

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH
KOLKATA**

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2485/Kol/2019
Assessment Year: 2010-11**

Apeejay Shipping Ltd. 1 st Floor, 15, Apeejay House, Park Street, Kolkata-700016 (PAN: AADCS7605P)	Vs.	Assistant Commissioner of Income Tax, Central Circle-III, Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Manish Tiwari, FCA
Respondent by : Shri G. Hukugha Sema, CIT,DR

Date of Hearing : 25.05.2023
Date of Pronouncement : 31.05.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Present appeal by the assessee is arising out of the order of Commissioner of Income-tax (Appeals), Kolkata vide order no. ITBA/APL/S/250/2019-20/1019378672(1) dated 24.10.2019 against the assessment order passed by ACIT, Central Circle – III, Kolkata under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the Act), dated 28.03.2013 for AY 2010-11.

2. Grounds taken by the assessee are reproduced as under:

1(a). That on the facts and in the circumstances of the case, Ld. CIT(A) has exceeded his jurisdiction by making enhancement of income by Rs.1,41,15,230/- by introducing new source of income which is not permissible in law.

1(b). That on the facts and in the circumstances of the case, enhancement of income by Ld. CIT(A) without issuing any statutory notice u/s 251(2) of the Act is bad in law.

1(c). That on the facts and in the circumstances of the case, asking assessee to send more information on new sources by letter dated 03.07.2019 can never be equated with issue of show cause notice u/s 251(2).

2. Without prejudice to Ground No. 1 and on the facts and in the circumstances of the case, Ld. CIT(A) has erred in making new addition of Rs.1,41,15,230/- with an impractical and incorrect view that no common costs are attributable to earn income from non-shipping business.

3. That on the facts and in the circumstances of the case, Ld. CIT(A) in directing the AO to apply Rule 8D for making disallowance u/s 14A is bad in law.

2.1. Ld. Counsel for the assessee asserted to primarily contest on the enhancement made by the Ld. CIT(A) by raising three new issues while disposing the appeal filed by the assessee before him in respect of the three disallowances/additions made by the Ld. AO in the course of assessment.

3. Brief facts of the case as culled out from the records are that assessee is the domestic company engaged in the business of operating ships for carriage of goods. Assessee had filed its return of income on 01.10.2010 which was subsequently revised reporting total income of ₹27,96,82,040/-. Income reported by the assessee comprises of income from shipping business amounting to ₹1,03,70,590/- based on Tonnage tax scheme as per section 115VA of the Act. Assessment was completed under section 143(3) of the Act wherein assessed total income is ₹28,09,97,170/- by making following three disallowances/additions which were contested in appeal before the Ld. CIT(A):

i) Late payment of contribution to PF	-	₹92,352/-
ii) Provision for leave encashment	-	₹3,76,778/-
iii) Provision for Bad debt	-	₹8,46,000/-

3.1. In the course of first appellate proceedings, Ld. CIT(A) apart from dealing with the above three issues contested by the assessee, observed from the profit and loss account and tax computation of the assessee that assessee has earned income from shipping business of ₹109.86 Crores and income from non-shipping activity of ₹28.59 Crores. Ld. CIT(A) noted that assessee has common expenditure of ₹ 2.52 Crores which have been bifurcated by the assessee as under:

- i) allocable to shipping business - ₹1.11 Crores
- ii) allocable to non-shipping business - ₹1.41 Crores

3.2. Ld. CIT(A) enquired from the assessee about the location of common expenditure to non-shipping business in the light of provisions contained in section 115VJ.

3.3. Ld. CIT(A) also noted that assessee has earned exempted dividend income of ₹10.62 crores as well as exempt long-term capital gain against which assessee has *suo moto* offered ₹3.70 lakhs as disallowance under section 14A. However, Ld. CIT(A) asked the assessee to explain why rule 8D should not be applied. Ld. CIT(A) also called for explanation in respect of deduction claimed under section 80G of ₹ 25.40 lakhs in view of section 115VL(ii).

3.4. In respect of all the above three issues raised by the Ld. CIT(A), he issued a letter dated 03.07.2019 which was duly replied by the assessee by making a submission dated 26.07.2019. In its submission, assessee contested by challenging the powers of the Ld. CIT(A) to examine three issues raised by him as section 251 does not permit to raise totally new issues which have not been dealt in the assessment proceedings completed under section 143(3) of the Act. Assessee made

it submissions on the merits of the three issues raised by the Ld. CIT(A) to explain its case. Countering the submissions made by the assessee, Ld. CIT(A) stated that *“in the present case, addition/disallowance in respect of certain issues has been proposed only on the basis of books of account submitted by the assessee as well as tax computation filed during the course of assessment.”*Ld. CIT(A) then proceeded to deal with the three issues on merit, raised by him in the course of appellate proceedings and enhanced the total income by making addition/disallowance towards the two issues of allocation of common expenses and disallowance under section 14A. No enhancement was done in respect of the third issue in respect of deduction under section 80G. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel for the assessee emphasised on the position of law which does not permit Ld. CIT(A) making an enhancement by bringing new issues as new sources of income which were not dealt with by the Ld. AO in the assessment proceedings. According to him, such an exercise of power by Ld. CIT(A) is arbitrary and not in accordance with the provisions of law contained in section 251 of the Act. Ld. Counsel submitted that the three additions/disallowances made by the Ld. AO in the assessment for which assessee came up in appeal before the Ld. CIT(A) are altogether different from the three issues raised by the Ld. CIT(A) in the course of first appellate proceedings. By raising the three new issues in the first appellate proceedings, Ld. CIT(A) has brought into picture new source of income which were not the subject matter of the assessment completed by the Ld. AO. The basis adopted by the Ld. CIT(A) for exercising the power of enhancement as noted by him is the books of account submitted by the assessee and the tax computation filed

during the course of assessment which according to the Ld. Counsel is not in accordance with the law.

4.1. Ld. Counsel submitted that when in the course of assessment, ld. AO has not applied his mind on the three issues raised by the ld. CIT(A), no enhancement can be made as these three issues do not germane out of the assessment completed by the ld. AO. According to him, ld. Counsel has travelled outside the assessment order passed by the ld. AO wherein addition/disallowance made are in respect of PF, Leave Encashment and Bad Debts. He thus asserted that addition/disallowance made by the ld. CIT(A) on the issues raised by him for the first time in the course of first appellate proceedings do not have any legal force to stand and ought to be deleted as the same have been done without any powers to do so. Enhancement made by the ld. CIT(A) are illegal and liable to be quashed as such, claimed the ld. Counsel.

5. Per contra, ld. CIT DR supported the action of the ld. CIT(A) since issues raised by the ld. CIT(A) are arising out of the computation of income filed by the assessee wherein certain discrepancies were noted by the ld. CIT(A) for which explanations were called for. According to him, the additions/disallowances made by the ld. CIT(A) in exercise of his powers of enhancement available under section 251(1)(a) of the Act are rightfully done and ought to be upheld.

6. We have heard the rival contentions and given our thoughtful consideration to the submissions made as well as material placed on record. To deal with the issue raised by the assessee in the present appeal on the power of enhancement available to the Ld. CIT(A), we first apprise ourselves with the provisions contained in section 251 of

the Act which deals with the powers of Commissioner (Appeals).
Relevant provision of section 251 reads as under:

“Power of the Commissioner(Appeals)

(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers –

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(aa)....

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation. – In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.”

6.1. Power of enhancement under section 251(2) of the Act is restricted to the subject matter arising out of assessment proceedings or the source of income which has been considered expressly or by clear implication by the Ld. AO from the point of view of taxability of the assessee.

6.2. In the present case, it is manifest that ld. AO did not consider the issues relating to allocation of common expenses in terms of provisions contained in section 115VJ requiring a reasonable basis, disallowance to be made under section 14A of the Act and deduction claimed under section 80GGB and 80G of the Act. It is also manifest that ld. CIT(A) had raised the three above noted issues from the point of view of their taxability. Since ld. AO had not applied his mind to the question of taxability or non-taxability of the three issues, ld. CIT(A) had no jurisdiction in the circumstances of the instant case to enhance the taxable income of the assessee on these three issues. It is not open for the ld. CIT(A) to travel outside the assessment order with a view to find out new sources of income. There must be something in

the assessment order to show that Ld. AO had applied his mind to the particular subject matter with a view to its taxability or its non-taxability and not to any incidental connection.

6.3. It is held by the Hon'ble Supreme Court in the case of CIT vs. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC) that powers of enhancement conferred on the appellate authority extend only to matters considered by the Income-tax Officer.

6.4. In the present appeal, it is not a case where the three issues have been considered but addition on that account is not made in the assessment order by the ld. AO. Had it been such a case, it would clearly follow that ld. AO had "determined" the same in the course of assessment by deciding not to make any addition empowering the ld. CIT(A) to invoke the provisions in respect of enhancement subject to fulfilment of conditions prescribed for the same under section 251 of the Act.

7. It is necessary to bear in mind that it is only the assessee who has a right conferred under section 246 and 246A to prefer an appeal against the order of assessment made by an Assessing Officer. If the assessee does not choose to appeal, the order of assessment becomes final, subject to power of revision that the Commissioner may have under section 263 of the Act. Further, there may arise an occasion after recording appropriate reasons to believe with proper approval wherein the assessment is reopened for the income which has escaped assessment. Thus, in the present case, had the assessee chosen not to come up in appeal for the three disallowance/addition made by the Ld. AO, there was no occasion for the Ld. CIT(A) to raise the three new issues for the taxability in the hands of the assessee. These issues

raised by the Ld. CIT(A), at best, could have been taken up by invoking the provisions of section 263 or section 147, subject to fulfilment of their respective conditions and requirements. Accordingly, in the present case, Ld. CIT(A) had no jurisdiction to enhance the taxable income of the assessee in respect of the three issues raised by him on which Ld. AO had not applied his mind in the course of assessment.

7.1. This aspect was dealt by Hon'ble High Court of Delhi in the case of CIT vs. Sardari Lal & Co. [2002] 120 Taxman 595 (Del) wherein vide para 8, it held as under:

“the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessee Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority.”

7.2. Also, Hon'ble High Court in the case of Gurinder Mohan Singh Nindrajog vs. CIT [2012] 348 ITR 170 (Del) had succinctly dealt with possible situations which may arise in respect of an assessment completed under the Act by an Assessing Officer for which various remedial measures are available under the Act contained in sections 147, 154, 251(1)(a) and 263 of the Act. Relevant paragraph is extracted below:

“14. We have considered the submissions of both the parties. There is no doubt about the fact that while framing the assessment even under Section 143(3) of the Act, the Assessing Officer may omit to make certain additions of income or omit to disallow certain claims which are not admissible under the provisions of the Act thereby leading to escapement of income. The Income-Tax Act provides for remedial measures which can be taken under these circumstances. While framing an assessment under Section 143(3) of the Act, any of the following situation may occur:-

(a) The Assessing Officer may accept the return of income without making any addition or disallowance; or

(b) The assessment is framed and the Assessing Officer makes certain addition or disallowance and in making such additions or disallowances, he deals with such item or items of income in the body of order of assessment but he under-assessed such sums; or

- (c) He makes no addition in respect of some of the items, though in the course of hearing before him holds a discussion of such items of income
- (d) Yet, there can be another situation where the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry.
- (e) Further another situation may arise, where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the revenue, or
- (f) Where an item of income which ought to have been taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary for computation of income.

To ensure for each of such situations, an income which ought to have been taxed and remained untaxed, the legislature has provided different remedial measures as are contained in sections 251(1)(a), 263, 154 and 147 of the Act.

In the category stated in (a), obviously if an income escapes an assessment, the provisions of Section 147 of the Act can be invoked, subject to the condition stated in the proviso of the said section. **In the category of cases falling in category (b), section 251(1)(a) provides the CIT(A) could enhance such an assessment qua the under-assessed sum i.e. where the AO had dealt the issue in the assessment and was the subject matter of appeal.** In category falling in (c) & (e), the CIT has been empowered to take an appropriate action under section 263 of the Act. In category of cases falling under clause (d) and (f), appropriate action under section 147 of the Act can be taken to tax the income which has escaped assessment or had remained to be taxed. There can be situations where an item has been dealt with in the body of the order of assessment and the assessee being aggrieved from the addition or disallowances so made, had preferred an appeal before the CIT(A) against the said addition and disallowance, the said disallowance and addition being the subject matter of appeal before the CIT(A) in such cases, the CIT(A) has been empowered u/s 251(1)(a) of the Act, to enhance such an income where the Assessing Officer had proceeded to make addition or disallowance by dealing with the same in the body of order of assessment by under assessing the same as the same was the subject matter of the appeal as per the grounds of the appeal raised before him. In other words, the CIT(A) has a power of enhancement in respect of such item or items of income which has been dealt with in the body of the order of the assessment, and arose for his consideration as per the grounds of appeal raised before him, being the subject matter of appeal.[emphasis supplied by us by bold and underline]

7.3. Present case of the assessee does not fall in the category (b) listed above so as to apply the provisions of section 251(1)(a) for the purpose of enhancement of income resorted by the ld. CIT(A).

8. Considering the facts and circumstances of the case, position of law and judicial precedents, all of which have been elaborately

discussed above, we are of considered view that exercise of power by the ld. CIT(A) to enhance the income of the assessee by raising the new issues not germane out of the assessment order is not tenable. Accordingly, additions/disallowances made by exercising such power are deleted. Grounds taken by the assessee in this respect are allowed. Since we have dealt with the legal issue on the exercise of power of enhancement by the ld. CIT(A), grounds relating to the merits of the case have been rendered academic and are not adjudicated upon.

9. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 31st May, 2023.

Sd/-

(Rajpal Yadav)
Vice President

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 31st May, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT(A)-20, Kolkata
 4. CIT, Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata