

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

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

आयकरअपील सं./ITA. No. 139/JP/2023
निर्धारणवर्ष / AssessmentYear :2014-15

Shri Jagat Singh Rathore 502, Goverdhan Nagar, Pratap Nagar, Sanganer, Jaipur – 303 902	बनाम Vs.	The ITO Ward 7(2) Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: BIRPS 4683 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Shri Mahendra Gargieya, Adv.
राजस्व की ओरसे / Revenue by : Ms. Monisha Choudhary, Addl. CIT

सुनवाई की तारीख / Date of Hearing : 05/09/2023
उदघोषणा की तारीख / Date of Pronouncement: 18/09/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is directed against the order of ld. CIT(A) dated 31-01-2023, National Faceless Appeal Centre, Delhi [hereinafter referred to as ld.CIT(A)/(NFAC)] for the assessment year 2014-15 wherein the assessee has raised the following grounds of appeal.

“1. The impugned order passed u/s 143(3) dated 19-12-2016 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence, the same kindly be quashed.

2. Rs.38,19,000/-: The AO erred in law as well as on the facts of the case in confirming the disallowance of Rs.38,19,000/- made u/s 68 of the Act on account of undisclosed income in the form of loan/cash credit. The disallowance so made and confirmed by the Id. CIT(A) is totally contrary to the provisions of law and facts on the record and hence the same kindly be deleted in full.

3. The AO erred in law as well as on the facts of the case in charging interest u/s 234A & 234B of the Act. The appellant totally denies its liability of charging of any such interest. The interest so charged being contrary to the provisions of law and facts, kindly be deleted in full.”

2.1 At the outset of the hearing, the Id. AR of the assessee vide his application dated 10th Aug. 2023 praying therein admission of additional evidences u/r 29 of Income Tax (Appellate Tribunal) Rules, for taking additional documents on record.

The details mentioned in the application dated 10-08-2023 are as under:-

“1 In the above case, the humble applicant – assessee prays for admission of following additional evidences as under:-

- (a) Confirmatory affidavit given by Dhuji Lal Sharma S/o Shitaram Sharma, Saligrampura, Vidhani, Teh. Sanganer, Distt. Jaipur Raj.
- (b) Confiramatory affidavit given by Badri Narayan Sharma S/o Hajari Lal Sharma, Jai Kishan Pura, Tonk, Raj.

2. The reason behind no filing these papers before the Id. CIT(A) was that the assessee has been requesting these persons to provide such confirmations. However, they were not cooperating and matter become old due to which assessee also lost sight to file the same before the authorities below.

3.1 There cannot be any dispute over the settled legal proposition that Rule 29 enables the Tribunal to admit the additional evidences in its discretion if such additional evidences would be necessary to do substantial justice in the matter. Kindly refer CIT vs Tax Hundred India (P) Ltd. (2011) 239 CTR (Del) 263, ITO vs B.N. Bhattacharya (1978) 112 ITR 423 (Cal) Prabhavati S Shah vs CIT (1988) 231 ITR 1.

3.2 In this case, these evidences goes to the root of the issues and consideration thereof is must for a just decision thereon.

Hence, under the totality of facts and circumstances, it is humbly prayed that such evidences kindly be taken on record and obliged.

2.2 However, the ld. DR objected to the filing of the additional evidence by the ld. AR of the assessee and submitted that it should have been filed before the lower authorities for adjudication of the case at the time of assessment proceedings or appellate proceedings before the ld. CIT(A).

2.3 The Bench has taken into consideration the submissions of the parties and found that the assessee should be provided equity and justice in the matter and should not be deprived off to file the additional evidence with a view to contesting his arguments. Hence, in the interest of equity and justice, the same are considered and allowed to be placed on record.

3.1 Brief facts of the case are that the assessee is an individual. During the year under consideration the assessee filed its return of income on 24-03-2015 declaring a total income of Rs. 2,18,710/- (PB 1-2) having income from agriculture, Job work and rental income from goods carriage. The case was selected under CASS and notice u/s 143(2) was issued dated 31.08.2015. Thereafter, notice u/s 142(1) along with questionnaire was issued to assessee. The AR of the assessee attended

from time to time and produced relevant papers and books for consideration. It is noted that the AO during the year under consideration noticed that the assessee had deposited cash totaling to Rs.40,17,000/- (Rs.8,10,000/- in Bank of Maharashtra A/c no. 3952000100120197 and Rs.32,07,000/- in Punjab National Bank A/c no. 60023884009). When asked, the assessee submitted that the assessee made a bid before the District Excise Department. The assessee tendered Demand Drafts for the same which were sourced out of past saving of Rs.1,98,000/- and contributions made by the various partners/members of the AOP totaling Rs.38,19,000/- . Unfortunately, however this application was rejected by the District Excise Officer and the Demand Drafts got cancelled and thus, the assessee returned back the contributions made to all the partners/members of the AOP. In support of the same, the assessee filed confirmations (PB 3-16). Even statements of some of them were recorded before the AO wherein they have accepted the fact that they have contributed the amount in cash for making application of liquor license (see AO pg.2). The ld. AO however disbelieved merely on the ground that the source of the agriculture income as stated by those persons was not furnished and therefore the amount of Rs.38,19,000/- was added as undisclosed income vide impugned Assessment order u/s 143(3) dated 19.12.2016.

3.2 In first appeal, the ld. CIT(A) also confirmed the additions vide order u/s 250 dated 31.01.2023 holding as under:

“ 7. Decision: - I have Considered the submission of the appellant and the assessment order of the AO passed u/s-143(3) of the I.T Act,1961. On Perusal of the appellant’s submissions made on the additions made by AO are found without any substance as same Submissions were filed before the AO who had considered those submissions and rejected after a detailed discussion on each and every point raised. I have noticed that AO had given opportunity of being heard to the appellant before making addition. AO had also discussed and incorporated appellant’s Submission in the assessment Order. Further, AO is found to have given reasons as to why he had rejected the appellant’s contentions. In the facts and circumstances of the case on hand, I am inclined to agree with the findings of the AO and all the additions made by the AO stand confirmed. All the grounds of appeal taken by the appellant are dismissed.

In the result, Appeal is Dismissed.”

3.3 Being aggrieved by the order of the ld.CIT(A), the assessee carried the matter before this Bench with the prayer that the ld. CIT(A) has erred in confirming the addition of Rs.38,19,000/- made by the AO for which the ld. AR of the assessee has filed a detailed written submission as under:-

Submissions:

1.1 Source of Bank Deposits fully explained: At the outset it is submitted

that the **subjected deposits were sourced from various persons on account of obtaining liquor license**, who constituted a group and filed an application for getting tender to the District Excise officer. Accordingly, demand drafts in favor of District Excise Officer were tendered. There is no dispute that the amount was transferred for obtaining liquor license and after the tendering process the assessee was refunded back the demand drafts as unsuccessful bidders. Returned DDs were deposited in the same bank account from which they were issued earlier and thereafter assessee **returned back the cash to the concerned persons.**

1.2 Capital Receipts: In support of these contentions the **affidavits along with their respective IDs duly signed & notarized from all these 7 persons were filed (PB 17-23)**. Thus, from these facts it is evidently clear that the **nature of the amount received** in the hands of the assessee was not a type of loan or advance but it **was a capital contribution** made by all those persons, **who were impliedly the members** of the unconstituted/ undeclared Association of Persons (deemed AOP for short) formed for the purpose of conducting liquor business. In that direction, capital contribution was made by all the persons and that amount was duly given to State Excise Department for obtaining liquor license. **All these facts are duly affirmed by all those persons in their respective affidavits (PB 17-23)**. The authorities below have not at all disputed these facts in the impugned orders. Thus, in the present case, the assessee did not accept any loan or deposit but the amount was obtained as a capital contribution towards obtaining a liquor license, **which do not fall u/s 68 of the Act**. Once this is the admitted jurisdictional fact, there is no scope of invoking of section 68 , 69 and 69A of Income Tax Act, 1961 and making addition of Rs.38,19,000/- as undisclosed income.

