

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 Nos. 119 & 120/JP/2023
निर्धारण वर्ष/Assessment Years : 2011-12 & 2012-13

Manish Chand Jain 11, C/o Manish Traders Teli Mohalla, Kekri, Ajmer	बनाम Vs.	ITO Ward 2(2), Ajmer
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AMAPJ 0876 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Mukesh Khandelwal (CA)
राजस्व की ओर से / Revenue by : Smt Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 18/04/2023
उदघोषणा की तारीख / Date of Pronouncement: 03/05/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These two appeals are filed by assessee and are arising out of the order of the National Faceless Appeal Centre, Delhi dated 10/01/2023 & 11/01/2023 [here in after (NFAC)] for assessment year 2011-12 & 2012-13 which in turn arise from the order dated 03.12.2018 passed under section 143(3) r.w.s 147 of the Income Tax Act, [here in after as Act] by the ITO, Ward 2 (3), Ajmer.

2. Since, the facts of both the cases are identical, we have heard these cases together and passing the order together. The facts and grounds are taken from the folder of Manish Chand Jain in ITA No. 119/JP/2023 for A. Y. 2011-12 and this case is taken as lead case. In this appeal the assessee has raised following grounds:-

“That under the facts and circumstances of the case the Id. CIT(A) has erred seriously in dismissing the appeal of the appellant without considering submissions given in person prior to formation of NFAC and further in not providing proper opportunity to the appellant during faceless hearing.

2. That without prejudice to the ground no. 1, the Id. CIT(A) erred seriously in not considering the fact that the income as assessed by Id. AO and as sustained by him was not income at all as the same relates to MTM margin for the derivative trade in shares.

3. That the appellant craves leave to add, amend, alter, withdraw any of the grounds before hearing of the appeal.”

2.1 In ITA No. 120/JP/2023 for A. Y. 2012-13, the assessee has raised following grounds: -

“That under the facts and circumstances of the case the Id. CIT(A) has erred seriously in dismissing the appeal of the appellant without considering submissions given in person prior to formation of NFAC and further in not providing proper opportunity to the appellant during faceless hearing.

2. That without prejudice to the ground no. 1, the Id. CIT(A) erred seriously in not considering the fact that the income as assessed by Id. AO and as sustained by him was not income at all as the same relates to MTM margin for the derivative trade in shares.

3. That the appellant craves leave to add, amend, alter, withdraw any of the grounds before hearing of the appeal.”

3. Succinctly, the fact of the lead case as culled out from the records is that the assessee filed his return of income originally on 29.09.2011 declaring total income of Rs. 1,72,750/-. The case of the assessee selected for scrutiny u/s. 147 of the Act, as information was received from the Dy. Director of Income Tax (Investigation) Unit 3(1), Kolkata that systematic evasion of taxes by clients/members of the NMCE[M/s. National Multi Commodity Exchange] during the year by mis use of NMCE platform and the assessee purchase transactions amounting to Rs. 2,61,47,550/- and sales transactions amounting to Rs.2,68,08,450/- through NMCE platform and earned a profit of Rs. 6,60,900/- during the year under consideration. Subsequently a notice u/s. 148 was issued to the assessee on 29.03.2018 which was served upon the assessee. In response assessee filed revised return of income of income declaring total income of Rs. 1,72,750/- on 07.08.2018.

4. Further, notice u/s 142(1) was issued on 19.09.2018 and sent through ITBA. Again on 04.10.2018, another notice u/s 142(1)/143(2) of the IT Act, 1961 with detailed query was issued to furnish the details by 11.10.2018, but the assessee has not responded in any manner. On 03.10.2018 the assessee filed a letter requesting to provide the reasons which was

provided to the assessee. As the assessee has not complied with the notice the Id. AO issued a show cause notice to the assessee stating that the case of the assessee will be decided ex-parte by invoking provision of section 147 of the Act and the proposed assessment be as under :-

“An information was also called for from NMCE regarding the transactions made by you during the FYr. 2010-11 relevant to the asstt. Year 2011-12 asking net MTM of identity code of Broker & client i.e. CL10233 with other relevant details. The NMCE has furnished the reply and shown net MTM amounting to 21,89,200/- (Rs. 11,95,000/- + 462000/- + 333300 + 198900/-) during the financial year 2010-11 relevant to the asstt. Year 2011-12. As you have not shown the profit of Rs 21,89,200/- +2% brokerage of profit, please show cause as to why this income may not be treated as undisclosed income and be added in your total income treating the same as income from other sources.

Further, it is noticed that in your case for AY 2011-12, your accounts need to be audited u/s 44AB of the IT Act, 1961. Although you have mentioned that, you have got your accounts audited but, neither the Form 3CB/3CD is available on e-filing portal nor have you submitted the same till date with regards to your submission for your case, which enforces me to come to a conclusion that you have deliberately wrongly stated that your accounts for AY 2011-12 have been audited, therefore you are required to show cause why penalty u/s 271B may not be initiated.

But before doing so, you are hereby given an final opportunity to produce all the documentary evidence as called for vide notice under sec. 142(1) dated 04.10.2018 on or before 29.11.2018 failing which it will be presumed that you do not want to say anything in the matter and will be decided accordingly as per material available on record”

4.1 In response the assessee filed reply through ITBA dated 29.11.2018 stating that “consider this letter as a revised return in response to notice under sec. 148 since presently due to technical reason I am not able to revised return filed in response to notice u/s 148”. The reply of the

assessee considered and found not tenable, this reply is for the sake of reply as the assessee has already filed his return in response to notice under sec. 148 on 7.8.2018 declaring the total income as filed in the original return and as such the computation given in the letter is not considerable. Further, it is worth mentioning here that the statute did not provide any provision for revising any return filed in response to notice u/s 148. Hence, after considering all the facts, the case is completed as under:-

“During the course of assessment proceedings the information was called from the National Multi-commodity Exchange (NMCE) u/s 133(6) of the Act and it is gathered that the assessee has earned net MTM amounting to Rs. 21,89,200/- (Rs. 1195000 + 462000 + 333300 + 198900) but the assessee has not shown any profit in the return filed originally or in response to notice under sec. 148. The assessee has not responded the notices/show cause notices properly and the reply filed is not convincing as mentioned above, therefore, the profit of Rs. 2232984/- (including 2% brokerage of Rs. 2189200) is treated the assessee’s undisclosed income as income from other sources and the same is added to the total income of the assessee.

(Addition: 22,32,984/-)”

5. Aggrieved from the order of the assessment assessee preferred an appeal before the Id. CIT(A). Apropos to the grounds of the appeal so raised the relevant finding of the Id. CIT(A) is reiterated here in below :

“5. In the instance of the case the appellant failed to make any submissions in support of grounds of appeal, this gives rise to an undisputable conclusion that the assessee has got nothing more to say in this regard. I have gone through the record before me and based on the record. I have decided to adjudicate the issue on the merits of the case. In the instant case the AO has rightly assessed an income of Rs. 24,05,740/-. Since the appellant failed to substantive appellant’s claim and addition made by the Assessing Officer of Rs. 22,32,984/- is hereby confirmed.

6. Ground Nos. 1,2,3, and 4 of the appeal are dismissed.”

6. Feeling dissatisfied with the order of the Id. CIT(A) the assessee has preferred this appeal before this tribunal on the grounds as raised by the assessee as reiterated here in above para 2. To support the various grounds so raised by the assessee, the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

“These instant appeals pertain to the same assessee for two years bearing common facts. The AYs involved are AY 11-12 and 12-13. Prior to formation of NFAC the appellant had given written submissions manually on 13.02.2019 which could not be considered since the appeal was not disposed of by 25.09.2020 when Faceless Appeal system started and appeal was migrated to NFAC. The Id. CIT (A) did not consider such manually filed submissions may be due to some communication error. Therefore there is no fault of the assessee in not submitting any submissions as alleged in the appeal orders. Hence the Id. CIT (A) sustained the order of the Id. AO in ex parte manner. Under these circumstances the appellant request the Hon`ble Bench to grant him an opportunity to submit all necessary explanations/ documents to the Id. CIT (A) so that justice may be granted to him.”

7. The Id. AR of the assessee in addition to the above written submission argued that the assessee has already filed a detailed reply for year under consideration on 13.02.2019 before the faceless appellate system implemented even though the detailed submission filed the Id. CIT(A) contended that the assessee has not filed submission to support the appeal filed by the assessee. He also submitted that the assessee is small tax payer, he cannot be expected to know each and every procedure to seek the justice and the Id. CIT(A) should have taken a lenient view of the matter and should have decided the appeal of the assessee on merits.

8. The Id DR is heard who has relied on the findings of the lower authorities and further submitted that the rights and duties should be read together and considering the causal approach of the assessee the appeal of the assessee required to be dismissed.

9. We have heard the rival contentions and perused the material placed on record. The bench noted that the assessee has filed the detailed paper book duly acknowledge on 13.02.2019 in the office of the Commissioner of Income Tax, (Appeals) Ajmer. This paper book in support of the grounds were filed physically before the faceless appellate system implemented. This submission made by the assessee has not been considered while disposing the appeal of the assessee National Faceless Appeal Centre(NFAC) and therefore, it is in violation of principles of natural justice. The bench noted that the appellant was serious and interested in prosecuting the appeal in as much as he had already engaged tax consultant and also made the submission before the Id. CIT(A), Ajmer. We find that the notices were issued to the assessee during the corona period and same remained unattended. On the contrary while deciding the appeal of the assessee Id. CIT(A) has also not considered the submission made by the assessee by filling a detailed paper book on 13.02.2019 and hence we

feel that the assessee is deprived of the justice and his appeal should have been decided based on the merits of the case which in this case is missing. Therefore, we set a side the matter to the filed Id. CIT(A) so as to decide the appeal of the assesses on merits. The assessee is also directed to co-operate with the Id. CIT(A) in deciding the appeal on merits and without sufficient reason, not to take further adjournments. Before parting, we may make It clear that our decision to restore the matter back to the file of the Id. CIT(A) shall in no way be construed as having an reflection or expression on merits of the dispute, which shall be adjudicated by the learned Commissioner of Income Tax, (Appeals) independently in accordance with the law.

10. The fact of the case in ITA No. 120/JP/2023 is similar to the case in ITA No. 119/JP/2023 and we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the assessee in this appeal No. 120/JP/2023 is equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 119/JP/2023 for the Assessment Year

2011-12 shall apply mutatis mutandis in the case of Manish Chand Jain in
ITA No. 120/JP/2023 for the Assessment Year 2012-13.

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

Order pronounced in the open court on 03/05/2023.

Sd/-

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

(राठौड कमलेश जयंतभाई)

(Rathod Kamlesh Jayantbhai)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 03/05/2023

*Ganesh Kumar

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

1. The Appellant- Manish Chand Jain, Ajmer
2. प्रत्यर्थी / The Respondent- ITO, Ward 2(2), Ajmer
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 Nos. 119 & 120/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar