

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 369/JPR/2022  
निर्धारण वर्ष/Assessment Year : 2014-15

Shri Satya Narain Parwal H-3, Todarmal Marg, Banipark Jaipur – 302 016	बनाम Vs.	ITO, Ward 3(2) Jaipur.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AHFPP 6786 L		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

आयकर अपील सं./ITA No. 395/JPR/2022  
निर्धारण वर्ष/Assessment Year : 2014-15

ITO, Ward 3(2) Jaipur.	बनाम Vs.	Shri Satya Narain Parwal H-3, Todarmal Marg, Banipark Jaipur – 302 016
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AHFPP 6786 L		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओरसे/ Assesseeby : Shri Raj Kumar Yadav, Advocate  
राजस्व की ओरसे/ Revenue by: Shri Shailendra Sharma, CIT-DR

सुनवाई की तारीख/Date of Hearing : 25/05/2023  
उदघोषणा की तारीख/Date of Pronouncement: 14 /08/2023

आदेश/ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

Both these appeals are cross appeals filed against order of the Id. CIT(A) dated 06-09-2022, National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment year 2014-15 which has been partly allowed.

2.1 The assessee has raised the following grounds of appeal-

1. That the order passed under section 144 of the Act is illegal, invalid or improper. This, is bad and liable to be quashed.

1.1 That on the facts and in totality of the circumstances, the learned AO was not justified in making best judgment assessment as assessee has made his appearance, have always extended all the assistance and co-operation during the course of assessment proceeding.

1.2 That on the facts and in totality of the circumstances, the learned CIT(A) ought to have held that the impugned assessment order is barred by time.

1.3 That the impugned assessment order was passed on 22.12.2016 but never served on assessee on or before 31.12.2016. Hence is barred by limitation.

2. That on the facts and in totality of the circumstances, the learned CIT(A) grossly erred in sustaining the addition of rupee 4,37,673 out of rupee 3,51,77,787/- on the ground that the assessee has not explained whether, these losses were reimbursed to the broker or these were met out of his initial investment.

2.1 That the addition should have been deleted in toto.

3. That the learned CIT(A) grossly erred in sustaining addition of rupee 1,92,375 as investment in shares of Power Grid Corporation of India.

3.1 That the learned CIT(A) grossly erred in holding that sources of investment in these shares has not been disclosed whereas shares with dividends received are dully disclosed in the return of income.

4. That on the facts and in totality of the circumstances, the learned CIT(A) grossly erred in sustaining addition of rupee 8,20,000/- as cash

and Time deposits in Bank on the ground that source has not been disclosed.

4.1 That the impugned amount represents deposit in bank and it & interest earned thereon has dully been disclosed in the return of income.

5. That the learned CIT(A) grossly erred in holding that initiation of penalty proceedings u/s 271(1) (b), 271(1)(c) and charging of the interest u/s 234A/234B/234C/234D of the Income Tax Act, 1961 are no valid grounds of appeal.

5.1 The assessee or his authorized representative appeared on each and every date for which notice(s) were validly served upon him. There had been no concealment of income or furnishing of inaccurate particulars of the income for the said assessment year. There was no specific finding in assessment order in respect to charging of interest. Therefore, initiation of penalty and charging of interest is bad in law.

6. That the humble appellant craves for leave to add, alter, or amend any of the aforesaid ground at or before the date of hearing.

3.1 The Revenue has raised the following ground of appeal.

“Whether on the facts and in the circumstances of the case and in law the ld.CIT(A) was justified in deleting the addition of Rs.3,47,40,114/- made on account of transaction made in shares and commodities.”

4.1 In this case, it is noted that the assessee has raised a legal ground that the order of assessment passed by the assessing officer is barred by limitation. The said ground no. 1.3 is as under-

*“1.3 That the impugned assessment order was passed on 22.12.2016 but never served on assessee on or before 31.12.2016. Hence is barred by limitation.”*

4.2 Firstly, we take up legal ground of assessee's appeal being ground number 1.3. The facts relating to this issue are that the assessee had filed his return of income on 18.08.2014 declaring total income at Rs.7,54,000/- which was processed u/s 143(1) of the Act. The case of the assessee was selected for scrutiny and notice u/s 143(2) was issued on 31-08-2015 and duly served on 29-09-2015 on the wife of the assessee. It is noted that the AO had time and again issued letters/ notices to the assessee but no reply was received by the AO whose details are available at pages 4 & 5 of the assessment order. The AO mentioned in his assessment order that at many a times the assessee was contacted telephonically and every time he avoided appearance before him despite assuring to appear on a certain date. In such circumstances of the case and time barring date being very near, the AO was constrained to finalise this case on the basis of information and available on record. The AO thus noted that this case was selected for limited scrutiny for the following reasons.

“Large value transaction (sale of equity other than delivery) reported in Security Transaction Tax Return and sale consideration disclosed in capital gain”

Hence, the ex-parte order was passed u/s 144 of the Act on 22-12-2016 by the AO making addition of Rs.3,51,77,787/-

4.3 Aggrieved by the order of the AO, the assessee carried the matter before the ld. CIT(A) wherein the assessee contended that the aforesaid order though made on 22.12.2016 yet served upon the assessee 26.05.2017 and is barred by limitation. The ld CIT(A) observed that as the copy of demand notice filed by the assessee himself shows that the order had been dispatched by speed post on 29.12.2016 which shows that the order is not barred by time and this objection is rejected. It is also noted that the appeal of the assessee has mainly partly allowed by the ld. CIT(A) by observing as under:-

“19.....As the assessee has not explained whether these losses were reimbursed to the broker or these were met out of his initial investment, as the source of the same is not disclosed, it is fair to sustain addition of Rs.4,37,674/- out of total addition of Rs. 3,51,77,787. The assessee gets relief of Rs.3,47,40,114 (Rs.3,51,77,787 – Rs.4,37,673 = 3,47,40,114).

29. The appeal is partly allowed. The assessee gets relief of Rs.3,47,40,114/- as per 19 above.

The ld. CIT(A) has also confirmed the two additions namely relating to investment of Rs.1,92,375/- in the shares of Power Grid Corporation and

Rs.8,20,000/- in the time deposit in Fingrowth Cooperative Bank which has been confirmed at para 21 and 25 & 26 as under:-

“21. The arguments have to be rejected as the investment is not disputed and source of investment is also disclosed. So the addition of Rs.1,92,375/- is confirmed.”

“25. As regards Rs.8,20,000/- being part of Rs.3,51,77,787/- and double addition of Rs.8,20,000/- this is no more valid as only Rs.4,27,673/-, a very small part of Rs.3,51,77,787/- has been sustained to take into account loss suffered and paid by the assessee. So, the argument of double addition has also to be rejected in light of the finding above. “26. Accordingly, the addition of Rs.8,20,000/- is confirmed.”

4.4 Now aggrieved by the order of the ld. CIT(A), the assessee submitted before the Bench that the assessee had received a penalty show cause notice dated 07.04.2017 which was received on 10.04.2017 (PB Page 1) and then he came to know that an assessment order under Section 144 of the Income Tax Act was made on 22.12.2016 who vide his letter dated **15.04.2017 (PB Page 2-4)** requested the assessing officer to serve the said assessment order. The assessing officer then served the copy of the assessment order and demand notice dated 26/05/2017. It was further submitted that the ld. CIT(A) has drawn adverse inference from the postal receipt dated 29.12.2016 affixed on the demand notice. The said postal receipt does not show that it pertains to dispatch of the assessment order nor it is a proof of dispatch of assessment order. The assessee has produced the certified copy of entire order sheet/note sheet of assessment record of the assessment year 2014-

15 which are open on 22.09.2015 and closed on 20.12.2016 (PB page 12-16) and submitted that the order sheet/note sheet is substance of the business conducted by the assessing officer and there was no such order sheet/note sheet that the assessment was made on 22.12.2016 and dispatched by speed post on 29.12.2016. The burden was on the assessing officer but he has failed to discharge his burden. The ld. CIT(A) had vide letter dated 10.12.2019 specifically asked the assessing officer as to the claim of the assessee that he was served the demand notice on 26.05.2017 is correct or not? The assessing officer did not reply nor submitted any comments. The ld. CIT(A) therefore accepted the claim of the assessee and recorded his finding in para 1 at page 1-2 of their order, which reads as; -

*“1. This appeal was filed by the appellant against the assessment order dated 22-12-2016 passed u/s 144 of the Income Tax Act by the ITO Ward-3(2), Jaipur. It is stated in the appeal memo that the demand notice was served on 26-05-2017. The e-appeal was filed on 02-06-2017. A report of the AO on some documents filed by the appellant to justify the delay was called for by CIT(A)-1, Jaipur vide letter dated 10-12-2019 but the AO has not submitted any comments. Therefore, the appellant’s claim of delay in service of assessment order is accepted and the appeal is treated as having been filed in time.”*

*(Emphasis supplied; underlined by us).*

It was also submitted that Order VIII rule 3 of the Code of Civil Procedure, 1908 **(in short here-in-after referred as to “the CPC”)** provides that the assessing officer should have specifically denied the factum of service if the claim of the assessee was not correct or true. The said Rule is;-

*“3. Denial to be specific. - It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.”*

The assessing officer neither denied the fact of service of assessment order nor filed any reply or comment. Therefore, in the light of Order VIII rule 5 of the CPC the claim of the assessee shall be taken to be admitted. The said Rule is;-

*“5. Specific denial. – (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:*

*Provided that the Court may in its discretion, require any fact so admitted to be proved otherwise than by such admission.*

*(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.*

*(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-section (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.”*

It is further submitted that Id. CIT(A) had specifically asked the assessing officer about claim of service and the assessing officer had neither disputed nor denied. The admission of the assessing officer is relevant under Section 20 of Evidence Act, 1872. Section 31 of the Evidence Act provides that the admission may operate as estoppels. The finding of the Id. CIT(A) is per-incuriam as service is sine qua non. The assessment year involved is 2014-15 and the order of assessment therefore should have been completed and served on or before 31.12.2016. Though the assessing officer claims that he made assessment on 22.12.2016 yet it was served on 26.05.2017 for which an affidavit of the assessee duly Notarized by Notary Public is also submitted by the assessee before the bench on 19-05-2023. The Id. AR of the assessee placed various reliance in the case of Hon'ble Karnataka High Court CIT vs. M/s B J N Hotels Ltd.; Cuttack Bench of ITAT in

the case of M/s Nidan vs. ACIT; order dated 16.05.2018; ITAT Jodhpur Bench in the case of Shantilal Godawat and Others vs. ACIT, reported in 126 TTJ (Jd) 135 and ITAT “E” Bench, Mumbai in the case of ACIT v. M/s Essel Corporate, order passed on 17.04.2023 in I.T.A. No. 4322/Mum/2017.

4.5 On the other hand, learned D/R placed reliance on the order of the ld. CIT(A) and submitted that the order was served in time.

4.6 We have considered rival contentions and carefully perused the material place on record. We find that Section 153 of the Income Tax Act mandate that order of assessment should have been completed within twenty-one month from the end of the assessment year in which the income was first assessable. The legislature has in Section 153 used the terminology “order of assessment”. It generally includes two elements viz;- (i) making of assessment i.e. determination of total income and tax liability and (ii) communication of assessment i.e. demanding the determined tax, interest etc. Thus, order of assessment means determination of total income and tax liability of an assessee and communicating the said determination of total income and tax liability to the said assessee. The communication of assessment, therefore, is sine qua non to constitute order of assessment. Thus, completion of assessment includes service of assessment on the assessee. Our above view derives support from the decision of Hon’ble Karnataka

High Court in the case of CIT vs. M/s B J N Hotels Ltd.; wherein, it has been held as under”-

*“9. ....That the revenue is neither able to point out from the records that the assessment orders were dispatched on 27.04.2007 nor produced the dispatched register to establish that the orders were complete and effective i.e. it was issued, so as to be beyond the control of the authority concerned within the period of limitation i.e. 29.04.2007. Admittedly, the assessment orders were served on the assessee on 30.04.2007. Hence, the assessment orders passed were barred by limitation.”*

The Cuttack Bench of ITAT in M/s Nidan vs. ACIT; order dated 16.05.2018; held at para 17 that it is not in dispute that the orders of assessment under consideration were dispatched only on 07.01.2017. Hence, in our considered opinion, the said orders of assessment were time barred. Similar view was also expressed by ITAT Jodhpur Bench in the case of Shantilal Godawat and Others vs. ACIT, reported in 126 TTJ (Jd) 135 and ITAT “E” Bench, Mumbai in the case of ACIT v. M/s Essel Corporate, order passed on 17.04.2023 in I.T.A. No. 4322/Mum/2017. We have called for the relevant assessment record to verify the claim of the assessee whereas the ld. DR could not produce the same despite various opportunities granted to him. However, the assessee produced the certified copy of entire order sheet/note sheet of relevant assessment record. The order sheet starts from dated 22.09.2015 and ends on dated 20.12.2016. We are of the considered view that the

order sheet/note sheet is substance of the business conducted by the assessing officer and there was no order sheet written by the assessing officer that the assessment was made on 22.12.2016 and dispatched by speed post on 29.12.2016. Furthermore, the Id. CIT(A) had when specifically asked the assessing officer about service of demand notice then the assessing officer should have specifically denied the factum of service if the claim of the assessee was not correct or true but the assessing officer had chosen not to reply which amounted to deemed admission and is relevant as per Section 20 of Indian Evidence Act. Thus the Id. CIT(A) rightly admitted the claim of the assessee that demand notice was served on 26.05.2017 and appeal before Id. CIT(A) was within time. Now the revenue cannot take contrary stands as the said admission of the assessing officer, as per Section 31 of the Evidence Act, may operate as estoppels against them. In this case, the assessment year involved is 2014-15 and the order of assessment therefore should have been completed on or before 31.12.2016. Though the assessing officer claims that he made assessment on **22.12.2016** yet it was served on **26.05.2017**. Hence, in our considered opinion, the said order of assessment was time barred and consequently, we quash the same and allow this ground of appeal of the assessee. In view of our above decision, other grounds of appeal taken by the assessee are allowed and appeal of revenue has become infructuous meaning thereby that appeal of the Revenue is dismissed.

5.0 In the result, appeal filed by the assessee is allowed and that of the Revenue is dismissed.

Order pronounced in the open court on 14/08/2023.

Sd/-

(राठोड कमलेशजयन्तभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)  
(Dr. S. Seethalakshmi)  
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 14/08/2023

\*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Satya Narain Parwal, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 3(2), Jaipur.
3. आयकरआयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No. 369/JPR/2022)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar