

आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा० एस. सीतालक्ष्मी,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 141/JPR/2023
निर्धारण वर्ष/Assessment Year : 2013-14

Deputy Commissioner of Income Tax, Jaipur	बनाम Vs.	Poonia Wines (Rewari) 7-D Villa, Station Road, Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AAAJP 0820 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

CO No. 03/JPR/2023
(Arising out of ITA No. 141/JPR/2023)
निर्धारण वर्ष/Assessment Year : 2013-14

Poonia Wines (Rewari) 7-D Villa, Station Road, Jaipur.	बनाम Vs.	Deputy Commissioner of Income Tax, Jaipur
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निर्धारिती की ओरसे / Assesseeby : Shri G.M. Mehta (C.A.)
राजस्व की ओरसे / Revenue by: Shri James Kurian (CIT)

सुनवाई की तारीख / Date of Hearing : 31/05/2023
उदघोषणा की तारीख / Date of Pronouncement: 28/06/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the Revenue and the Cross Objection filed by the assessee, which is arising out of the order of the Learned Commissioner of

Income Tax (Appeals) (NFAC), Delhi[herein after referred to as “NFAC/Id.CIT(A)”] dated 09.02.2023 for the assessment year 2013-14, which in turn arise from the order passed by the DCIT, Circle-3, Jaipur u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act') dated 19.11.2018.

2. Since the issue is involved in the Revenue's appeal and cross objection of the assessee relate to the same assessment year are being disposed off by this consolidated order.

3. Before moving towards the facts of the case, we would like to reiterate the revenue has assailed the appeal in ITA No. 141/JPR/2023 on the following grounds:-

“1. Whether on the facts and in the circumstances of the case in law, the Id. CIT(A) was justified in deleting the additions of Rs. 3,81,033/- made by the AO on account of interest on late payment of TCS.”

4. The assessee has filed cross objection in CO No. 03/JPR/2023 against the revenue's appeal, on the following grounds:-

“1. While repeating the submission of assessee, Id. CIT(A) NFAC was not justified in not giving his finding on legality of action initiated under section 147 of I.T. Act.

2. *The deletion of addition of Rs. 3,81,033/- for interest for late payment of TCS was as per the law laid down in different judicial pronouncements and therefore cannot be treated as unlawful act of Ld. CIT(A), NFAC.*

3. *Ld. CIT(A), NFAC has erred in sustaining addition of Rs. 56,680/- on account of depreciation of vehicles, the deduction of which was allowed by the then Id. AO after making relevant query and on application of mind, meaning thereby it was a change of opinion, not permissible under income tax reassessment proceedings.”*

5. The fact as culled out from the records is that the assessee has filed the return of income on 28.09.2013 declaring total income of Rs. 1,43,03,990/- the assessment u/s 143(3) of the Act was passed on 20.03.2016 assessing the total income at Rs. 1,48,78,990/-. After completion of the original assessment proceeding, again the assessment in this case was reopened issuing the notice u/s 148 of the Act after taking necessary approval. The reopened assessment was completed vide order dated 19.11.2018 wherein following additions were made:-

“Addition:

1. Addition on account of disallowance of Interest payment of late deposition of TCS	Rs.3,18,033/-
2. Addition on account of disallowance of depreciation as discussed above	Rs. 56,680/-
Total income	Rs. 1,48,41,703/-
R/o	Rs. 1,48,41,710/-

6. Feeling dissatisfied the assessee has carried the matter before the Id. CIT(A). A propose to the grounds so raised the finding of the Id. CIT(A)is reiterated here in below:-

“6. Decision: in this case, an addition has been made by the Assessing Officer on two grounds (1) Deposition of TCS worth Rs. 3,81,033/- and (2) depreciation worth Rs. 56,680/-.

6.1 The Assessing Officerhas made on addition of Rs. 3,81,033/- on ground of late deposition of T.C.S. and treated it as not allowable expenditure. The appellant had filed written submission before me. The appellant has relied upon various judgment that late deposition of T.D.S., T.C.S., Service Tax is not penal in nature. I agree to the submission of the appellant. Hence, this ground is allowed.

6.2 Second addition is on account of excess depreciation claimed by the appellant worth Rs. 56,680/-. The Assessing Officer has claimed that the appellant is not engaged in hiring/buying the vehicles. In the written submission, the appellant had claimed that this new pick-up vehicle was purchased as there was one pick-up vehicle was purchased as there was one pick-up van. No proper reply has been given against the order of the Assessing Officer. Only reassessment has been challenged. Hence, this addition of the Assessing Officer is confirmed. Hence, this ground of appeal is dismissed.”

7. The Revenue is aggrieved from the findings of the Id. CIT(A) preferred this appeal and since the appeal of the assessee was partly allowed, the assessee has also preferred cross objection.

8. Since the issue in the appeal of the revenue and cross objection inter related and inter woven we have decided to deal the

appeal of the Revenue and cross objection of the assessee by this consolidated order. A proposed to the grounds so raised by the Revenue, the Id. DR reiterated the contention raised in the scrutiny report submitted before the Id. PCIT while filing the appeal before this Tribunal and the contention of the Revenue raised in the scrutiny report is reproduced for the sake of convenience as under:-

“The assessee is an AOP dealing in Indian Made Foreign Liquor and Beer with total turnover of more than Rs.213Cr. in retail as well as wholesale branches. Assessment in this case completed u/s 143(3) of IT Act on 19.11.2018 after considering the allowability interest of Rs.3,81,034/ on late payment of TCS amount and made addition of Rs.3,81,034/- on account of disallowance of Interest payment on late deposition of TCS and made addition of Rs.56,680/- on account of disallowance of part depreciation of Rs.56,680/- on vehicles.

The Ld. CIT(A) vide order dated 09-02-2023 in ITBA/NFAC/S/250/2022-23/1049589112(1) allowed appeal of the assessee on the 1st Issue holding that late deposition of T.D.S., T.C.S., Service Tax is not penal in nature relying upon various judgment quoted by the assessee.

Second addition is on account of excess depreciation claimed by the appellant worth Rs.56,680/-. The addition made by the Assessing Officer is confirmed on this issue by the Ld.CIT(A).

The decision of Ld. CIT(A) is not acceptable on 1st issue. As, in respect of claim of interest payment on late deposition of TCS, the assessee has submitted it to be compensating in nature. The assessee has stated that due to use of TCS amount by it less withdrawal from bank loan was made resulting in less interest payment for the loan. First of all the version put forth by the assessee is not supported by any evidence. The assessee had not put any effort to prove this fact. Moreover, interest payment on late deposition of TCS is not allowable as expenditure, being penal in nature. The assessee cannot justify the infringement of law by taking any excuse. If it would be accepted than the provision of law will not be followed in true spirit. Such expenditure does not pertain to the business or profession of the assessee firm but is personal and penal in nature.

The tax effect involved in the case is Rs.1,17,740/- which is below the limit prescribed by the Board's Circular no. 17/2019 dated 08.08.2019 for filing appeal before the Hon'ble ITAT, but, this case falls in the exception mentioned in Para 10(c) of Board's Circular No. 03/2018 dated 11-07-2018. Considering the facts, mentioned above, further appeal before Hon'ble ITAT is authorized."

9. Per Contra, the Id. Authorized Representative appearing on behalf of the assessee, apropos to the appeal of the revenue and cross objection of the assessee, he has relied upon the following written submission:-

"After examining the books of account and considering the details in response to the queries raised. Id. AO had allowed following sums as deduction in order u/s. 143(3) of IT Act:

S. No.	Nature of expenses	Amount
1.	Interest on late payment of TCS	3,81,033
2.	Depreciation on vehicle claimed @ 30%	56,680

Thereafter in an action under section 147 of Income tax, both the sums were disallowed against which appeal under section 246A of Income tax Act was preferred. Vide order dated 09.02.2023, Id. CIT(A), NFAC allowed relief in respect of first addition of Rs.3,81,033/- but sustained the disallowance of Rs.56,680/-. For deletion of addition of Rs.3,81,033/-, the department is in appeal whereas for sustaining disallowance of Rs.56,680/-, the assessee is in CO.

(1) Department's appeal for deletion of addition of Rs.3,81,033/-: "Whether on the facts and in the circumstances of the case in law, the Ld. CIT(A) was justified in deleting the addition of Rs.3,81,033/- made by the AO on account of interest on late payment of TCS" The appeal is not maintainable in view of Circular No. 17 of 2019 dated 8th August 2019 (P.B. page 3 & 4) as the tax

effect is just Rs.1,17,740/-. Otherwise also the interest paid on late payment of TCS is compensatory in nature as held by Id. CIT(A) NFAC, after considering different judicial pronouncements referred to at page (8) of said order dated 09.02.2023.

(2) CO of the assessee:

(i) While repeating the submission of assessee, Id. CIT(A) NFAC was not justified in not giving his finding on legality of action initiated under section 147 of L.T. Act: Notice under section 148 of IT Act was issued on 29th March 2018 on the existing material for which basis appears to be audit objection for the reason that query in respect of all the deduction for the expenses debited to profit and loss account was already examined and allowed by the Id. AO and there was no failure on part of the assessee, therefore reopening on same facts and existing material is mere change of opinion which is not permissible under the Income tax Act. However on the above ground raised in Form 35, Id. CIT (A) NFAC had not given any finding as per order dated 09.02.2023. Reassessment proceedings on the basis of facts available during original assessment will amount to changed of opinion, not permissible under the Income tax Act - (2023) 452 ITR 224 (SC).

(ii) The deletion of addition of Rs.3,81,033/- for interest for late payment of TCS was as per the law laid down in different judicial pronouncements and therefore cannot be treated as unlawful act of Id. CIT(A), NEAC: The issue has already been discussed and addition of Rs.3,81,033/- was deleted by CIT(A), who found it to be compensatory in the light of different judicial pronouncement (page 8 of order), and therefore CIT(A) acted perfectly in accordance with law. The department is not, therefore, justified in challenging the deletion.

(iii) Ld.CIT(A) NFAC has erred in sustaining addition of Rs.56,680/- on account of depreciation of Vehicles, the deduction of which was allowed by the then Id. AO after making relevant query and on application of mind, meaning thereby it was a change of opinion, not permissible under Income tax reassessment proceedings.

By order under sec. 143(3) of LT. Act for immediately preceding year (A.Y. 2012-13) Id. AO has allowed depreciation on vehicle (pick up -HR 47A 9708) 30% (P.B. page 5 to 12). Considering the facts and order u/s. 143(3) for A.Y.

2012-13, Id. AO allowed depreciation@ 30 per cent on w.d.v. of same pickup van No. HR 47A 9708 (PB 13 to 15).

Without prejudice to above submission, the difference in depreciation claimed allowed @ 30% and considered to be allowable @ 15% is just Rs.26,927/- (Rs.53,853/-- Rs.26,926/-) (P.B. Page 15) and not Rs.56,680/- for which reassessment proceedings were initiated. Since depreciation was allowed after considering the facts of the case and as per past history (order u/s. 143(3) for the A.Y. 2012-13).”

10. The Id. AR of the assessee further submitted that ground No. 1 raised being legal that may be decided first. A propose to this ground so raised relying on the decision of the Hon’ble Supreme Court in the case of Joint Commissioner of Income Tax and Another v. Cognizant Technology solutions India Pvt. Ltd. (2023) 452 ITR 224, wherein the apex court dismissed the SLP filed by the revenue and confirmed the view of the Hon’ble Madras High Court. In that decision the Madras High Court held that

16. Thus, in the absence of new facts coming to the knowledge of the Assessing Officer subsequent to the original assessment proceedings, the reopening could not have been done on the same materials. In fact, when we perused the reasons for reopening, it is evidently clear that all the materials have been culled out from the return of income filed by the assessee and the Annexure thereto. Thus, the impugned reassessment proceedings, having been done with the same set of facts which were available during the regular assessment, is to be held to be a clear case of change of opinion.

11. We have heard the rival contention, perused the material placed on record and also gone through the judicious decision serviced before us by both the parties to drive home to their contentions. The bench noted that in this case in the original assessment proceedings both the issues [for which the reopening proceeding initiated] were there and the assessee has furnished the necessary details and the order has been passed by the Assessing Officer after making adjustment in the return of income u/s 143(3) of the Act. Thereafter merely based on the audit objection, the assessment proceedings cannot be reopened merely on the same material which is already placed on record. We also noted that in the original assessment proceedings the issue related to the claim of the depreciation and interest paid on late payment of deposit of TCS is already forming part of the records. The issue raised by the Revenue is nothing but a change of opinion and the law does not permit the change of opinion on the same issue which has been examined by the Id. AO while passing the assessment order. In this case the assessment is completed on 20.03.2016, the assessee vide their submission dated 15.03.2016 has already given a detailed

submission and the same is reproduced for the sake of convenience:-

“Genuineness of the expenses debited to trading and profit & loss account: You will please find from the trading and profit and loss account to the assessee AOP that major expenses and payments like permit fee, license fees, application fee stock transfer fee etc. are either to Government Department (Excise Department) or to banks or other statutory deductions like depreciation etc which are cross verifiable. The details of these expenses/payments/deductions are as under:

S No.	Head of expenses	Amount	Total
Expenses debited to trading account			1,76,67,918
1.	Permit fee		
Expenses debited to profit & loss account			
2.	Additional Fee	50,26,455	
3.	Audit fee & service tax	22,472	
4.	License Fee: R/s IMFL/Beer 29,07,29,100		34,69,30,378
5.	W/L IMF/Beer 1,75,00,00	30,82,29,100	
6.	Interest payments	2,39,54,909	
7.	Application fee (Excise)	20,75,000	
8.	Banker's charges for loan	8,72,941	
9.	processing	4,29,850	
10.	Bank Charges & Comm.	40,31,786	
11.	Stock Transfer Fee (Excise)	19,93,695	
12.	Depreciation W/o Vehicle Insurance	2,94,170	
Total of expenses/Deductions			36,45,98,296

Total expenses debited to trading and also to profit & loss accounts are Rs. 39,68,82,012/- (Rs. 2,48,59,202+Rs. 37,20,22,810) out of which 92% payments/deductions of Rs. 36,45,98,296/- as per above table are either Govt. payments or the payments which are verifiable from bank statements or otherwise. In other words, the assessee AOP had incurred

just 8% of total expenses in running liquor contract which had achieved turnover of Rs. 2,13,32,12,250/-“

12. Thus it is evident from the above submission that the issue on depreciation and interest payment has already been verified in the original assessment proceedings and the Id. Assessing Officer has already considered the claim of the assessee based on the submission placed before him. We also take note of the fact that in the reasons recorded in this case is that assessee has paid interest payment of TCS and claim on higher rate of depreciation is already decided based on the submission made by the assessee. Therefore, reopening is done merely based on the same material already on record. We find from the order of the Id. CIT(A) that the assessee has challenged the reopening of the case before the Id. CIT(A) in ground No. 1. But the Id. CIT(A) has not decided this ground for the reasons best known to him even through there is a submission of the assessee challenging the proceeding initiated u/s 147 of the Act. The Bench noted that the Id. AR of the assessee has relied upon the decision in case of **Joint Commissioner of Income Tax and Another v. Cognizant Technology solutions India Pvt. Ltd.**

(supra). Similar view is taken by the apex court on re-opening of the case in the case of ACIT Vs. CEAT Ltd. 449 ITR 171(SC) wherein the apex court has held that

“It is not in dispute that the assessment was sought to be reopened beyond four years. Therefore, all the conditions u/s. 148 of the income tax act for reopening the assessment beyond four years are required to be satisfied. Having gone through the reasons recorded for reopening, we are of the opinion that the conditions precedent for reopening of the assessment beyond four years or not satisfied. The assessment was on change of opinion. There are no allegations of suppression of material facts. Under the circumstances, no error has been committed by the High Court in setting aside the reopening notice under section 148 of the income tax act. We are in complete agreement with the view taken by the High Court. The special leave petition stands dismissed.”

Since, the facts that the case as decided by the Hon'ble Apex Court with that case in hand, wherein the issue has already been examined by the AO in the original assessment proceedings and from the reasons so recorded there is no allegation of suppression of material facts by the assessee and while reopening the case of the assessee, there is no new material placed on record. Considering this fact reopening of the case is bad and illegal and in the same is quashed consequently, the ground no. 1 raised by the assessee in their cross objection is allowed.

13. Since, we have considered the ground No. 1 of the assessee being legal in nature the other grounds of the assessee become infructuous and does require our adjudication.

14. Since, we have considered the legal ground of the assessee in cross objection the ground taken by the Revenue on merit also become infructuous therefore, the cross objection of the assessee is allowed and the appeal of the Revenue is dismissed in terms of these observation.

In the result, the Cross objection of the assessee is allowed and the Revenue's appeal is dismissed.

Order pronounced in the open court on 28/06/2023.

Sd/-

(डा० एस. सीतालक्ष्मी)
 (Dr. S. Seethalakshmi)
 न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
 (Rathod Kamlesh Jayantbhai)
 लेखासदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 28 /06/2023

*Santosh

आदेश की प्रतिलिपिअग्रेहित / Copy of the order forwarded to:

1. The Appellant- DCIT, Jaipur.
2. प्रत्यर्था / The Respondent- Poonia Wines, Jaipur
3. आयकरआयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur

6. गार्डफाईल / Guard File (ITA No. 141/JPR/2023 & CO No. 03/JPR2023)
आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar