obliged.”

6. The Id DR is heard who has relied on the findings of the lower authorities. The Id. DR also submitted the looking to the nature of frequent

transaction done by the assessee the Id. AO has rightly assessed the income of the assessee. The details which the Id. AR of the assessee so filed are not filed on the records of the lower authorities.

7. We have heard the rival contentions and perused the material placed on record. It is not in dispute that the primary income of the assessee is under the head salary. It is also not in dispute that the assessee is working under World Health Organization. The only dispute that based on the facts on record whether the investing activity done by the assessee is business receipts or it falls under the head Capital Gains and the amount of Rs. 3,37,731/- and Rs. 12,68,656/- are receipts or income of the assessee or not.

7.1 As regards the contention of the assessee that the gain that he has received from the investing activity is the capital receipt/gain and shall be chargeable to tax as capital gain only. The bench noted that the assessee is employee of the World Health Organization and doing the investing activity and found that he regular income source is salary only. This fact is accepted by the revenue that the assessee is salaried employee and has offered the capital gain in his computation of income for an amount of Rs.

49,320/-. Merely the receipt of the activity is Rs. 28,35,802/- how the applicability of presumptive taxation will apply looking the facts of the case on hand. It is also not disputed by the revenue that the assessee has not disclosed the capital gain for an amount of Rs. 49,320/-. There is no observation of the Id. AO while estimating income at 8 % that why the income offered by the assessee for an amount of Rs. 49,320/- is not correct whether it is of the income from business or profession or from the investing activity. The Id. AO also not dealt with the fact how the provision of section 44AD will apply when apparently these transactions are related investing activity. At this stage we would like to note the circular issued by the CBDT vide its No. 6/2016 [F.No.225/12/2016-ITA-III dated 29.02.2016. The relevant extract is as under:-

“Sub-section (14) of section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether ,or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature, of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past. 2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stockin-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations. 3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of

income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of 26 IT(IT)A No. 02, 04/JP/2018 CO No. 41/JP/2018 &IT(IT) A No. 12/JP/2019 Arun Nagar shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following — (a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income, (b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, **if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer.** However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years; (c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT. 4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions. 5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the act shall continue to apply on the transactions involving transfer of shares and securities.”

Based on this instruction we observed that even the CBDT is instructing their officer that once the stand taken by the assessee shall not be disturbed by the assessing officer and here in this case the assessee has already taken a stand to offer the income under the head capital gain the same cannot be rejected without taking any reason to the assessee and the Id. AO cannot the dispute the income that has already been offered by the

assessee under the head capital gain. Based on these observations the ground no. 1 taken by the assessee is allowed.

7.2 To substantiate the ground no. 2 raised by the assessee before, us the Id. AR of the assessee demonstrated that so far as two receipt recorded in the bank account is concerned the first amount of Rs. 12,68,656/- is the amount of maturity amount of his fixed deposits made in Oriental Bank of Commerce in his SBI bank account no. 30469874280 dated 17-06-2015 for an amount of Rs. 8,22,488/- and dated 12-02-2016 for an amount of Rs. 4,46,168/- totaling to Rs. 12,68,656/- not only that the receipt if any cannot be so odd and therefore, the view taken by the Id. AO is incorrect. The second receipt is for an Rs. 3,37,731/- the Id. AR of the assessee relied upon the various vouchers of reimbursement received by him from his employer being the amount of the reimbursement of expenditure amount received by the assessee [vouchers (APB-15-33)] and summary at page 14 as extracted here in below:

Axis Bank Account no. 911010009396867

Date in Bank Statement	Amount	Voucher No.	Voucher Date	Cheque No.	Received from	
4/16/2015	42800	0001	4/15/2015	135069	National Polio Sevillance Project-Kota	
5/18/2015	64700	0006	5/18/2015	156990	National Polio Sevillance Project-Kota	
6/16/2015	23800	0008	6/15/2015	157009	National Polio Sevillance Project-Kota	
7/1/2015	3400	0002	6/30/2015	157015	National Polio Sevillance Project-Kota	
7/27/2015	10200	0007	7/23/2015	157029	National Polio Sevillance Project-Kota	
8/1/2015	3900	0002	7/29/2015	157031	National Polio Sevillance Project-Kota	
8/25/2015	12800	0005	8/25/2015	157049	National Polio Sevillance Project-Kota	
9/1/2015	3400	0003	9/1/2015	157055	National Polio Sevillance Project-Kota	
9/7/2015	40000	0009	9/30/2015	157059	National Polio Sevillance Project-Kota	
10/3/2015	37632	0009	9/30/2015	157066	National Polio Sevillance Project-Kota	
10/17/2015	13600	0001	10/16/2015	184201	National Polio Sevillance Project-Kota	
10/26/2015	3400	0006	10/26/2015	184211	National Polio Sevillance Project-Kota	
12/19/2015	10200	0001	12/15/2015	184246	National Polio Sevillance Project-Kota	
12/22/2015	13000	0012	12/22/2015	184262	National Polio Sevillance Project-Kota	
1/21/2016	10200	0006	1/16/2016	184277	National Polio Sevillance Project-Kota	
1/21/2016	3400	0002	1/21/2016	184284	National Polio Sevillance Project-Kota	
2/12/2016	17499	0002	2/12/2016	198201	National Polio Sevillance Project-Kota	
2/25/2016	10200	0004	2/16/2016	198204	National Polio Sevillance Project-Kota	3400
			2/24/2016	198207	National Polio Sevillance Project-Kota	6800
3/29/2016	13600	0004	3/28/2016	198249	National Polio Sevillance Project-Kota	
TOTAL	337731					

Based on same these set of evidence we observed that the same is not taxable receipts and therefore Id. AO has incorrectly disallowed it. The Id. DR not contended to these averments on facts but at the same time Id. SR. DR submitted that so far these contentions were not raised or submitted before the lower authorities, needs verification on the part of the Id. AO. She further submitted that let these receipt be verified by the Id. AO and if found in accordance with the law AO may grant the relief to the assessee after verification of evidence based on these evidences contending that the

receipt is not taxable. The bench noted that the contentions raised by the assessee cannot be brushed aside and he cannot be taxed on the receipt which is the maturity amount of the fixed deposit receipt with the bank and reimbursement of the expenditure received. But since the assessee has not raised this issue before the Id. AO we admit these additional evidences and direct the Id. AO to verify the contentions of the assessee and as agreed by the Id. DR that he [Id. AO] will complete the assessment after verifying the required information from the assessee and grant the relief in accordance with the law with in certain time frame. Based on these observations the ground no. 2 raised by the assessee is allowed for statistical purpose.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 20/04/2023.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठौड कमलेश जयंतभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 20/04/2023

*Ganesh Kumar

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Sh. Rajesh Gupta, Dadabari
2. प्रत्यर्थी / The Respondent- ITO, Ward-2(2), Kota
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 446/JP/2022)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar