

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.206/Ind/2022
Assessment Year: 2014-15

Hitesh Kumar Bindal Swastik House, 21/3 Ratlam Kothi Indore	<u>बनम/</u> Vs.	DCIT-1(1) Indore
(Appellant / Assessee)		(Respondent / Revenue)
PAN: AGGPB9228H		
Assessee by	Ms. Nisha Lahoti & Shri Vijay Bansal, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	28.02.2023	
Date of Pronouncement	25.05.2023	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 26.12.2019 passed by learned Commissioner of Income-Tax (Appeals)-III, Indore ["Ld. CIT(A)"], which in turn arises out of assessment-order dated 09.08.2016 passed by learned DCIT-1(1), Indore ["Ld. AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2014-15, the assessee has filed this appeal.

2. Heard the learned Representatives of both sides at length and case-records perused.

3. Brief facts leading to present appeal are such that for the relevant AY 2014-15, the assessee filed return of income declaring a total income of Rs. 2,17,34,230/- including exempted long-term capital gain of Rs. 1,39,38,259/- derived from sale of Rs. 1,46,88,259/- of shares of Sunrise Asian Ltd. The case of assessee was subjected to scrutiny assessment by issuing notices u/s 143(2) and 142(1) of the act; the details as required by AO were filed by assessee from time to time. Ultimately, the AO treated the shares of Sunrise Asian Ltd. as what is called “penny stock”; considered the exempted capital gain declared by assessee from those shares as a mere accommodation entry to show non-taxable income u/s 10(38); thus rejected the exempted capital gain declared by assessee and made an addition of Rs. 1,46,88,259/-, thereby assessed total income at Rs. 3,64,22,490/-. Being aggrieved, the assessee went in first appeal but could not succeed. Now, the assessee has come in next appeal before us assailing the orders of lower-authorities.

4. Originally the assessee has raised various grounds in the Appeal-Memo (Form No. 36) placed on record; the same are not re-produced for the sake of brevity. Thereafter, the assessee also filed following “**Additional Ground**” vide application dated 27.02.2023:

“On the facts and in the circumstances of the case and in law, Learned Assessing Officer erred in completing the assessment by making the addition of Rs. 1,46,88,259/- without providing the material gathered within the meaning of section 142(3).”

5. Ld. AR relied upon decision of Hon’ble Supreme Court in **National Thermal Power Company Ltd. Vs. CIT 229 ITR 383 (SC) and National Newsprints Vs. CIT 223 ITR 688 (MP)** and submitted that the additional ground is purely legal in nature, goes to the root of matter and can be adjudicated on the basis of facts already available on record; hence the same deserves to be admitted. Ld. DR could not show any objection. We, therefore, admitted the same and thereupon both sides made submissions.

6. Since the impugned additional ground raises a legal issue involving section 142(3) of the act which goes to the root of matter, we firstly adjudicate this ground. The assessee's claim in this ground is such that the AO has erred in completing assessment by making an addition of Rs. 1,46,88,259/- without providing the material gathered by him to assessee as required u/s 142(3).

7. Ld. AR straightaway drew our attention to Para No. 4.3 of the assessment-order and demonstrated that the AO has proceeded to treat the impugned shares of Sunrise Asian Ltd. sold by assessee as 'penny stock' and capital gain declared therefrom as mere 'accommodation entry' on the basis of material gathered by way of statement dated 31.03.2013 of a person named "Shri Anuj Agarwal" (mistaken mentioned in assessment-order as "Shri Anju Agrawal"). The AO has also reproduced statement of Shri Anuj Agarwal in Para No. 4.4 / Page No. 4 to 12 of assessment-order. Thereafter, in subsequent paragraph(s) of the assessment-order, the AO has utilized the same for the purpose of making assessment u/s 143(3).

8. Ld. AR invited our attention to the provision of section 142(3) which reads as under:

"(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any enquiry under sub-section (2) or any audit under sub-section (2A) and proposed to be utilized for the purposes of the assessment."

9. Ld. AR then submitted that the AO has not provided the impugned material being statement of Shri Anju Agarwal to assessee during entire proceeding of assessment and it is only after seeing the assessment-order that the assessee came to know of the said material. Ld. AR went further and drew our attention to Page No. 77 of the Paper-Book where a copy of the letter dated 22.08.2016 filed by assessee to AO is placed. Referring to the same and also Page No. 4 to 12 of assessment-order, Ld. AR pointed out that the statement of Shri Anuj Agarwal re-produced by AO in the

assessment-order is not even readable and the assessee had to file an application to AO for providing readable copy of the same. In short, Ld. AR submitted that the said material i.e. the statement of Shri Anuj Agarwal was not made available to assessee before utilizing for the purpose of assessment; therefore it is a clear case of utter violation of section 142(3). Hence, Ld. AR contends, the AO has committed a serious error in passing assessment-order and making addition. Hence, the assessment-order deserves to be set aside.

10. Per contra, Ld. DR representing the revenue, defended the action of AO and objected to the prayer of assessee. He submitted that the AO has not only relied upon the impugned statement of Shri Anuj Agarwal but also upon the Report dated 27.04.2015 published by Investigation Wing of Income-tax Department on penny stocks. Ld. AR submitted that the said Report is already in public domain and it need not be supplied to assessee as held by Hon'ble Kolkata High Court in *PCIT Vs. Swati Bajaj*, ITA No. 06/2022, dated 14.06.2022 (Para No. 3, 55, 65 of order). Ld. AR further drew our attention to Para No. 4.7 of assessment-order and pointed out that during assessment-proceeding, the AO has also recorded statement of assessee u/s 131 on 04.08.2016 and having considered assessee's replies therein, made the impugned addition. Therefore, it cannot be said that the action of AO was faulty. Ld. DR strongly supported the order of AO and prayed to uphold the same without any interference.

11. We have considered rival submissions of both sides and perused the orders of lower-authorities in the light of provision of section 142(3) of the act. Firstly we find that in the present appeal the assessee has specifically raised a legal claim through "additional ground" that there was a violation of section 142(3); hence it becomes imperative for us to dispose of such claim. Then, on the legal side, we have noted the provision of section 142(3) of the Act in the foregoing paragraph and find that the said provision casts a mandatory procedural requirement on the part of AO to afford an

opportunity of being heard to the assessee in respect of any material gathered by him and proposed to be utilized for the purpose of assessment. The only exception to this requirement is where an assessment is made u/s 144 but that is not the case in present appeal since the assessment has been made u/s 143(3). On factual side, we find that the Ld. AR representing the assessee has successfully demonstrated that the AO has not provided the statement of “Shri Anuj Agarwal” and the assessee came to know of it after reading of assessment-order only and interestingly the statements are not even readable for which the assessee had to file a separate letter to AO after getting assessment-order. On perusal of Para No. 4.4 / Page No. 4 to 12 of assessment-order, we observe that the AO has re-produced the statements of Shri Anuj Agarwal which is not even readable. Ld. DR could not rebut or contradict this precise claim of assessee. Therefore, this is a case of not following the procedural requirement mandated by section 142(3). Hence, in such a case, the only remedy is to remand this case back to file of AO who shall provide the copy of impugned statement, in fact a readable copy of the statement, to assessee; consider assessee’s submissions thereon and thereafter re-frame assessment. Since the matter is restored to the file of AO for fresh adjudication in terms of finding and observation made here, we are not expressing any view on the merit of the case so as to limit the assessment procedure before the AO. The observations herein made by us in remanding the matter back to the file of Ld. AO will not impair or injure the case of the Revenue nor will it cause any prejudice to the defense or explanation of assessee. Needless to mention that the AO shall give sufficient opportunities to the assessee and the assessee shall also avail those opportunities. Accordingly, in these terms, the appeal of the assessee is allowed for statistical purpose.

12. Since we have restored the matter to AO, there is no need to adjudicate the original grounds raised by assessee in appeal-memo (Form No. 36) which have become infructuous at present.

13. Before parting we would like to make a mention for the sake of clarity, which will also cover the pleading made by Ld. DR representing the revenue. Ld. DR claims that the Report of Investigation Wing of Income-tax Department is in public domain and the same need not be supplied to the assessee as held by Hon'ble Kolkata High Court in **Swati Bajaj (supra)**. While we respectfully and dutifully accept such a view taken by Hon'ble Kolkata High Court, in the present case the assessee is aggrieved by the AO's action of not supplying the statement of Shri Anuj Agarwal in terms of section 142(3), which the AO had in possession and AO duly incorporated in the body of assessment-order but did not supply to assessee before completion of assessment. Further, the assessee has raised a specific claim to address this grievance by filing additional ground which is duly admitted with the consensus of Ld. DR. Therefore, our view in the preceding paragraph is confined to the non-supply of statement of Shri Anuj Agarwal utilized by AO without following the mandate of section 142(3) and not for supply of report of Investigation Wing of Kolkata.

14. Resultantly, this appeal of assessee is allowed for statistical purpose in terms mentioned above.

Order pronounced in the open court on 25/05/2023.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 25.05.2023
Patel/Sr. PS

- Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the approved draft is placed before other Member	
5.	Date on which the fair order is placed before the Dictating Member for pronouncement	
6.	Date on which the file goes to the Bench Clerk	
7.	Date on which the file goes to the Head Clerk	
8.	Date on which the file goes to the Assistant Registrar for signature on the order	
9.	Date of dispatch of the Order	