

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "S.M.C." NEW DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER,
S.M.C.

आ.अ.सं./I.T.A No. 1362/Del/2022
निर्धारणवर्ष /Assessment Year : 2009-10

Shri Manak Garg, C/o. Saurav Rohatgi & Associates, G-2/7, Ganga Triveni Apartments, Sector : 9, Rohini, Delhi - 110 085.	बनाम Vs.	Income Tax Officer, Ward : 36 (3) New Delhi.
PAN No. AESPG0394M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितकीओरसे / Assessee by :	Shri Saurav Rohatgi, C. A.;
राजस्वकीओरसे / Department by:	Shri Om Parkash, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing:	11.07.2023
उद्घोषणाकीतारीख/ Pronouncement on:	11.08.2023

आदेश / O R D E R

PER C. N. PRASAD, J.M. :

This appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-27, New Delhi

[hereinafter referred to CIT (Appeals)] dated 31.03.2022 for assessment year 2009-10.

2. The assessee has raised the following grounds of appeal:-

“1. That the impugned order is un-sustainable in law as well as on merits.

2. That the impugned order is without jurisdiction.

3. That under the facts and circumstances of the case, the assessment Order is without jurisdiction for non-service of alleged notice U/s. 143 (2) within the statutory time limit.

4. That under the facts and circumstances of the case, the Ld. CIT (Appeals) grossly erred in law as well as on merits in adopting Net profit rate @33.33% on undisclosed sales and consequently in sustaining the addition of Rs.10,88,015/-.

5. That under the facts and circumstances of the case, the Ld. CIT (A) grossly erred in law as well as on merits in not admitting additional evidence under Rule 46A of Income Tax Rules.

6. That under the facts and circumstances of the case, the loss from Future & Options of Rs.51,44,484/- needs to be allowed and set-off against the business income

7. That under the facts and circumstances of the case, no interest U/s. 234A, 234B & 234C should have been charged. Without prejudice in any case, the calculations are excessive and incorrect.”

3. The Ld. Counsel for the assessee, at the outset, submits that the CIT (Appeals) grossly erred in not admitting additional evidences under section 46A of the Income Tax Rules. Ld. Counsel submits that only part evidences were admitted. Ld. Counsel further submits that there is no finding by the ld. CIT (Appeals) on the

remand report of the Assessing Officer. Ld. Counsel submits that the matter may be restored to the file of the Ld. CIT (Appeals) for admission of all the evidences under Rule 46A of the I. T. Rules in respect of the issue of loss from furniture and Options to be allowed set off against business income. Ld. Counsel also submits that ground No. 1 and 2 are not pressed.

4. The Ld. DR has no serious objection in restoring the matter back to the file of the Ld. CIT (Appeals) for admission of all the evidences and decided the issues in accordance with law.

5. Heard rival submissions. Ground Nos. 1 and 2 are dismissed as not pressed. Ground No. 3 is in respect of validity of the assessment order as it was passed without service of notice under section 143(2) of the Income Tax Act, 1961 (the Act) within the statutory time limit. Placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Laxman Das Khandelwal [417 ITR 325 (SC)] the Ld. DR submits that since the assessee has not raised any objection on jurisdiction before the Assessing Officer and since the assessee has participated in the proceedings and also since the notice under section 143(2) of the Act was issued within the time specified under the Act the assessee is precluded from raising this ground of non-service of notice under section 143(2) of the Act in view of the provisions of section 292BB, I find force in the contention. Following the decision of the Hon'ble Supreme Court in the case of CIT Vs. Laxman Das Khandelwal (supra) ground No. 3 of grounds of appeal is dismissed.

6. Coming to estimation of net profit on undisclosed sales and consequently in sustaining the addition to the extent of

Rs.10,88,015/- and not allowing loss from Future and Options of Rs.51,44,484/- against business income it is noticed that the Ld. CIT (Appeals) only partially admitted the evidences furnished by the assessee and decided the issue. In so far as the estimation of net profit at 33.33% the Ld. CIT (Appeals) decided the issue as under:-

“10.3 The appellant in the return of income had declared net profit of Rs.3,20,141/- on declared turnover of Rs.9,60,600/-. The appellant himself in his return of income declared net profit @ 33.33% of business turnover. After perusal of bank statement of the appellant's ICICI Bank A/c Number 003701037216 the Assessing Officer had taken credit entries as revenue receipts and on the basis of difference in the quantum of credit entries in bank account and declared turnover presumed concealed turnover at Rs.76,66,002/- On perusal of submission filed by the appellant and bank statement of appellant's ICICI Bank A/c Number 003701037216, the following are observed:

(i) During the year there is a total credit amounting to Rs.1,09,62,602/- in ICICI Bank A/c number 003701037216 and Rs.10,000/- in HDFC Bank A/c.

(ii) Amount of Rs.23,46,000/- (782000 * 3) is re-credited into ICICI Bank A/c due to cheque rejection.

(iii) The appellant was dealing in commodity market and maintained account with ICICI Bank for share dealing and transactions in Future and Options (F&O) segment of NSEA total amount of Rs.32,43,584/- has been credited into the ICICI Bank account from F&O and equity trading activity (EBA entries).

(iv) The appellant has shown cash deposit at Rs.29,94,000/- in his submission. However, on perusal of ICICI Bank A/c statement it is observed that the appellant has deposited total cash amounting to Rs30,03,831/- into ICICI Bank A/c bank account during the year. The AR of the appellant vide submission dated 24.08.2015 admitted that the source of cash deposit is the appellant's undisclosed turnover from business.

(v) Amount of Rs.5,12,530/- has credited into ICICI Bank A/c on 21.07.2008 as loan from Barclays bank. The appellant has produced copy of payment advice from Barclays bank.

(vi) Amount of Rs.5,85,517/- has been credited into ICICI Bank A/c on 06.08.2008 as loan from Kotak Mahindra Bank. The appellant has produced copy of agreement cum repayment schedule and loan closure certificate from Kotak Mahindra Bank.

(vii) As per ICICI Bank A/c statement amount of Rs.10,000/- deposited in HDFC Bank A/c on 12.12.2008 is from transfer entry from ICICI Bank A/c on 11.12.2018. Thus, this entry has been considered twice by the AO while calculating business turnover of the appellant.

(viii) The appellant stated that amount of Rs.3,50,000/- credited into ICICI Bank A/c on 22.12.2008 is receipt back of loan amount from Sh. Naresh Kumar but no documentary evidence in this regard has been furnished by the appellant.

(ix) The appellant stated that amount of Rs.1,00,000/- credited into ICICI Bank A/c on 22.12.2008 is receipt back of loan amount from Smt. Sunita Gupta, but no documentary evidence in this regard has been furnished by the appellant. On perusal of ICICI Bank A/c statement it is observed that amount of Rs.50,000/- was given by the appellant to Smt. Sunita Gupta on 09.09.2008. Therefore, loan amount to the extent to Rs.50,000/- only seems to be justified in view of submission of the appellant.

10.4 In view of above discussion concealed business turnover of the appellant is re-calculated as under:

Items	Amount (in Rs.)
Total credit entries as per Assessing Officer in Asstt. Order.	1,09,72,602
Less- Amount re-credited due to cheque Rejection	23,46,000
Less- Amount credited from F & O and equity Trading.	32,43,584

Less- Amount credited from Barclays Bank.	5,12,530
Less- Amount credited from Kotak Mahindra Bank	5,85,517
Less- Amount transferred to HDFC Bank (self A/c)	10,000
Less- Amount received back from Smt. Sunita Gupta	50,000
Less- Business turnover already declared by the appellant in ITR.	9,60,600
Total :	32,64,371

10.5 Hence, concealed business turnover taken by the Assessing Officer at Rs.76,66,002/- is restricted to Rs.32,64,371/-.

10.6 The AR of appellant urged that rate of net profit should be taken as envisaged for retail dealer as per section 44AF @ 5% or @ 10% in case of unexplained deposits in business account as held by the Hon'ble Delhi ITAT in the case of ITO vs. Rohit Kharbanda in ITA No. 1904/Del/2012 dated 12.03.2015. The appellant filed his return of income on 31.07.2009 as required u/s 139(1) of the Act & declared business turnover at Rs.9,60,600/- and net profit at Rs.3,20,141/- being 33.33% of total business turnover. The appellant had sufficient time u/s 139(5) of the Act to file revise return of income to lower his N.P. if required. However, no such revised return was filed by the appellant u/s 139(5) of the Act within statutory time limit. During the course of assessment proceedings, the appellant did not stated anything / objected NP rate @ 33.33%. It is after the completion of assessment proceedings, when the AO made addition on account of concealed business turnover, the appellant raised issue of higher NP rate. Since, the NP rate @ 33.33% was suo-moto self declared by the appellant in ITR filed u/s 139(1), I do not find any reason to interfere with the same.

10.7 In view of above discussion the Assessing Officer is directed to restrict concealed business turnover from Rs.76,66,002/- to Rs.32,64,371/- and calculate concealed business income by applying NP rate @ 33.33% on concealed business turnover of Rs.32,64,371/-. Accordingly, these grounds of appeal are partly allowed.”

7. The Ld. CIT (Appeals) considering various submissions of the assessee arrived at the concealed business turnover at Rs.33,64,371/- and adopted the net profit rate of 33.33% which was suo moto self decorated by the appellant in the return in estimating the net profit. I do not find any infirmity in the same. Action of the Ld. CIT (Appeals) is sustained. Ground No. 4 of grounds of appeal is dismissed.

8. Coming to ground Nos. 5 and 6 regarding the loss on Future and Option trading and consequently set off against business income is concerned, it is noticed that the Ld. CIT (Appeals) has only admitted partial evidences furnished by the assessee which according to me is not correct. In the interest of justice, the issue of whether loss from Future and Options can be set off against income from business is restored to the file and the Ld. CIT (Appeals) may consider for admission of all the evidences furnished by the assessee by way of an application under section 46A of the I. T. Rules. The assessee be provided adequate opportunity of being heard. Ground Nos. 5 and 6 of grounds of appeal are allowed for statistical purpose.

9. In the result, appeal of the assessee is partly allowed for statistical purpose as indicated above.

Order pronounced in the open court on : 11/08/2023.

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 11/08/2023.

MEHTA

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	07.08.2023
Date on which the typed draft is placed before the dictating member	08.08.2023
Date on which the typed draft is placed before the other member	11.08.2023
Date on which the approved draft comes to the Sr. PS/ PS	11.08.2023
Date on which the fair order is placed before the dictating member for pronouncement	11.08.2023
Date on which the fair order comes back to the Sr. PS/ PS	11.08.2023
Date on which the final order is uploaded on the website	11.08.2023
Date on which the file goes to the Bench Clerk	11.08.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	