

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'G' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 144/DEL/2017 [A.Y. 2009-10]

Taiyab Chaudhary S/o Yakub Chaudhary Village Indrishpur, P.O.Baraut Dist Baghpat, Uttar Pradesh PAN: AACCS 4209 C	Vs.	The Income tax Officer Ward - 2(4) Ghaziabad
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(Applicant)

(Respondent)

Assessee By : Shri Salil Agarwal, Sr. Adv
Shri Shailesh Gupta, CA
Shri Madhur Agarwal, Adv

Department By : Ms. Yamini Gautam, Sr. DR

Date of Hearing : 11.05.2023
Date of Pronouncement : 17.05.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A), Ghaziabad dated 18.10.2016 pertaining to Assessment Year
2009-10.

2. The substantive grievances of the assessee read as under:
 1. *That the Ld. CIT (A) erred in confirming that the initiation of the assessment proceedings u/s 147 of the Act was valid, without appreciating that reason recorded for initiation of assessment proceedings u/s 147 was unjustified and inconsistent with the facts of the appellant's case.*
 2. *That the Ld. CIT (A) erred in facts and law in upholding the contention of the Ld AO and enhancing the addition made on account of unexplained investment without bringing in any cogent material on record to prove that the appellant has made any investment from undisclosed sources.*
 3. *That the Ld- CIT (A) erred in facts and law in enhancing the addition made on account of unexplained investment from Rs 38,03,8501- to Rs 76,07,7001- by considering the appellant as sole owner of property, without appreciating the fact that as per sale deed appellant is 50% owner of the property.*
 4. *That the Ld. CIT (A) erred in facts and law in upholding the contention of the Ld. AO and enhancing the addition made on account of unexplained investment without appreciating the fact that the appellant has received 50% share in property by way of gift.*
 5. *That the Ld. CIT (A) erred in facts and law in upholding the contention of the Ld AO and enhancing the addition made on account of unexplained investment without appreciating the fact that the appellant has duly substantiated the actual source of purchase of property i.e. whole payment was made from bank account of co - owner of property in Euros directly to the builder.*

6. *That on the facts and in the circumstances of the appellant's case the Ld. CIT (A) has erred both on facts and in law in enhancing the disallowance of 20% business expenses amounting to Rs 3,28,8371- made by Ld AO to Rs. 18,42,4801- being 100% receipts as unexplained income:*

- a) merely on basis of doubt, suspicion, conjecture and surmises that the appellant has not conducted any business activity*
- b) by arbitrarily rejecting the submissions of the appellant.*

That the appellant craves leave to add, amend or alter any of the grounds of appeal.”

3. The representatives of both the sides were heard at length, the case records carefully perused. We have considered the documentary evidences brought on record and have also perused the judicial decisions relied upon by both the sides.

4. The first substantive grievance of the assessee relates to the addition on account of unexplained investment in property amounting to Rs. 38,03,850/-.

5. The underlying facts are that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has purchased a property at Indirapuram, Ghaziabad, jointly with Ms. Diana Perrone, a resident of Italy for Rs. 76,07,700/-. The assessee's share in the investment being half, comes to Rs. 38,03,850/.

6. The assessee was asked to furnish the source of investment.

7. The assessee explained that the property was purchased by Ms. Diana Perrone, who gifted 50% of the share in the property to the assessee. It was explained that all the payments for the flat were made by Ms. Diana Perrone and the payments were made in Euros directly to the builder's account. Documentary evidences in support of this submission were submitted.

8. The Assessing Officer did not accept the submission of the assessee and was of the firm belief that the assessee has made investment of Rs. 38,03,850/- and since the explanation offered by the assessee was not satisfactory and without supporting evidence, the Assessing Officer made the addition of Rs. 38,03,850/-.

9. The assessee carried the matter before the Id. CIT(A) but without any success.

10. Before us, the Id. counsel for the assessee reiterated what has been stated before the Assessing Officer.

11. Per contra, the ld. DR strongly supported the findings of the Assessing Officer.

12. We have carefully perused the orders of the authorities below. The undisputed fact is that the payments for the purchase of the impugned property were made in Euros and were paid directly to the builder by Ms. Diana Perrone. This is evident from the receipt issued by the builder exhibited at pages 102 and 103 of the paper book supported by copy of ledger account of the assessee in the books of the builder placed at page 104 of the paper book.

13. U/s 69 of the Act, all that is required, is to explain the source of investment and the source of investment in the impugned property is the Euros received from Ms. Diana Perrone. Therefore, we do not find any substance in the observations of the revenue authorities that the assessee has failed to explain the source of investment. The Assessing Officer is, accordingly, directed to delete the impugned addition of Rs. 38,03,850/-. This ground is, accordingly allowed.

14. Next grievance of the assessee is that the ld. CIT(A) erred in enhancing the disallowance of 20% business expenses made by the

Assessing Officer to Rs. 18,42,480/- being 100% receipts as unexplained income.

15. Facts are that while scrutinizing the return of income and on perusal of the profit and loss account, the Assessing Officer noticed that the assessee has debited expenses at Rs. 16,44,437/-. The assessee was asked to produce the bills and vouchers and on receiving no plausible reply, the Assessing Officer made disallowance of 20% of the expenses and made disallowance of Rs. 3,28,837/-.

16. The assessee carried the matter before the ld. CIT(A), but instead of getting any relief, faced enhancement. The ld. CIT(A) completely changed the colour of assessment and added entire deposit of Rs. 18,42,480/-, which were the sale proceeds of the handicrafts sold by the assessee.

17. Before us, the ld. counsel for the assessee vehemently stated that the ld. CIT(A) has travelled beyond the assessment and has made enhancement for new source which was never considered by the Assessing Officer while framing the assessment u/s 143(3) of the Act.

18. Strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of Rai Bahadur Hardutroy Chamaria 66 ITR

443 and the Hon'ble Delhi High Court decision in the case of Sardari Lal & Co.251 ITR 864.

19. Per contra, the ld. DR strongly supported the findings of the ld. CIT(A) and stated that the powers of the ld. CIT(A) are co-terminus to that of the Assessing Officer, therefore, the ld. CIT(A) can do what the Assessing Officer can do.

20. We have carefully perused the orders of the authorities below. It is true that the Assessing Officer has not considered the issue which has been the basis of enhancement done by the ld. CIT(A). The Hon'ble Supreme Court in the case of Rai Bahadur [supra] had the occasion to consider the decision of the Hon'ble Supreme Court in the case of Shapoorji Pallonji Mistry 44 ITR 891 wherein the following question was adjudicated:

"The only question is whether in enhancing the assessment for any year lie can travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income, not disclosed in either. It is contended by the Commissioner of Income-tax that the word 'assessment' here means the ultimate would it which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words 'enhance the assessment' are not confined to the assessment reached through a particular process but the amount which ought to

have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.

The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section."

21. The Hon'ble Supreme Court observed as under:

"The principle that emerges as a result of the authorities of this Court is that the Appellate Assistant Commissioner has no jurisdiction, under s. 31(3) of the Act, to assess a source of income which has not been processed by the Income-tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore, the Appellate Assistant Commissioner cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under s. 31 (3) of the Act is restricted to the subject-matter of assessment or

the sources of income which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of the assessee. It was argued by Mr. Vishwanath Iyer on behalf of the appellant that by applying the principle to the present case, the Appellate Assistant Commissioner had jurisdiction to enhance the quantum of income of the assessee. It was pointed out that the fact of alleged transfer of Rs. 5,85,000 to Forbesganj branch was noted by the Income-tax Officer and also the fact that it did not reach Forbesganj on the same day. So, it was argued that in the appeal the Appellate Assistant Commissioner had jurisdiction to deal with the question of the taxability of the amount of Rs. 5,85,000 and to hold that it was taxable as undisclosed profits in the hands of the assessee. We are unable to accept the argument put forward on behalf of the appellant as correct. It is true that the Income-tax Officer has referred to the remittance of Rs. 5,85,000 from the Calcutta branch, but the Income-tax Officer considered the despatch of this amount only with a view to test the genuineness of the entries relating to Rs. 4,30,000 in the books of the Forbesganj branch. It is manifest that the Income-tax Officer did not consider the remittance of Rs. 5,85,000 in the process of assessment from the point of view of its taxability. It is also manifest that the Appellate Assistant Commissioner has considered the amount of remittance of Rs. 5,85,000 from a different aspect, namely, the point of view of its taxability. But since the Income-tax Officer has not applied his mind to the question of the taxability or non-taxability of the amount of Rs. 5,85,000, the Appellate Assistant Commissioner had no jurisdiction, in the circumstances of the present case, to enhance the taxable income of the assessee on the basis of this amount of Rs. 5,85,000 or of any portion thereof. As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income-tax Officer with a view to find out new sources of income and the power of

enhancement under s. 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied Ms mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. In the present case it is manifest that the Income-tax Officer has not considered the entry of Rs. 5,85,000 from the point of view of its taxability and therefore the Appellate Assistant Commissioner had no jurisdiction, in an appeal under s.31 of the Act, to enhance the assessment."

22. The Hon'ble Delhi High Court in 251 ITR 864 again considered the two decisions of the Hon'ble Supreme Court [supra] as under:

"A similar question has been examined by the Apex Court as noted above, on several occasions. We do not think it necessary and appropriate to proliferate this judgment by making reference to all the decisions. A few of the important ones need to be noticed. One of the earliest decisions on the point was in CIT v. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC). The matter related to the corresponding provisions of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act"). It was held, inter alia, that in an appeal filed by the assessed, the Appellate Assistant Commissioner has no power to enhance the assessment by discovering a new source of income not considered by the Income Tax Officer in the order appealed against. A similar view was expressed in CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967)

*66 ITR 443 (SC). That also related to a case under section 31(3) of the old Act. It was held that the power of enhancement under section 31(3) of the old Act was restricted to the subject-matter of the assessment or the source of income, which had been considered expressly or by clear implication by the assessing officer from the point of view of taxability and that the Appellate Assistant Commissioner had no power to assess the source of income, which had not been taken into consideration by the assessing officer. It is to be noted that strong reliance was placed by learned counsel for the revenue on the decision of the Apex Court in CIT v. Nirbheram Daluram (1997) 224 ITR 610. It was submitted that a different view was expressed about the scope and ambit of the power of the first appellate authority vis-a-vis the sources considered by the assessing officer and even if the action of the first appellate authority related to a new source of income not considered by the assessing officer, it was not impermissible. It is to be noted that in Union Tyres' case (*supra*), this decision was also considered by this court in the background of what had been stated in Daluram's case (*supra*) and it was observed that there was really no difference from the view expressed earlier in Shapoorji's case (*supra*) and Chamaria's case (*supra*).”*

23. The gist of the aforementioned decisions is that whenever the question of taxability of income from new source of income is concerned, which had not been considered by the Assessing Officer, jurisdiction to deal with the same in appropriate cases may be dealt with u/s 147/148 of the Act and u/s 263. It is unconceivable that in the presence of such specific provisions a similar power is available to the first appellate authority.

24. Respectfully following the ratio laid down by the Hon'ble Supreme Court/High Court we do not find any merit in the addition made by the ld. CIT(A) and the same is directed to be deleted. This Ground is allowed

25. Challenge to the reopening of the assessment was not seriously contested and the same is accordingly, dismissed.

26. In the result the appeal of the assessee in ITA No. 144/DEL/2017 is partly allowed.

The order is pronounced in the open court on 17.05.2023.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 17th May, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the approved draft comes to the Sr.PS/PS	
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