IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'H': NEW DELHI)

BEFORE SHRI KUL BHARAT JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No:- 1190/Del/2022
(Assessment Year: 2011-12)

M/s AJ Energy Private Limited, Plot No. 3, Mahaveerji Complex, LSC Rishab Vihar, Delhi-110092.	Vs.	ITO, Ward-1(1), Delhi.
PAN No: AAICA1727B		
APPELLANT		**RESPONDENT**

Assessee by : Shri Ved Jain, Adv.
Ms. Uma Upadhyaya, CA
Revenue by : Shri Manvendra Goel, CIT(DR)

Date of Hearing : 07.06.2023
Date of Pronouncement : 28.06.2023

ORDER

PER KUL BHARAT, JM

This appeal by the Assessee is directed against the order of Income Tax Department, National Faceless Appeal Centre (NFAC), Delhi vide order dated 28.04.2022 for Assessment Year 2011-12. Assessee has raised the following grounds of appeal:

"1. On the facts and circumstances of the case, the order passed by the National Faceless Appeal Centre (NFAC) is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case, the order passed by the NFAC is bad in law having been passed exparte without giving assessee an opportunity of being heard in clear violation of natural justice.

3. On the facts and circumstances of the case, the NFAC has erred both on facts and in law in confirming the order of the AO despite that reopening the assessment under Section 147 of the Act and consequent reassessment without complying with the statutory conditions and the procedure prescribed under the law are bad and liable to be quashed.

4. On the facts and circumstances of the case, the NFAC has erred both on facts and in law in confirming the order of the AO despite the fact that the reasons recorded for reopening the assessment does not meet the requirements under section 147 of the Act, bad in law and are contrary to the facts.

5. On the facts and circumstances of the case, the NFAC has erred both on facts and in law in confirming the reopening ignoring the fact that there is no live nexus between the reasons recorded and the belief formed by the assessing officer.

6. On the facts and circumstances of the case, the NFAC has erred both on facts and in law in confirming the reopening despite the fact that the same has been made by the AO without independent application of mind.

7. On the facts and circumstances of the case, the NFAC has erred, both on facts and in law, in confirming the action of the AO despite that the assessment order having been framed on the basis of material collected at the back of the assessee, without providing adequate opportunity to the assessee to rebut the same in violation of statutory provision of section 142(3) of the Act.

8. (i) On the facts and circumstances of the case, the NFAC has erred both on facts and in law in passing the order despite the fact that the assessment has been reopened by the AO on the basis of reasons without there being any whisper that the income has escaped due to the failure on part of the assessee to disclose fully and truly all material facts necessary for assessment, as the same has been reopened after a period of four years from the end of relevant assessment year and the assessment has already been made under Section 143(3).

(ii) On the facts and circumstances of the case, the order passed by learned A.O. is bad both in the eye of law and on facts, as the assessee had already disclosed fully and truly all material facts necessary for the assessment under Section 143(3).

9. On the facts and circumstances of the case, the learned NFAC has erred in passing the order despite the fact that the reassessment order passed by the A.O. is bad and liable to be quashed as the same has been reopened on the basis of the reasons which are mere change of opinion as the issue was already examined during the course of assessment under Section 143(3) of the Act.

10. On the facts and circumstances of the case, the NFAC has erred, both on facts and in law, in confirming the action of the AO despite that the reassessment proceedings initiated by the learned AO without valid approval of the prescribed authority under the Act is bad in law and liable to be quashed.

11. (i) On the facts and circumstances of the case, the NFAC has erred both on facts and in law in confirming the addition of Rs. 13,22,10,000/- made by AO on account of share application money treating the same as unexplained credits invoking the provisions of section 68 of the Act.

(ii) That the said addition has been confirmed ignoring the detailed explanation and evidences brought on record by the assessee to prove the identity and creditworthiness of the shareholders as well as the genuineness of the transaction.

12. (1) On the facts and circumstances of the case the NFAC has erred both on facts and in law in confirming the addition of Rs. 26,44,200/- at the rate of 2% of Rs. 13.22,10,000/- on account of commission expenses invoking section 69C of the Income tax Act.

(ii) That the addition has been confirmed by applying an arbitrary rate of 2% on the above eligible amount without there being any basis for the same.