2. Supporting Case Laws:

2.1 Sunil Kumar, Chirawa vs Addl. Commissioner of Income Tax, Jhunjhunu ITA No. 203 & 204/JP/2018 vide order dated 09.01.2019 (DPB) wherein it was held that:

*“the explanation of the assessee that the said amount was deposited by the said person in the bank account of the assessee for the purpose of taking a D.D in favour of the excise department for participating in the tender of liquor shops **was accepted by the assessing officer then it will not fall in the ambit of loan or deposit as contemplated in the provisions of section 269SS and 269T of the act and in absence of any fresh material or contrary record to show that the amount was taken as a loan by the assessee for the assessee’s requirement, the penalty levied u/s 271D or section 271E are not justified.**”*

Thus, it is already being held in similar facts and circumstances of the case that what the various persons have given to the assessee was nothing but capital contribution and was not in the nature of loan or deposit. **Hence, could not be considered as even a deemed income.**

3. Additions without jurisdiction: Admittedly, in the entire impugned order there is **no reference to any particular provisions of law**, which could empower the AO to make impugned additions. There is no reference to section 68 or 69, if applicable, meaning thereby, the addition made were completely without jurisdiction in as much as under the Act, no income can be assessed unless it is specifically authorised by a particular provision of law and hence the impugned addition deserves to be deleted at this stage alone.

4. Assuming section 68 was invoked:

4.1 However, the same is not applicable on facts of the present case. Firstly and admittedly there were no books maintained by the assessee and the bank passbook cannot be termed as book of accounts, Therefore, it has been held that provisions of section 68 cannot be applied. **But otherwise also on merit no addition could be made in as much as the assessee has already established the identity, the genuineness of the transaction. Secondly, otherwise also this being a capital contribution, section 68 cannot be invoked. There apart, the assessee has already furnished the confirmatory affidavit of the creditors and notably statement of those persons was recorded** wherein they duly admitted the fact of making contribution by giving cash to the appellant and also explained the source being income from agriculture. However, the rejection of such a confirmation and source by the AO in absence of corroborative evidence is principally wrong in as much as the AO cannot ask the assessee to be the source of source and the law is well settled on that aspect. **Following decisions of Hon'ble Rajasthan High Court are directly relevant** for the purpose.

4.1.1 Kindly refer **Labhchand Bohra V/s ITO (2008) 8 DTR 44 (Raj.) (DPB ?)** held that

“Cash credit- burden of proof- identity of the creditors established and the confirmed the credit. This discharged the burden of appellant to prove genuineness. However, capacity of the lender to advancement money to appellant was not a matter which the appellant could be required to establish and that would amount to calling upon him to establish the source of source. Hence addition cannot be sustained.”

4.1.2 In **Aravalli Trading Co. v/s ITO (2008) 8 DTR 199 (Raj) (DPB 1-5)** held that:

“Once the existence of the creditors is proved and such persons own the credits which are found in the books of the appellant, the appellant's onus stand discharged and the latter is not further required to prove the sources from which the creditors could have acquired the money deposited with him and, therefore the addition u/s 68 cannot be sustained in the absence of anything to establish that the sources of the creditors deposits flew from the appellant itself.”

4.2 It is a prevailing trade practice that in the liquor trade, various persons come together, form an Association of Persons (AOP) and application filed with the State Excise Officer.

Sometime the AOP may be formally formed or sometime it may be verbal. However, **each and every member of the AOP makes a contribution towards the capital of the said AOP as agreed. This collection, the amount is sent** by way of Demand Draft along with the application to the State Excise Officer which, are returned back in case of unsuccessful bid. In this case also, this is what has happened and has already been stated herein above. There have been various cases **in the past where the concerned department has accepted the genuineness and bonafide** such a contention and having been satisfied, proceeding u/s 269SS and/ or u/s 271 was initiated on account of the cash receipt/ repayment and penalty u/s 271D and 271E have been imposed. In these cases, the Hon'ble Tribunals and courts have recorded findings. The department has accepted the plea of the assessee that they with the such a receipts were not in a nature of loan or deposits but were a capital contribution and therefore the provisions of Sec.269SS or 269T were not applicable. On the similar analogy therefore, in the present case also the amount having been received from different persons being the member of the AOP for participation in tender was not in the nature of loan or advance and therefore was not a case of cash credit.

4.3 To support small past savings, ROI of earlier year were filed (PB 31-38).

5. To be examined in their hands only: The law is well settled that once **the person who has made the payment/investment, is the correct person** in whose hands, the question of source has to be examined, considered and if need arise then addition can have made in its hand only **but not in the hands of the company, firm, the present assessee AOP.** For this purpose, reliance is placed on the decision of supreme court is **Commissioner of Income-tax v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC) (DPB)**

In the instant case since 7 persons other than assessee, who came together with the appellant assessee to run the Liquor business, made investment, have categorically confirmed the fact of giving their contribution in their duly sworn affidavit as also in the statement recorded, **which fact is mentioned by ld. AO also at the top pg.3 in its order u/s 143(3) dated 19.12.2016.** Hence, such an issue should have been examined and considered in their hands only. Consequently, the impugned addition has to be deleted in its entirety.

6. Assuming if section 69 was invoked: Here also, no addition can be made because the appellant has already furnished a satisfactory explanation along with supporting evidences which, the AO is bound to judiciously appreciate and cannot be rejected on mere whims and fancies. Further, discretion conferred upon the AO has to be exercised judiciously as held in **CIT vs Smt. P.K. Noorjahan (1999) 237 ITR 0570 (SC):**

“As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in Parliament, the word "shall" had been used but during the course of

*consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word "may". This clearly indicates that the intention of Parliament in enacting s. 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under s. 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the ITO under s. 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case. In the instant case, the Tribunal has held that the discretion had not been properly exercised by the ITO and the AAC in taking into account the circumstances in which the assessee was placed and the Tribunal has found that the sources of investments could not be treated as income of the assessee. The High Court has agreed with the said view of the Tribunal. There is no error in the said finding recorded by the Tribunal. There is thus no merit in these appeals and the same are accordingly dismissed. — CIT vs. Smt. P.K. Noorjehan (1980) 15 CTR (Ker) 138: (1980) 123 ITR 3 (Ker): 42R.1622, **affirmed.**"*

7. Contents of affidavits filed remained uncontroverted hence were binding upon AO as held in Mehta Pareek & co. (30 ITR 181 SC). Onus shifted to AO was not discharged and he proceeded on mere suspicion which is not a good basis as held in Dhakeshwari Cotton Mills (26 ITR 775 SC).

8.No application of mind by the CIT(A): A bare look upon the order of the CIT(A) makes it clear that **there has been no application of mind at all** by him on the facts, the submissions made by the assessee and the judicial precedents in as much as he again and again referred to the finding recorded by AO and he has done nothing except justifying and confirming the AO's finding only. There is **no independent finding** recorded by the Id. CIT(A) as to why he found merit in the case of the AO and against the Assessee. The impugned order of the CIT(A) is thus, completely silent and breaft any reasoning and such an order therefore is nothing but a nullity and deserves to be quashed.

For this proportion kindly refer the following cases :

In the case of **Fujitsu Consulting India (P.) Ltd v. ACIT [2019] 110 taxmann.com 172 (Delhi - Trib.)**, it was held as under:

"5. _____ It is our considered opinion that it was incumbent upon Ld. first appellate authority to pass a speaking order after proper appreciation of the facts before her. It may not be out of place here to note that as held by the Hon'ble Apex Court in the case of KapurchandShrimal v. CIT [1981] 7 taxmann 6/131 ITR 451 (SC) in connection with the appeal before the Ld. CIT (A) that it is the duty of appellate authority to remove the errors in the order of authorities below and remit the issue with or without direction for

reconsideration unless prohibited by law. Accordingly, since the Ld. CIT (A) has not passed a speaking order on this issue, we are of the considered opinion that the interest of justice will be served if this issue is remitted to the file of the Ld. CIT (A) with a direction to pass a speaking order after duly examining and considering all the contentions raised by the assessee. Accordingly, the appeal is restored to the file of the Ld. First Appellate Authority with a direction to re-adjudicate the issue after duly considering all the contentions of the assessee which it may raise in this regard and after giving proper opportunity to the assessee. Needless to say, passing of a speaking order is mandatory.”

In the case of **Hitesh Outsourcing Services v. ITO-Ward6 (2)[2015] 55 taxmann.com 408 (Gujarat)**, it was held:

“Section 251 of the Income-tax Act, 1961 - Commissioner (Appeals) - Powers of (Power to grant stay)- Assessment year 2011-12 - Whether when a stay application is to be considered and decided, it would be required for concerned authority to record reasons and then to reach to ultimate conclusion as to whether stay should be granted or not and if yes on what condition - Held, yes [Para 5] [In favour of assessee/Matter remanded].”

In the case of **CIT v. Indian Aliminum Co. Ltd [2023] 150 taxmann.com 55 (Calcutta)**, it was held:

“it had simply adopted findings rendered by Commissioner (Appeals) in verbatim as its own findings and so much so, even directions given by Commissioner (Appeals) to Assessing Officer had been copied verbatim – Whether on facts, it was clear that order passed by Tribunal was without any application of mind and suffered from utter perversity and therefore, it was to be set aside and remanded to Tribunal for fresh consideration - Held, yes [Para 7] [Matter remanded].”

Hence, the entire impugned addition therefore deserves to be deleted. “

3.4 On the other hand, the ld. DR supported the order of the ld. CIT(A) and submitted that the assessee has not proved the source of each of the creditors and therefore, the decision cited by the assessee are not applicable considering the facts of the case on hand and even the assessee though prayed relief of 38,19,000/- till the last date of hearing has not filed the complete details which shows the causal and cavalier approach of the assessee.

3.5 We have heard both the parties and perused the materials available on record including the written submission of the assessee. Brief facts of the case are that during the scrutiny assessment proceedings u/s 143(3), the ld. AO noted that the assessee deposited cash totaling to Rs.40,17,000/- in two bank accounts (Rs.8,10,000/- in Bank of Maharashtra A/c no. 3952000100120197 and Rs.32,07,000/- in Punjab National Bank A/c no. 60023884009). When asked to explain the source of the same, the assessee vide letter dated 15.11.2016 submitted that the subjected amount of Rs.38,19,000/- was from the contributions made by the various partners/members of the AOP for making application and obtaining the liquor license. As is narrated in the ld. CIT(A)'s order at page 3 that detailed chart was submitted showing the amount deposited from own funds and from funds contributed by other persons. In support of the same, the assessee filed affidavit/confirmations (PB 3-16). Even statements of some of them were recorded before the AO wherein they have accepted the fact that they have contributed the amount in cash for making application of liquor license as noted by the AO himself (see AO pg.2). The AO however disbelieved merely on the ground that the assessee submitted confirmations from the few persons only, whose statements were recorded and they explained the source from agriculture income but no

supporting document was furnished. Finally, without further confronting the assessee of his doubts, the AO made the impugned addition of Rs.38,19,000/- on account of undisclosed sources which have been confirmed by the Id. CIT(A) vide his order dated 31-01-2023. The Bench feels that it is not imperative to repeat the facts of the case as it has been elaborately discussed hereinabove. From the documents submitted by the assessee at pages 3 to 16 of the paper book, these 07 persons had filed ledger balance confirmation, Adhar Card and Affidavit whose details are as under:-

S.N.	Name of the persons	Amount
1	Shri Banwari Lal	5.00 lacs
2.	Shri Babu Lal Mali	4.00 lacs
3.	Shri Hansraj Gurjar	3.00 lacs
4.	Shri Mast Ram Meena	5.00 lacs
5.	Shri Giriraj Meena	3.00 lacs
6.	Shri Komal Nagar	5.00 lacs

7.	Shri Mukesh Meena	5.00 lacs
Total		30.00 lacs

Further affidavits submitted by the Id. AR of the assessee during the course of hearing being additional evidences in respect of these two persons amounting to Rs. 4.00 lacs each as contribution towards obtaining the tender from Distt. Excise Department are as under:-

S.N.	Name of the persons	Amount
1	Shri Jagat Singh	4.00 lacs
2.	Shri Badri Narain Sharma	4.00 lacs
Total		8.00 lacs

The Bench has taken into consideration the entire conspectus of the case and feels that it will be in the interest of equity and justice to restore the matter to the file of the Id. AO to decide it afresh after taking into consideration the additional evidence for an amount of Rs. 8 lac and as regards the amount of Rs.30 lacs for which the assessee has submitted the details with affidavit. Thus, considering the peculiar circumstance that the assessee is not serious to file the correct details till the appeal travelled to the second appellate stage and it would be in the interest of justice we have admitted the additional evidence. Therefore, it would be appropriate for the interest of the revenue as well as to assessee that the assessee placed the correct information and details required before the Id. AO so as to decide the issue afresh by the Id. AO in accordance with the law. With this remark the appeal of the assessee is allowed for statistical purposes.

4.1 The Ground No. 3 of the assessee is regarding charging of interest u/s 234A and 234B of the Act which are consequential in nature and does not require any adjudication.

5.1 In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18/09/2023

Sd/-

Sd/-

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

(राठोडकमलेशजयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 18/09/2023.

Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Jagat Singh Rathore, Jaipur
2. प्रत्यर्थी / The Respondent- The ITO, Ward 7(2), Jaipur
3. आयकरआयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्डफाईल / Guard File {ITA No. 139/JP/2023}

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar