

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “F” DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

I.T.A. No.7489/DEL/2018
Assessment Year 2009-10

Ratori Maa Trading M-98, 2 nd Floor Jagat Ram Park Laxmi Nagar New Delhi.	Vs.	ITO Ward-21(1) New Delhi
TAN/PAN: AAECR0612A		
(Appellant)		(Respondent)

Appellant by:	Shri Mukesh Jain, CA Shri Sahil Gupta, CA		
Respondent by:	Shri R.S. Yadav, Sr.DR		
Date of hearing:	14	03	2023
Date of pronouncement:	13	06	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-XXV, New Delhi ('CIT(A)' in short) dated 28.09.2018 arising from the assessment order dated 21.12.2016 passed by the Assessing Officer (AO) under Section 143(3) r.w. Section 147 of the Income Tax Act, 1961 (the Act) concerning AY 2009-10.

2. The substantive grounds of appeal raised by the assessee are extracted hereunder:

“1. On the facts and circumstance of case and in law, the Ld. CIT(A) has wrongly enhanced the disallowance made by the Ld. Assessing Officer in making addition of Rs.42,10,200/- by invoking the provision of 69 w.r.t. unexplained investment to Rs.3,69,55,260/-.

2. On the facts and circumstance of case and in law, the Ld. CIT(A)

as well as the Ld. Assessing Officer has erred in making addition on the ground other than recorded reasons.”

3. In the course of hearing, the ld. counsel for the assessee raised additional grounds of appeal vide application dated 02.03.2023 which read as under:

“1. That the initiation of proceeding u/s 148 against the struck off company after the date of strike off is void-ab-intio. Hence, the notice issued u/s 148 of the Act as well as further proceeding are void-ab-initio.

2. That the Ld. Assessing Officer has failed to appreciate the legal position that where the assessee company had failed in terms of the notice issued under section 142(1), then the provisions of section 144 are attracted and the Ld. AO has to pass an order to the best of his judgment. In such scenario, the assessment order passed under section 143(3) of the Act is illegal and void ab initio.

3. That the initiation of proceedings u/s.148 and the consequent assessment u/s 147 r.w.s 143(3) is contrary to law in the absence of any incriminating material to form reason to believe, as per the report of Investigation Wing and AO relied on, which only directs that the AO has to examine the details and after this examination only to determine whether there could be any justification for initiation of action u/s 147 r.w.s 143(3). Thus, the issue of notice u/s 148 and the consequent assessment u/s 147 r.w.s 143(3) is without the authority of law and do not provide jurisdiction to the Assessing Officer to make re-assessment u/s. 147 r.w. Section 143(3) of the Act.”

4. The ld. counsel for the assessee moved yet another additional grounds of appeal vide application dated 14.03.2023 which read as under:

“4. That the Ld. CIT(A) in enhancing the assessment as well as Ld. Assessing Officer in making the addition, both erred in law and in facts of the case that the additions are not sustainable in law as the same has been made without identifying the precise section under which additions are covered.

5. The Ld. Assessing Officer erred in re-opening of the assessment that while recording the "Performa for approval to issue notice u/s 148 of the Act" mentioned that case falls under the Explanation 2(c) of section 147 of the Act without appreciating the fact that the no original assessment was completed u/s 143(3) and the reopening the assessment based on wrong premises, is merely patent non-application of mind.”

5. As per Rule 11 of the Income Tax [Appellate Tribunal] Rules,

1963, the additional grounds of appeal not set forth in the memorandum of appeal is required to be signed and verified by the appellant as specified under Section 140 of the Act and none other. The Authorized Representative or the counsel of the assessee is not permitted to move additional grounds on his own accord unless it is signed by the appellant. Hence, on account of this fundamental defect, we decline to grant leave for admission of such additional grounds. The additional grounds so raised are thus dismissed *in limine*. While holding so, we also simultaneously observe that a power of attorney e-Stamp dated 22.09.2019 has been filed wherein Director Bijay Singh Rajput of the assessee company appears to have authorized Shri Mukesh Kumar Jain, Chartered Accountant for representation on behalf of the assessee. In the same vein, it is pointed out in the course of hearing that in pursuance of application moved on behalf of the assessee dated 09.01.2013 vide Sr.No. B-65561748 for voluntary winding up, the Ministry of Corporate Affairs has struck off the name of the company from the Registrar of Companies which is stated to be effective from 15.02.2013. Thus, the power of attorney has been signed by the Director who had become *functus officio* and was thus not authorized to sign the power of attorney. The Additional ground signed by the counsel on the basis of such non-est power of attorney, thus, in any event, cannot be entertained.

6. We now advert to remaining ground for adjudication.

7. Briefly stated, the assessee-company was incorporated on 12.05.2008. The assessee company filed return of income for Assessment Year 2009-10 on 31.03.2010 which was processed under Section 143(1). Subsequently, based on information received from the Investigation Wing in the case of the company, the Assessing Officer found that large amount of cash deposits on various branches

followed by transfer to account of various individuals and business within the bank and other banks were done by the assessee. The volume of cash transaction was estimated at Rs.19 crore during the month of December, 2009. The Assessing Officer thereafter recorded detailed reason under Section 148(2) of the Act to conclude that chargeable income has escaped assessment. Notice under Section 148 was issued on 30.03.2016 for carrying out the assessment under Section 147 of the Act. After a lot of follow up action by issuance of severe notices under Section 142(1) of the Act, one Shri Surinder Kumar Rawat appeared on behalf of the assessee company on 08.11.2016 and 16.12.2016. No substantiation of the source of deposits in bank was made before the Assessing Officer. The notices remained substantially uncomplied with. Consequently, the Assessing Officer adversely viewed the nature and source of such large deposits. However, the Assessing Officer applied the peak credit theory and assumed that subsequent recurrence of deposit are relatable to earlier withdrawals and arguably sourced out of previous withdrawal. Based on the doctrine of 'peak credit' evolved by judicial precedents, a partial relief was granted to the assessee as a matter of benevolence on the grounds of preponderance of probabilities where it could not adduce satisfactory evidence to support the source of deposit. Consequently, an amount of Rs. 42,10,200/- was determined by the Assessing Officer as unexplained investment in the bank being the peak investment lying in the bank account at any point of time during the year.

7. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) perused the submissions made on behalf of the assessee and also the observations made in the assessment order but however did not see any merit in the plea of the assessee. The CIT(A), on the other hand, observed that the assessee has failed to pointedly

demonstrate any specific carrying on of business to explain the nature of flow of funds in and out of the bank. The CIT(A) further noted that the assessee could not establish the carrying out any business activities as conventionally perceived. In the peculiar circumstances, the CIT(A) observed that concept of peak credit shall not apply in the instant case as the immediate nexus of flow of fund has not been established. Thus, the CIT(A) was of the view that entire deposit requires to be treated as income in the instant case instead of merely adding the peak sum as unexplained income since the assessee has not furnished any explanation in respect of flow of fund except some stray justifications. The CIT(A) thus enhanced the income by reversing the peak credit theory. The assessed income was accordingly enhanced by Rs.3,27,45,060/- over and above additions of Rs.42,10,200/- made by the Assessing Officer.

8. Further aggrieved, the assessee preferred appeal before the Tribunal. However, what is under challenge is the enhancement of assessed income from Rs.42,10,200/- to Rs.3,69,55,260/-. As per the main grounds of appeal, the assessee has not objected to the income originally assessed of Rs.42,10,200/- and confirmed by the CIT(A).

9. When the matter was called for hearing, the Id. counsel for the assessee submitted at the outset that the company is no longer in existence and the name of the company has been struck off from the register of members based on the application moved by the assessee. Hence, in view of the records of Registrar of Companies, the assessee-company is no longer in existence. It was contended that the notice under Section 148 has been issued on the company which was wound up by the order of the Registrar of Companies (ROC) and therefore, the notice under Section 148 is illegal and the whole proceeding requires to be quashed on this ground alone. In defense to this, the Id. DR for the Revenue pointed out that this ground has

never been taken before the lower authorities in the course of assessment proceedings and the authorized representative of the assessee did not file any evidence in this regard at any stage. The Assessing Officer was never intimated about the removal of the name of the company from register of members. The AR for assessee rather attended the assessment proceedings and suppressed the crucial facts of such nature. The Id. DR further referred to the judgment rendered by the Hon'ble Delhi High Court in the case of *Ravinder Kumar Aggarwal vs. ITO judgment dated 17.11.2022 in W.P.(C) 7122/2019 & CM APPL.29656/2019* and contended that it is a case of voluntary winding up and the existing liability of the assessee prior to such voluntary winding up will not dissolve by the act of the assessee to the detriment of the Revenue. Section 250 of the Companies Act, 2013 provides the safeguard in this regard. A reference was made to the decision of the Tribunal in the case of *Dwarka Portfolio P. Ltd. vs. CIT 265/Del/2017 order dated 17th May, 2022* to support the case of the Revenue. It was pointed out that the assessee has possibly declared itself solvent to enable it to opt for voluntary winding up before ROC.

10. The Id. counsel for the assessee next contended that the reopening was carried out for making additions towards cash deposits whereas ultimate additions have been carried out under Section 69 with respect to unexplained investment. Thus, the basis of additions have been modified subsequent to the reasons recorded under Section 148(2) of the Act which is not permissible in law as new issues have been racked up beyond the jurisdiction. The Id. DR for the Revenue relied upon the order of the CIT(A) in this regard.

11. We have carefully considered the rival submissions and the perused the orders of the authorities below.

12. As per the grounds of appeal, the assessee has only challenged the enhancement to the disallowance carried out by the Assessing Officer. The disallowance carried out by the Assessing Officer *per se* is not under challenge. We thus refrain from examining the disallowance carried out by the Assessing Officer on merits which is not under challenge and do not express any opinion on such additions carried out by the Assessing Officer. The discussion is restricted to the enhancement carried out by the CIT(A) alone. For the enhancement carried out by the CIT(A), we observe that it is incumbent upon the CIT(A) under Section 251(2) to provide reasonable opportunity of showing cause against any proposed enhancement to the Assessee. Thus, the CIT(A) is prevented from making enhancement to the assessed income without opportunity to the assessee. In view of the explicit provision in this regard, it is mandatory requirement of law to necessarily provide opportunity failing which the enhancement carried out is unsustainable in law. On a perusal of the order of the CIT(A), nowhere reference to such show cause or opportunity to assessee for carrying out enhancement is found. Therefore, the enhancement made by the CIT(A) is unsustainable in law. The enhancement so carried out by the CIT(A) thus stand reversed.

13. Ground No.1 of the appeal of the assessee is thus allowed.

14. As per Ground No.2, the assessee has challenged the action of the lower authorities for making additions on the ground other than recorded reasons. We do not see any merit in such plea. The additions carried out by the Assessing Officer squarely flows from reasons recorded, i.e., large cash deposits in the bank account etc. The additions made comprise of the cash deposits and enhancement of quantum thereof in the appellate proceedings. The objection of the assessee has no substance. Hence, Ground no.2 is dismissed.

15. Consequently, the additional grounds are dismissed whereas the main grounds are partly allowed.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 13/06/2023

Sd/-

**[YOGESH KUMAR US]
JUDICIAL MEMBER**

DATED: **/06/2023**
prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**

Copy forwarded to:

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

Assistant Registrar