13. On the facts and circumstances of the case, the NFAC has erred both on facts and in law in rejecting the contention of the assessee that same has been made merely relying on the report of the investigation wing and without application of his own mind.

14. On the facts and circumstances of the case the NFAC has erred both on facts and in law in confirming the addition made by AO despite the fact that same has been made without concluding enquiry conducting during the course of assessment proceeding to the logical end.

15. On the facts and circumstances of the case, the NFAC has grossly erred both on facts and in law in confirming the above addition by indulging in surmises without bringing on any direct evidence against the assessee, only on the basis of presumption and assumption

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

2. The facts in brief are that in this case, the assessment was re-opened on the basis of information regarding accommodation entries obtained by the assessee company. It is recorded by the Assessing Officer ("AO") that reasons recording for re-opening of assessment were supplied to the assessee. Thereafter, the AO passed impugned assessment order dated 12.12.2018 u/s 147 of the Income Tax Act, 1961 ("the Act"). Thereby, he assessed the income of the assessee at INR 13,50,02,570/- against the return income of INR 1,48,368/-.

3. Aggrieved by the assessment order, the assessee company preferred appeal before Ld.CIT(A), who also dismissed the appeal of the assessee.

4. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

5. At the outset, the Ld. Counsel for the assessee contended that the impugned order has been passed ex-parte to the assessee without given the sufficient opportunity to represent his case. He submitted that in the interest of principle of natural justice the impugned order may be set aside and the grounds of appeal may be restored to the file of the Ld. CIT(A) for decision on merits.

6. Further, apropos to grounds of appeal, the Ld. Counsel for the Assessee reiterated the submissions as made in the Synopsis. For the sake of clarity, the synopsis of the assessee is reproduced as under:

> *"1 This an appeal filed by the assessee against the exparte order passed by the Ld CITIA) wherein the Ld CIT(A) has dismissed the appeal without giving the assesses adequate opportunity of being heard.*

2. The brief facts of the case are that the case of the assessee was reopened by issuing notice u's 148 dated 31.03.2018 (Placed at PB Page 20). In response to which the assessee vide reply dated 26.04.2018 submitted that return filed on 30.09.2011 be treated to have been fed in response to notice u/s 146 and also requested to provide the copy of reasons recorded for reopening the assessment which were provided on 14.06.2018 (Placed at PB Page 21 and 22-25)

3. On perusal of the reasons recorded, it may be noted that the assessee's case was reopened on the basis of the information received by the ITO, Ward 1(1), Delhi, based upon which AO formed a belief that the assessee had received an amount of Rs. 50,00,000/- from two shell concerns namely M/s Dreamland Barter Pvt Ltd and Mis Shiv Shakti Commodeal Pvt Ltd and therefore amount of Rs. 50,00,000/- has escaped assessment in the case of the assessee However, the Ld. AO completed the reassessment proceedings by making an addition of Rs. 13.22.10,000/- u/s 68 of the Act on account of share capital having been received from the other parties not from M/s Dreamland Barter Pvt Ltd and M/s Shiv Shakti Commodeal Pvt Ltd

4. Aggrieved by this, assessee filed an appeal before the Ld. CIT(A). However, the Ld. CIT(A) dismissed the appeal of the assessee.

5. Aggrieved by this, assessee is in appeal before the Hon'ble ITAT

<u>No addition has been made on the basis of reasons recorded by the Ld. AO</u>

6. At the outset, in the present case Ld AO formed the belief that the assessee had received an amount of Rs. 50,00,000/- from two shell concerns namely M/s Dreamland Barter Pvt Ltd and M/s Shiv Shakti Commodeal Pvt Ltd and the same has escaped assessment. However, while assessment was completed at an addition of Rs. 13,22,10,000/- on account of share capital having been received from the other parties not from these two parties. Further, this fact can also be verified from the list of the parties provided in the assessment order from whom information was called u/s 133(6) On perusal of the same it can be notice that in the said list no such party is mentioned on which belief was formed by the AO while recording the reasons Thus, AO did not make any addition in respect of the income which he has initially formed reason to believe had escaped assessment and accepted the contention of the assessee.

7. In this regard, it is submitted that it is a settled position of law that Assessing officer has no jurisdiction to reassess issues other than the issued in respect of which proceedings were initiated especially when the reason for which the case reopened have ceased to survive. The issue in hand is squarely covered by the decision of Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. v. CIT [2011] 336 ITR 136 dated 03.06.2011, wherein the Court has held as under:

> *"Section 147 has this effect that the Assessing Officer has to assessee or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings However, if after issuing a notice under Section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under Section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."*

8. Further reliance in this regard is placed on the following judgements:

> ***(i) Jurisdictional High Court in the case of CIT(Exemption) v. Monarch Educational Society [2016] 387 ITR 416, wherein its was held as under.***
>
> *"6. However, in the course of the reassessment proceedings, as is evident from the assessment order dated December 10, 2010 passed by the Assessing Officer, the sum that was sought to be added to the income of the assessee was not the aforementioned sum of 16,61,000 but a sum of 26,10,000 which according to the Assessing Officer represented the unsecured loans that were unable to be explained by the assessee. In other words, the addition sought to be made to the income of the assessee was not based on the accommodation entries which formed the subject matter of the reasons to believe for issuance of the notice under section 148 of the Act.*

7.....................

8. The issue urged by the Revenue stands covered in favour of the assessee by the decision of this court in Ranbaxy Laboratories Ltd. v. CIT [2011] 336 ITR 136 (Delhi) which has been followed in CIT v. Software Consultants [2012] 341 ITR 240 (Delhi). In sum, if no addition is made on the basis of the reasons to believe recorded by the Assessing Officer for reopening the assessment under section 148 of the Act, resort cannot be had to Explanation 3 to section 147 of the Act to make an addition on any other issue not included in the reasons to believe for reopening the assessment. No substantial question of law arises. The appeal is dismissed."

(ii) Delhi High Court in the case of CIT v. Software Consultants [2012] 341 ITR 240

"As the AO did not make any addition for the reasons recorded at the time of issue of notice under Section 148 of the Act. This position is not disputed and disturbed by the Commissioner of Income Tax in his order under Section 263 of the Act. Sequitur is that the Assessing Officer could not have made an addition on account of share application money in the assessment proceedings under Section 147/148. Accordingly, the assessment order is not erroneous. Thus, the Commissioner of Income Tax could not have exercised jurisdiction under Section 263 of the Act Decided against the – Revenue."

*(**iii) Delhi High Court in the case of CIT v. Adhunik Niryat Ispat Ltd. in ITA No. 2090 of 2010 dated 28.07.2011***

Since the grounds for reopening the reassessment do not exist any longer and no additions were ultimately made on that account, the additions in respect of other items which were not part of "reasons to believe" cannot be made. Decided in favor of assessee.

*iv) **ITAT Delhi in the case of Shanker Gas and Mfg. Co. Pvt. Ltd. v. ITO in ITA No. 4429/Del/2013 dated 25.05.2016***

"Reopening of assessment - accommodation entries receipt - Held that:- No addition has been made in respect of the accommodation entry from M/s. Zigma Telecom Private Limited and the additions made are in respect of the parties, which are not mentioned in reasons recorded by the Assessing Officer. Thus, respectfully following the ratio of the judgment of the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd (2011 (6) TMI 4-DELHI HIGH COURT), we are of the opinion that the reassessment proceedings are invalid in law, therefore, we the quash the reassessment proceedings in the case of the assessee initiated by the Assessing Officer Decided in favour of assessee."

Therefore, the order passed by Id AO and confirmed by CIT(A) is illegal and void-ab-initio as the AO has no jurisdiction to make addition on any other issue not included in the reason to believe for reopening the assessment especially when no addition is made on the basis of reasons recorded.

CIT(A) passed an exparte order dismissing the appeal of assessee without giving the assessee adequate opportunity of being heard and without giving proper findings on the merits of the case.

9. That the ld.CIT(A) issued notice dated 15.10.2019 fixing the case for the very next day Le, 16.10.2019. This notice itself received by the assessee on 16.10.2019, in response to which assessee filed an adjournment application. Thereafter, another notice dated 29.01.2021 was issued in response to which assessee sought for an adjournment. A further notice dated 12.04.2022 issued fixing the date of hearing 18.04.2022 in response to the which assessed again sought for an adjournment. Accordingly, case of the assessee was fixed for 28.04.2022 From the abovementioned facts, it is submitted before your honors that all the notices received from Id.CIT(A) were duly complied by the assessee. Thus, no non-compliance on part of the assessee copies of notices and replies placed at PB pg no. 253-260

10. Now, It is pertinent mention here that on the next date of hearing, assessee was in the process of uploading the written submissions through the e-filing portal of Income-tax. However, same could not be uploaded on that day due to some internal server issue of the e-filing portal. For which assessee immediately

took a step and raised a grievance on the portal itself acknowledgement enclosed at PB pg no. 262. Assessee alternatively filed its submission by email on the same day which was not considered by the Id.CIT(A) while passing the order Copy of email enclosed at PB pg no 264-281. Further, in view of this ongoing server issue assessee was left with no other option but to get the case adjourned to some other day Consequently, a short adjournment of two days was sought by the assessee in the remarks column. Screenshot enclosed at PB pg no. 263.

11. Now, It is important to draw your honors kind attention that this adjournment filed by assessee was not taken note of by the Ld.CIT(A). Accordingly, Ld. CIT(A) had passed its order on the same date without examining the facts of the case and in ignoring the adjournment sought for and submission filed by the assessee.

12. In view of the above facts. It is humbly submitted before your honor that assessee sought for adjournment on a reasonable ground well-explained to be one beyond the control of the assessee for which adjournment was not granted to the assessee. Reliance in this regard is placed on the judgment of Hon'ble Supreme Court in the case of State Bank of India v KM. Chandra Govind Ji 2000 (11) TMI 1224 held as under:

In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. The earlier adjournments, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on my grounds the same would have been rejected. Therefore, in our view, the High Court as well as the learned District Judge and the Rent Controller have missed the essence of the matter In that view of the matter we set aside the order made by the Rent Controller as affirmed by the District Judge and the High Court and remit the matter to the Rent Controller for a fresh consideration from the stage when the matter was set down on 24.11.1992 and after notice to the

parties proceed to dispose of the matter as expeditiously as possible The appeal is allowed, but in the circumstances of the case there shall be no orders as to costs.

13. Further, this action of the Ld CIT(A) is against the settled position of law, that the Ld. CIT(A). even while deciding the appeal ex-parte, is required to decide the issue on merits of the case

14.In the absence of the appeal being decided by the Ld. CIT(A) by giving the assessee adequate opportunity of being heard and further in the absence of any proper finding on merits, the order passed by the Ld CIT(A) is bad in law and liable to be set aside. Reliance in this regard is placed on the judgment of Hon'ble Bombay High Court in the case of Bharat Petroleum Corporation Ltd. v. ITAT [2013] 359 ITR 371 (Bom), wherein it has been held that even the Tribunal has no power to dismiss the appeal of the assessee for non-appearance and it has to deal with the merits of the case.

15. Further reliance in this regard is placed on the following judgments: .

ITAT Delhi in the case of Gaurav Goel v. ITO in ITA No. 605/Del/2012 dated 09.04.2012

8. After hearing Ld DR and considering the material on record, we find that the assessee has defaulted in appearing before CIT(A) despite repeated opportunities and every time he was seeking adjournment and after having been given final opportunity, CIT(A) refused further adjournment and proceeded ex-parte and passed the order on merits in paras.4.1 and 5 as reproduced in earlier part of the order. From the conclusion as drawn by the CIT(A), while passing the order on merit, we find that he has just confirmed the action of the Assessing Officer without properly discussing the case on merits. He has just confirmed the order of the Assessing Officer. The law provides that even for passing ex-parte order, first appellate authority is required to decide the appeal on merits by passing a speaking order which is absent in this case. As such while considering the entirety of facts, circumstances and material on record, we find it just and appropriate to set aside the order of the CIT(A) and restore the matter back on

his file with the direction to re-decide the appeal afresh after giving due opportunity to the assessee well as to the Assessing Officer and to pass a speaking order in accordance with law. We hold and direct accordingly

ITAT Delhi in the case of Haryana Liquor Company v. ACIT in ITA No. 1852/Del/2012 dated 25.06.2012

6. In view of the foregoing, especially when the Id CIT(A) has not passed a speaking order on various issues raised before him we consider it fair and appropriate to set aside the order of the Id. CIT(A) and restore the matter to his file for deciding the issues raised in the grounds raised before him by the assessee, afresh in accordance with law, after allowing sufficient opportunity to both the parties. Needless to say that while redeciding the appeal, the d CIT(A) shall pass a speaking order, keeping in mind, inter alia, the mandate of provisions of sec. 250(6) of the Act.

ITAT Surat in the case of Nisha Vrateen Vaish v. ITO ITA No. 78 to 80/SRT/2012 dated 16.09.2022

Considering the facts and circumstances of the present case that NFACIL CIT(A) passed ex parte order without adjudicating the grounds of appeal raised by the assessee and the assessee was not afforded fit and proper opportunity. thus, we are of the view that assessee deserves hearing on ment. Therefore, the grounds of appeal raised by assessee are restored back to the file of NFAC/LD CIT(A) to adjudicate all the grounds of appeal on merit. Needless to say that before passing the order, NFAC/Id. CIT(A) shall grant fair and proper opportunity of hearing to the assessee. The assessee is also directed to appear before NFAC/LD CIT(A) as and when the date of hearing and to provide all necessary evidence & information without any further delay and not to seek adjournment without any valid reasons. In the result, appeal of assessee is allowed for statistical purposes in above terms.

16. Therefore, in view of the facts of assessee's case and the settled position of law in this regard, the order passed by the Ld. CIT(A) is bad in law and liable to be set aside."

7. On the other hand, Ld. CIT DR opposed the submissions and submitted that the assessee has been negligent for not providing the information directed by the Ld. CIT(A).

8. We have heard the rival contentions, and perused the materials available on records. The preliminary grievance of the assessee is that it was not provided adequate opportunity by Ld.CIT(A) for effectively representing its case. We find that Ld.CIT(A) in the impugned order has recorded that the assessee was provided several opportunities. For the sake of clarity, the relevant contents of the impugned order of Ld.CIT(A) is reproduced as under:-

> 6.1. "It is clear from the above that the appellant has been granted several opportunities to represent its case in the appellant proceedings but has failed to make any submissions in support of the grounds of appeal filed by it. The appellant is not interested in prosecuting the appeal filed by it. In the appellate proceedings, burden of proof lies on the appellant to prove that the facts and the findings of the Assessing Officer are incorrect. Since the appellant has chosen not to attend the hearing, the appeal is decided on the basis of material available on record.
>
> *6.2. I have considered the facts and circumstances of the case, the observations of the AO and material available on record on the above matter. As mentioned in paragraph 6 of this appeal order, this office has issued several letters to file written submission. However, neither any adjournment was sought for nor any written submission was filed. The*

letters were issued through ITBA System at the email ID provided by the appellant. From the above conduct of the appellant, it is evident that the appellant is no more interested in pursuing the appeal. Hon'ble Supreme Court in the case of CIT VS B.N. Bhattacharjee and others [1979] 10 CTR 354 (SC) observed that preferring an appeal, means effectively pursuing it. Hon'ble M.P. High Court in the case of Estate of Late Tukojirao HolkarVs CWT [1979] 223 ITR 480 (M.P.) dismissed the reference filed at the instance of the assessee for default and for not taking necessary steps. Considering the conduct of the assessee in the present circumstance, I am of the view that the assessee is not interested in pursuing the appeal. This view has been affirmed by Hon'ble ITAT Ahmedabad in case of Amitkumar H. Shah Vs. ACIT in ITA No. 2985/Ahd/2010 vide their order dated 31.12.2013, wherein following the order of ITAT Delhi Bench in the case of CIT Vs Multiplan India Pvt. Ltd., [1991] 38 ITD 320 (Del), ITAT has dismissed the appeal filed by the assessee for want of persuasion. Under these circumstances, the current appeal of the appellant is liable to be dismissed."

8.1. However, considering the facts that Ld.CIT(A) has not adjudicated the grounds taken by the assessee before him, related to legality of the re-opening of assessment and also merit of the additions. To sub-serve the interest of principles of natural justice, the impugned order is hereby, set aside and the issues raised by the assessee are restored to the file of Ld.CIT(A) to decide it afresh after providing adequate

opportunity of being heard to the assessee. Needless to say that the assessee would cooperate in the proceedings and would not seek adjournment without any reasonable cause.

9. In the result, the appeal of the Assessee is allowed for statistical purposes.

Order pronounced in the open court on 28th June, 2023.

Sd/-	***Sd/-***
(M. BALAGANESH)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 28/06/2023.
Pooja/-
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI