IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

ITA Nos.120 to 123/CTK/2023
Assessment Years : 2011-12 to 2014-15

Mr Tapan Kumar Bhuyan, Chandradeipur, Salepur, Cuttack	Vs.	Income Tax Officer, Ward-1(1), Cuttack
PAN/GIR No.ADOPB 5206 C		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Samir Ranjan Dash, AR
Revenue by : Shri S.C.Mohanty, Sr DR

Date of Hearing : 07/08/2023
Date of Pronouncement : 07/08/2023

O R D E R

These are appeals filed by the assessee against the separate orders of the ld CIT(A), NFAC, Delhi all dated10.01.2023 in Appeal No.ITBA/NFAC/S/250/2022-23/1048586596(1),ITBA/NFAC/S/250/2022-23/1048587277(1),ITBA/NFAC/S/250/2022-23/104858788161) and ITBA/NFAC/S/250/2022-23/1048588097(1) for the assessment years 2011-12 to 2014-15, respectively.

2. Shri Samir Ranjan Dash, ld AR appeared for the assessee and Shri S.C.Mohanty, ld Sr DR appeared for the revenue.

3. At the time of hearing, ld AR has filed a written submission, as follows:

"The appellant is retired employee of State Bank of India, an assessee under the Income Tax Act, have been filing his return more than two decades under the jurisdiction of Income Tax Officer, Ward-1, Cuttack under the head salary.

Being an employee of the State Bank of India (SBI) and attracted by the Co-operative moments of late 70's he joined the SBI Staff Co-operative Societies Ltd., and to empower the movement, he started recording his transactions ever since he got its membership.

During the assessment year 2011-12, the appellant filed his return of income on declaring the total income of Rs.4,67,580/- as per the Form No.16 issued by my employer, all the deductions on account of Chapter VIA and loss under the head house property is duly reflected in such Form 16, disallowed by the AO, and reassessed the appellant under the head income from other sources on the so called interest earned from the society.

The Income Tax Officer Ward-1(1), Cuttack has reassessed the income of the petitioner as per the assessment order dated 19.12.2018.

A. Assessee has failed to declare the head "income from other sources", on its opening balance of with society as on 31.3.2021, and interest if any earned.

B. Assessee has failed to explain the source of fresh deposit of Rs 8,80,@0.00, and its interest earned of Rs 3,25,264.00.

C. Assessee has failed to show deduction under Chapter VIA U/S 80C of Rs 10,000.00.

D. Assessee/Appellant, also show caused, for disallowance of on account of has from house property as such is not reflected in Form No-16 of Rs 19,517.00

Being aggrieved by the order of assessment u/s 143(3) row's 147 of the lncome Tax Act, the appellant filed an appeal before the Commissioner of lncome Tax (A) Cuttack.

The Commissioner of lncome Tax (A), (NFAC) dismissed the appeal without applying his judicial mind and, confirmed the additions made by the lncome Tax Officer vide order dated 10.1.2023.

That it is humbly stated that when the assessee, himself a retired SBI Senior Citizen aged about 68 years, lives in a remote village Chandeipur about 20 KM from Salipur.The learned first appellate authority (NFAC), Delhi without considering the true facts of the matter, available documents, corresponding settled position of law etc., failed to apply his adjudicating skill and dismissed the appeal vide order dated. 10-01-2023. such order passed by the authority with a clear disregard to the concept of natural

justice and suffers from absent of reason for accepting the views of assessing officer. There is no time stipulated for adjudicating the matter in that forum.

It is clear therefore, that both the authorities below having passed orders in a very casual manner, totally ignoring the pleadings of the assessee and in complete disregard to the principles of natural Justice. The orders are highly unjustified and are not sustainable in law. ln view of the above, being a cryptic and non-speaking order.

That, it is settled law that, the AO cannot compel the assessee to earn income so that the addition made by AO in respect of such income is wholly illegal. Section 69 does not provide any guideline about the extent and length of the discretionary power given to AO in the matter of treating the investment as income which is unexplained or unsatisfactorily explained by the investor-assessee. Therefore, Assessing Officer is expected to appreciate the reasonable explanation offered to him, the evidences produced before him about the nature and source of investment and he cannot make the addition merely on surmises, conjectures as well as without any supporting evidences. (Ashok Kumar Rastogi V CIT (1991) 100 CTR 204.)

The Hon'ble Supreme Court in the case of Chuharmal v. ClT, held that - What is meant by saying that the Evidence Act does not apply to proceedings under the lncome-tax Act is that the rigor of the rules of evidence contained in the Evidence Act are not applicable, but that does not mean that when the taxing authorities are desirous of invoking the principles of the Act in proceedings before them, they are prevented from doing so. All that is required is that if they want to use any material collected by them which is adverse to the assessee, then the assessee must be given a chance to make his submissions thereon. The principles of natural justice are violated if an adverse order is made on an assessee on the basis of the material not brought to his notice. - [Chuharmal v. CIT (1988) 172 ITR 25O (SC)]

ln the case of Dhakeswari Cotton Mills Ltd. v. ClT, the Hon'ble Supreme Court has held that the rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh where it was stated that while proceeding under sub-section (3) of section 23, the lncome-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to

meet it." lt was held in that case that "ln this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. - [Dhakeswari Cotton Mills Ltd. v. CIT (1954) 25 ITR 77s (SC)

As per Section - 69, Income-tax Act, l961-Unexplained investments. "Where in the financial year immediately preceding the assessment year the assessee has made investments WHICH ARE NOT RECORD€D IN THE BOOKS OF ACCOUNT, if any, maintained by him for any source of income, AND the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year." The above section indicates that in order to be an income, there must be fulfillment of two conditions since the word "and' has been used in the section. The investments made in the current year must not be recorded in the books of accounts AND the explanation not offered or not satisfactorily offered. ln addition to the same, it may be noted that this is a deeming provision which means that even though the assessee has no real income it may be deemed to be his income. The provision which is deeming is always rebuttable. The use of the words 'if any' in the section indicates that it is not compulsory that the assessee must have maintained the books of accounts. He can prove the genuineness of the investments by some other evidence which proves investment out of disclosed source.

It may be noted that the AO is under obligation to give reasons for not accepting the explanations offered by the assessee. lt is also to be noted that the revenue cannot rely on assessee's statements to third parties. lt is worth noting that the word "investment' has not been defined in Section 69 itself. Therefore, investment should be construed in general meaning. lt is just possible that on the day of search the investment may not be physically available but the said investment might be in existence in earlier Financial Year e.g. Search has taken place on 8.3.2006 where the Fixed Deposit of on 14.5.2002 having the date of maturity as 13.5.2005 is located. Section 69 would be applicable.

Opportunity of Being Heard under section 59 The imperative Condition Before Making Addition :- Since the words used in the Section 69 are "assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory" conspicuously indicates that there must be an opportunity of being heard to the assessee.

Therefore the appellant draws the kind attention and judicial discipline in this regards that The learned Assessing authority initiated the proceeding with complete disregard to the concept of natural justice, without confronting the material with his possession and without providing the reason and his satisfaction for reopening assessment under the lncome Tax Act .

All the materials with assessing authority and society is laying since the assessee become the member of the Society nothing new material with the AO , in the year if the material only refers to balance in Society Account and assessment was reopened solely based on suspicion rather than a formation of belief and the proceeding could not be initiated merely on a fallacious assumption or suspicious and the sources of deposit need not necessary be income of the assessee.

Secondly fresh contribution to the Society is comes from the family members through Account Payee tax paid source having KYC updated Bank , hence there is no fault in part of the appellant to receive that chegue . Sec 69 gives power to the AO to treat the value of investment as the income of the assessee. If the assessee does not offer any explanation or the explanation offered by the assessee is not satisfactory . This is a very wide power given to the Assessing Officer. Therefore AO is expected to appreciate the reasonable offered to him, the evidence produced before him about the nature and source of investment and he cannot make any addition merely on surmises, conjectures as well as without any supporting evidence. The family member of the assessee duly provided their letter of information accounts statement.pan and address with income tax return and he was also a employee of HDFC . Hence his identity, genuineness, creditworthiness, source of income and capacity, pertaining to transaction in question, were all in records.

The Sec 69. of lncome tax Act reproduced here:

Section 69 : States that

".....the explanation offered by him is , in the opinion of the Assessing Officer is not satisfactory. Thus, for applying the provisions of section 69 of the Act, the Assessing Officer should first come to a finding that the assessee has made investments and the same are not recorded in the books of account and thereafter he can call the assessee for an explanation from about the nature and source of the investments and in case he finds that the assessee is unable to furnish the explanation or the explanation offered by him is not satisfactory, the AO can treat the value of the investments to be the income of the assessee of the financial year in which He has made the investments.

Essential Conditions of Section 69:

1. The assessee has made investment in the financial year immediately preceding the assessment year.

2. Also, such investments are not recorded in the books of accounts, if any, maintained by him for any source of income.

3. Either the assessee unable to furnish explanation about the nature and source of the investments or the AO is in the opinion that the explanation offered by him is not satisfactory. If all the above conditions are satisfied then the value of such investments 'may' he deemed to be the income of the assessee of the financial year in which he has made the investments. Opportunity provided to Assessee. Thus, it is clear from the above discussions that the provisions of Section 69 contained that before the amount of the undisclosed investment is included in the total income of an assessee, he is entitled to get an opportunity to explain the same before the assessing officer proceeds for addition. ln the case T.C.N. Menon vs lncome-Tax Officer, 1973, 96 ITR 148, Kerela High Court held that "The petitioner's case attracts the application of section 69 of the Act. The lncome-tax Officer was, therefore, bound to give an opportunity to the petitioner to explain about the nature and source of his investment before it was treated as his income".

4. The burden of proving that the income is subject to tax is on the revenue. But to show that transaction is genuine, the burden primarily lies on assessee. The assessee should offer the necessary explanation with suitable proof in respect of the investments under consideration. Thus, under Section 69 a primary onus is cast upon the assessee to make plausible explanation, and in case the explanation is given by the assessee and it is not accepte4 the onus shifts on the Department to prove that the explanation offered by the assessee is either wrong or not sufficient to explain the impugned investment by bringing further material evidence on record. But 1n the instant matter all the funds transferred to the Societies Acco.unt through proper Banking Channel, duly reflected in the societies record and for the proper satisfaction of AO ,furnished the details of cheque ,lTR, and creditworthiness declaration.

On the other hand learned Assessing authority whimsically applied Sec 115BBE of the lncome tax on a arbitrary manner without respecting the statutory prescription of legislation on a "income from other sources", which is never falls in the hands of the Assessee for the Assessment Year 2011-12.

Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC)

ln this case, the Supreme Court held that the addition under Section 59 could not be made on the basis of suspicion or conjecture. The AO must have some material to show that the cash credits are unexplained and

represent the assessee's income. ln the absence of such material, the addition could not be made.

CIT v. Taikisha Engineering lndia Ltd. (2016) 381 ITR 666 (Delhi HC)

ln this case, the Delhi High court held that the mere fact that the assessee could not provide a satisfactory explanation for the source of the investment could not lead to the presumption that it was the assessee's income. The court held that the AO must have some material to show that the investment represented the assessee's income before making the addition under Section 69.

The appellant most respectfully produced the copy of Order passed by the Hon'ble lncome Tax Appellate "A" Bench Chennai,Tribunal in ITA NO-160/Chny/2O2O lncome tax officer,Ward (2) VS ITA No- 178/10,in case of Dy. Commissioner of lncome Tax VS M/S Elgie

After section 115BBD of the lncome-tax Act, the following section shall be inserted with effect from the 1st day of April, 2013, namely:-

'11588E. Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.-(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 698, section 59C or section 59D, the income-tax payable shall be the aggregate of-

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 59B, section 59C or section 59D, at the rate of thirty per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a)-

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1). ".

That as per the decision of ITAT Indore in ITA No-828/Ind/2018, ACIT VS M/s One Enclave The Section 115BBE of the Act was inserted by Finance Act, 2012 w.e.f. 142O13 which restricts the claim of deduction in respect of any expenditure or allowance or set off of any loss against the income shown by the assessee or assessed u/s 68, 59, 59A,598, 69C & 69D of the Act. The appellate case relating to the A.Y 2011-12 AND 2012-13 relates to prior to Amendment Assessment Year 2012-13 and therefore the assessee's case will not be hit by provisions of Section 115BBE(2) of the Act.

That, it is pertinent to state that both the Assessing authority and as well as Appellate authority failed to distinguish between Co-Operative Society Registered Under the Cooperative Act and Cooperative Bank registered under the Cooperative Act and not received license to operate as a financial institution under the Banking regulation Act from RBI. The activities of the SBI Cooperative Society Ltd were limited to the members of a specific group and the area of operations was also limited to the acceptance of deposits of members and providing credit facilities to only members, which have been held as not falling under banking activities as defined in the Banking Regulation Act.

The Society has not provided banking facilities either to the general public at large or even to the members of the society. Even the bye laws of the appellant do not provide for banking activities, like issuance of cheque, Bank Draft and not able to sit in the clearing house, hence it issued the deposit receipts on receiving of cheques not after the clearing the amount. Therefore, facts of this case are not identical to with any bank as relied upon by the AO. On the other hand, the facts of the instant case are almost different as predicted by learnd Assessing authority. ln the present case, the SBI Co-operative Society Ltd is not licensed from the Reserve Bank of lndia to act as co-operative bank. Hence, the foundation of observation and all the findings AO, is not factually correct. The deposit receipts issued by the Society clearly mentioned the deposit date and effective data The learned appellate authority without considering all the facts and circumstances of the matter dismissed all the points regarding the nature and source of transaction, its identity, credit worthiness or capacity of his co-depositor. Doubt of assessing officer cannot he the basis of rejecting the assessees claim or explanation The above has been held in the case of S. Madhavi, Hyderabad vs Assessee on 12 September, 2014 ITA No. 1936/Hyd/2011 by ITAT, Hyderabad. ln this case the assessee has explained the source of investment by producing necessary evidence. The Ld ITAT observed that it is a fact on record that assessee at the time of assessment proceedings as well as before the CIT (A) had stated that the amount of Rs. 3 lakh is received from her uncle who is an agriculturist and she has also filed a confirmation in support of such claim. Thus, it is not understood what more supporting evidence assessee could have produced in support of her claim. When assessee has explained her source by producing evidence in the form of confirmation, it is duty of the lneome Tax authorities to make enquiry and ascertain whether assessee's claim is correct or not. Without conducting any enquiry assessee's claim cannot be rejected.

Prior to the enforcement of the Finance Act.,2O21, the provisions governing re-assessment under the I.T Act were regulated by the erstwhile Sections 147, 148,149, read with Sections 150, 151, 152, and 153 of the 1T Act. Under the previous regime, the jurisdiction to reassess an assessee would arise when the jurisdictional Assessing Officer had a reason to believe that any income chargeable to tax had escaped assessment for any AY.

Subsequently, subject to the limitation period as specified in Section 149 of the lT Act and prior sanction (if applicable), the Assessing Officer would assume jurisdiction to reassess the assessee by issuing a notice under Section 148 of the IT Act. lt is relevant to note that under the erstwhile regime there were no inherent statutory safeguards in form of conducting an inquiry and providing an opportunity to the assessee before issue of notice under Section 148 of the 1T Act. To address these statutory gaps the Hon'ble Supreme Court in the case of GKN Driveshafts (lndia) Ltd. Vs. lncome Tax Officers & Ors- (2003) SCC 72,held that when a notice under Section 148 of the lT Act is issued, the proper course of action for the noticee is to file a return and, if desired, seek reasons for the issuance of such notice. The assessing officer is therefore obligated to provide reasons within a reasonable time" and upon receiving the reasons. the noticee is entitled to file objections to the notice. Thereafter, the assessing officer must dispose of the objections by passing a speaking order. Hence, inherent safeguards were read into Section 148 of the lT Act, mandating the assessing officer to furnish reasons, allowing the assessee to file objections thereby granting the assessee an opportunity of being heard and requiring the assessing officer to dispose of those objections through a speaking order before proceeding with a notice under Section 148 of the lT Act. Besides the aforementioned safeguards, another crucial aspect for initiating re-assessment proceedings against an assessee is the strict adherence to the tlme llmlt for issuing a notice under Section 148 of the lT Act. No notice under Section 148 can be issued for the relevant AY if it exceeds the time limit prescribed in Section 149 of the IT Act. As per Section 149(1), the time limit to issue a notice under Section 148 is four years from the end of the relevant AY when the escaped assessment amount is less than Rs. 1 lakh, and six years from the end of the relevant AY when the escaped assessment amount is more than Rs. 1 lakh.

Therefore, for the AY 2011-12 and 2012-13, where the escaped assessment amount is more than Rs. 1 lakh, the limitation period to initiate reassessment proceedings by issuing a notice under Section 148 of the lT Act expired on 31.03.2018 and 31.03.2019, respectively. Thereforethe illegal notice issued aforesaid period is bad in law as the Assessing authority has no jurisdiction to do so as per the ratio settled by the various forums.

The appellant also relied on the judgment of Hon'ble lTAT,Delhl "B"Bench in ITA No.1299/Del/2020, ,Humboldt Wedag lndia Pvt Limited Vs AClT,Circle - ii(2) for better adjudication of matter.

All the Orders of Appeal passed by the Appellate authority in a casual manner without providing any virtual! requirement of appearance, without Considering the nature and source of transaction with proper banking channel and conforming a whimsical order of assessments from AY 2011-12 TO 2014- 15, Liable to quashed particularly it is a case of no adjudication and simply a copy paste work of (NFDC).

That in the circumstances of the case and in low, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) is based on assumption, presumptions, whims and fancies conjectures, surmises, preconceived notions and incorrect application of law and therefore liable to be quashed.

Hence considering facts and circumstances of case, this Hon'ble Tribunal may Quashed the assessments made illegally, arbitrarily with a clear disregard to the rule of natural justice and may pass any other order/orders passed in the interest of justice and equity."

4. In reply, ld Sr DR has submitted that no evidences have been produced before the ld CIT(A). It was the further submission that for the assessment year 2012-13, the assessment order submitted before the ld CIT(A) and ITAT is incomplete insofar as the pages are missing and even this has not been corrected.

5. Ld AR further submitted that the assessee wishes to challenge the reopening of assessment and for this purpose, he has requested for copy of reasons recorded, which have not been furnished to the assessee. For the assessment years 2011-12 and 2012-13, the assessment orders seems to be time barred.

6. I have considered the rival submissions. A perusal of the written submission filed by ld AR on behalf of the assessee shows that the assessee has based his arguments only on various case laws without setting down the facts properly. A perusal of the order of the ld CIT(A) shows that the ld CIT(A) has called for various details and the assessee has not furnished the same. The details called for clearly are for the purpose of setting down the

facts in its right perspective. In the absence of setting down the facts, placing reliance on case laws would have no purpose. The claim of the assessee that he wishes to challenge the reopening of assessment would not survive insofar as there is no ground against the reopening raised before the Tribunal. The claim of ld AR that the assessment orders for the assessment years 2011-12 and 2012-13 are time barred also are not substantiated.

7. However, as it is noticed that the assessee has not produced the evidences called for by the ld CIT(A) for the purpose of adjudication the issues on merits and ascertainment of the correct facts, in the interest of justice, the issues are restored to the file of the ld CIT(A) for re-adjudication. Liberty is granted to the assessee to raise all such issues as he deems necessary for adjudication on merits before the ld CIT(A). If so desires, the assessee is at liberty to raise the legal issues before the ld CIT(A). The ld CIT(A) shall re-adjudicate the issues after granting the assessee adequate opportunity of being heard.

8. In the result, appeals of the assessee stands partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 07/08/2023.

Sd/-
(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 07/08/2023

B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Mr Tapan Kumar Bhuyan, Chandradeipur, Salepur, Cuttack

2. The Respondent: Income Tax Officer, Ward-1(1), Cuttack

3. The CIT(A)-, NFAC, Delhi
4. Pr.CIT, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack