

आयकर अपीलिय अधिकरण, चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 313/Chd/2023
निर्धारण वर्ष / Assessment Year : 2010-11

Shri Sandeep Kumar H.No. 130, Vill- Majri Rasulra Ludhiana	बनाम	The ITO Ward- 4, Khanna
स्थायी लेखा सं. / PAN NO: AUIPK8861B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Kuldeep Singh, ITP and
Shri M.P. S. Malhotra, ITP
राजस्व की ओर से/ Revenue by : Shri Dharam Vir, JCIT, Sr. DR

सुनवाई की तारीख/Date of Hearing : 17/10/2023
उद्घोषणा की तारीख/Date of Pronouncement : 09/01/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A), NFAC, Delhi dt. 29/04/2023 pertaining to Assessment Year 2010-11.

2. In the present appeal, the assessee has raised the following grounds of appeal:

1. "The notice issued u/s 148 of Income Tax Act is not in accordance with law and as such the said notice is liable to be quashed as illegal and consequently the entire assessment proceedings are liable to be quashed as void abinitio.

2. The Ld. CIT(A) has erred in confirming the addition of Rs. 8,39,191/- as there is no evidence on record that the assessee has made a lump sum payment of Rs. 8,39,191/- at the time of purchase of scrap."

3. Briefly the facts of the case are that the assessment in this case was completed under section 144 r.w.s 147 vide order dt. 13/12/2017 wherein the AO

brought to tax an amount of Rs. 8,39,191/- as income of the assessee from undisclosed sources under Section 68 of the Act.

4. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) and thereafter before the Coordinate Bench who in turn remanded the matter back to the file of the Ld. CIT(A) to decide the legality of the proceedings as so conducted by the Assessee. Thereafter, the Ld. CIT(A) has passed the impugned order dt. 29/04/2023 wherein both the legality of the proceedings as well as on the merits of the addition, the order of the AO has been sustained.

5. Against the said findings and the directions of the Ld. CIT(A), the assessee has again come in appeal before us.

5.1 During the course of hearing, the Ld. AR submitted that in this case, proceedings under section 147 were initiated on the basis of an alleged information received by the AO that the assessee had made a payment of Rs 839,191/- for purchase of scrap to M/s Bhupindra Steel Alloys Pvt Ltd on 09.06.2009. The AO further noted that as the assessee had not filed return of income, the source of this amount of Rs 839,191/- allegedly paid by him, is not explained. He accordingly initiated proceedings under section 147 of the Act. And thereafter made an addition of Rs 839,191/- as unexplained investment under section 68 of the Act, without confronting the assessee with any information in her possession which shows that the assessee had made payment of Rs 839,191/- and the source of which he had failed to explain.

5.2 It was submitted that the information received by the AO, copy of which is placed in paper book, shows that it is based on Form No 26AS of the assessee. Further perusal of the Form 26AS of the assessee shows that on 09.06.2009, the assessee made purchases of scrap of Rs. 839,191/- from M/s Bhupinder Alloy (P) Ltd. and on this day, an amount of Rs 839,191/- was either debited by the selling

party to the account of the assessee in its books or the same was paid by the assessee and TCS of Rs 90,483/- was collected. There is no specific indication in the Form 26AS that the amount of Rs 839,191/- was necessarily/ actually paid by the assessee and that it was not debited to his account. Information in Form No. 26AS is obviously taken from the TCS return filed by the selling party and in the TCS return also, it is never differentiated as to whether the amount is actually received from the buyer or the amount is just debited to the buyer's account . In fact as per section 206C, TCS has to be collected by the selling party at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by cheque or by any other mode, whichever is earlier. As the TCS has to be collected at the time of sale transaction, irrespective of whether the payment is received or not at that time, as such there is no need to specify in the TCS return as to when the sale amount is actually received. Thus it is only an assumption of the AO that payment was actually made by the assessee and not debited in his account by the selling party at the time of such transaction. As such, the reason to believe, that payment was actually made by the assessee was just on the basis of baseless assumption of the AO. The AO never made any enquiry from the selling party to know whether any such payment was actually received or it was just debited in its books in the account of the assessee. Thus initiating proceedings under section 147 is bad in law and subsequent addition of this amount as unexplained investment, without confronting the assessee with any specific evidence that he had actually made any payment, the source of which remained unexplained is also bad in law.

5.3 It was further submitted that the assessment in this case was completed *ex-parte* as the assessee's Counsel failed to file the return and make compliance of notices, whereas the assessee was of the honest belief that his Counsel must be attending the proceedings before the AO and complying with the

requirements of the notices . The assessee came to know of the non compliance by the counsel only when he received the assessment order, passed ex-parte .

6. It was submitted that being aggrieved, the assessee went in appeal before the Ld CIT(A)-2 , Ludhiana. The Ld CIT(A) has also observed in para No. 3 of his order that the A.O had information in his possession that the assessee had made payment of Rs. 839191/- to M/s Bhupindra Steel Alloys Pvt Ltd. and had not filed return of income.

6.1 It was submitted that before the Ld CIT(A), it was explained that the assessee was a small broker of scrap and during the year under consideration, the assessee purchased scrap from M/s Bhupinder Alloys (P) Ltd , 487, Industrial area -B, Ludhiana on credit basis. It was further explained that the assessee sold the scrap to local kabadies and out of sale proceeds of scrap, made payments in cash in small amounts less than 20,000/-on various dates to M/s Bhupinder Alloys (P) Ltd., as per copy of account submitted before the Ld. CIT(A), copy of which is placed in paper book. It was further explained that as the sales of assessee were below Rs 40 lacs, his case fell under the provision of section 44AF and as such, he was not required to maintain the books of account. And further as the income of the assessee was less than the exemption limit of Rs. 1,60,000/-, he was not required to file the return of income. It was further explained that addition under section 68 was wrongly made as it is not a case of unexplained cash credit as no books are maintained by the assessee. Copy of account of M/s Bhupindra Steel Alloys Pvt Ltd was produced before the Ld CIT(A) as additional evidence. But the Ld CIT(A) observed that as the assessee did not attend the assessment proceedings and furnish any explanation before the AO , the copy of account submitted at appellate stage before him, is an afterthought and a self serving statement, in the absence of any corroborative evidence. The Ld CIT(A) also called for information from M/s Bhupindra Steel Alloys Pvt Ltd directly under section 133(6) of the Act, but the notice issued to

the company was received back with the remarks of the postal authorities as 'recipient left the premises for unknown place'. The notice also could not be served through the notice server. The Ld CIT(A) confirmed the addition made by the assessee.

6.2 It was submitted that the Ld CIT(A) was not justified in observing so. For initiating proceedings under section 147 of the Act, the onus is rather on Revenue to prove with evidence that the assessee had made any lump sum payment as claimed, before sale of scrap so purchased. The Ld CIT(A), apparently, to discharge such onus of the department, made enquiry from M/s Bhupinder Alloys (P) Ltd., under section 133(6), but he could not bring any evidence on record to prove that any such payment of Rs. 839191/- was actually made by the assessee on 09.06.2009. If no such evidence could be found even after making enquiry at the appellate stage at the Ld CIT(A)'s level, that the assessee had made any such payment, the addition should have rather been deleted. The Ld CIT(A) was thus not justified in confirming the addition when even after making enquiry at his level, no evidence could be found that the assessee has made any such payment.

7. It was submitted that being aggrieved by the order of the Ld CIT(A)-2 , Ludhiana, the assessee filed appeal before the ITAT Chandigarh. The Hon'ble Tribunal, considering the request of the assessee, that no ground of appeal relating to unlawful reopening in this case, could inadvertently be taken before the authorities below, set aside the assessment to the file of the Ld CIT(A).

8. It was submitted that during the course of fresh proceedings before the Ld CIT(A) (Faceless System) , the assessee made the following submissions :-

"The Ld. A.O received information that as per Form 26AS an amount of Rs 8,39,191/- has been debited in the assessee's account by M/s Bhupindra Alloys (P) Ltd or paid by the assessee and T.C.S of Rs 9483/- have been collected thereon on 09.06.2009. The assessee has already explained that he made purchases of scrap of Rs 8,39,191/- on which date amount was debited to his account in the

books of that party and T.C.S of Rs 9483/- was collected. There is no evidence on record of the A.O to prove that any payment of amount of Rs 8,39,191/- was made at the time of purchase of scrap. The assessee duly explained that purchase of Rs 8,39,191/- were made on credit and subsequently payments were made in small amounts after sale of that scrap. The assessee has fled a copy of account also to this effect. It is the case of the AO that the assessee has made the entire payment in lump sum at the time of purchase. But there is no such evidence to this effect. In the absence of any evidence to this effect the Ld. A.O. cannot justifiably form reasons to believe that assessee has made lump sum payment of Rs 8.39.191/- and the assessee has failed to explain the source of this expenditure. For valid initiation of proceedings under section 147 it is for the AO, to prove that the assessee has made lump sum payment and such payment is not out of sale proceeds of scrap purchased on credit but from other unexplained sources. Thus, proceedings under section 147 have not been validly initiated.

It is humbly submitted that as per the settled position of law, the proceedings under section 147 could be initiated only if the assessing officer has certain tangible material on the basis of which he could have "reason to believe" that certain income has escaped assessment. The courts have consistently held that for taking action under the above mentioned section, the material with the Assessing Officer should be such on the basis of which he could have "reason to believe" and not "reason to suspect", that income has escaped assessment. The phrase "reason to believe" has been defined in the landmark judgment of the Hon'ble Apex Court in the case of Sheo Nath Singh Vs AC IT (1971) (82 ITR 147), in following words: The words "reason to believe" suggest that the belief must be of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence, but not on mere suspicion, gossip or rumour.

It has further been consistently held by various courts that the assessing officer should make certain enquiries etc. if required, to have the tangible material in his possession on the basis of which he could objectively have reason to believe that income did escape assessment. However, in this case the Assessing Officer did not deem it fit to make any enquiries and just on the basis of the information that assessee made certain purchases of scrap out of which TCS was collected by the seller company, came to have reason to believe that certain income escaped assessment. As per the reasons recorded by the A.O., as the assessee did not file return of income the sources for making the payments could not be verified. It implies that the Assessing Officer just wanted to verify the position by calling for return of income. However, it is trite law that action under section 147 cannot be taken for verification or for making enquiries. Therefore, from that point of view itself taking action under section 147 was not justified legally.

Coming to the next ground of appeal which is against the addition, first of all it is a settled position that even in an ex parte case, addition could only be made on the basis of some material with the A.O. Addition cannot be made arbitrarily. In this case the A.O. had the information that the assessee made certain purchases of scrap iron for Rs 839191/- and TCS of Rs 9483/- was collected by the seller company M/s Bhupindra Alloys (P) Ltd. As per the provisions of section 206C, the TCS is collected at the time of debiting the purchases to the account of the purchaser or at the time of receipt of amount from the purchaser, whichever is

earlier. The assessee made the purchases in two lots on 09.06.2009 on credit and the payments were made in cash from time to time after selling the scrap. The A.O. proceeded on the presumption that the assessee made the entire payment in cash at one time. However, that is not the factual position. The assessee being a small trader was not maintaining any books of account. However, the payments against the said purchases were made in small amounts out of the sale proceeds received at different times the details of payments made by the assessee to M/s Bhupindra Alloys is enclosed with these submissions. These were filed before the Ld. CIT(A)-2 Ludhiana also. The Ld. CIT(A) rejected the contention of the appellant. Though the Ld. CIT(A) observed that he made enquiries and that the seller company could not be traced at the given address. It is humbly prayed that if the Company could not be found at the given address that could not be viewed adversely against the appellant. It is precisely on the basis of the information received by the department from the same company about the TCS collected, that the proceedings in this case were taken up. Therefore, it could not be presumed that the company did not exist etc. Therefore, the Ld. A.O. could not make addition on the presumption that the entire payment of Rs 839191/- was made in cash at one time itself. Therefore, even on merit the addition made by the Ld. A. O. is not sustainable.

Another prayer is that the turnover of trading of iron scrap of the appellant being very small, his return, if to be filed, was to be filed under section 44 AF of the Act. As per the decision of the Hon'ble jurisdictional High Court of Punjab and Haryana in CIT vs Surinder Pal Anand in ITA no 156 of 2010, dated June 29,2010 no addition under section 68 can be made in a case where income is to be returned on presumptive basis, applying the provisions of section 44AF etc. of the Act. Therefore, even from this angle addition made in this case is not sustainable.

It is therefore prayed that the appeal may kindly be accepted, additions made may kindly be deleted or any other relief to which the appellant may be found entitled, may kindly be granted."

8.1 It was submitted that the Ld CIT(A)(Faceless System) has passed a detailed order running into 28 pages on 29.04.2023 in which he dismissed the appeal of the assessee on both the grounds . But in such a detailed order passed by the Ld CIT(A)(Faceless System), he has not appreciated the basic plea of the assessee that the assessee had not made any lump sum payment of Rs. 839191/- on the date of purchase and purchase was made on credit basis on 09.06.2009 but payments were made subsequently, in small amounts, after sales of scrap so purchased, on various dates, as per copy of account filed. He proceeded on the assumption that the assessee had made the lumpsum payment. He further held that since the assessee had made the payment and not filed the return, proceedings under section 147 have been rightly initiated

and since the assessee has not filed the confirmed copy of account from the selling party the addition is rightly made.

9. In the aforesaid background, it was submitted that the assessee has again come in appeal before the Tribunal.

9.1 It was submitted that the proceedings have been wrongly initiated under section 147 of the Act. In this case, information was received by the AO that the assessee had entered into a transaction for purchase of scrap amounting to Rs. 839191/- from M/s Bhupinder Alloys (P) Ltd., 487- Industrial Area B , Ludhiana on 09.06.2009 on which TCS of Rs 9483/- was collected by that party. As per provision of section 206C of the Act, TCS is collected when either the payment is made by the purchaser of scrap to the selling party or when such amount is debited by the selling party in the account of the purchaser, whichever is earlier. There was no specific information with the AO that the assessee had made the purchases on cash basis and the payment was made at the time of purchase of scrap itself; And that the purchases were not made on credit basis and the purchase amount was not debited to the account of the assessee in the books of the seller and the same were not received in subsequent period. The information with the AO was a general information based on Form 26AS of the assessee. Perusal of form 26AS in this case shows that on 09.06.2009 an amount of Rs 839191/- was either paid by the assessee to that selling party or such amount was debited to the account of the assessee, in the books of that selling party. The Ld AO without making any enquiry from the selling party as to whether the payment was actually received or the amount was debited to the account of assessee and payments were received subsequently by the selling party (say after selling the scrap in the market), formed a belief that the assessee had actually made cash purchases of scrap and the payment of this amount was made by the assessee on the date of purchase itself, before selling

the same in market. He formed a view, without any reasonable basis, that scrap was not purchased on credit and as such the purchase amount was not debited in the account of the assessee in the books of selling party.

9.2 It was submitted that it is clearly mentioned in the information received by the AO that this information is based on form 26AS of the assessee. Copy of the information is enclosed for ready reference. Copy of form 26AS of the assessee is also enclosed which may kindly be perused. It will be seen that it is clearly mentioned in the form 26AS that on 09.06.2009, TCS of Rs 9483/- was collected by M/s Bhupinder Alloys (P) Ltd. on sale of scrap of Rs 839191/- to the assessee and the amount of Rs 839191/- was either paid by the assessee or such amount was debited to the account of the assessee. Thus there was no definite information with the A.O that the transaction on which the T.C.S was collected, was on account of payment received by the selling party and not on account of amount debited in the account of the assessee, in the books of the selling party. Without ascertaining the true fact from the selling party of scrap as to whether it had actually received the amount on the date of sale of scrap to the assessee or the amount was debited to the account of the assessee on that date and it was received subsequently from the assessee (out of the sales of such scrap by the assessee in the market), he could not validly form reasons to believe that amount of Rs 839191/- was actually paid by the assessee on the date of purchase i.e. 09.06.2009. Thus from the foregoing facts, it is clear that the Ld A.O is not justified in forming reason to believe that assessee has made payment of Rs 839191/- to M/s Bhupinder Alloys (P) Ltd., on 09.06.2009, before selling the scrap so purchased by the assessee. He at the most can have reasons to suspect so. It was therefore explained by the assessee in its submission before the Ld CIT(A) (Faceless System) that no valid proceedings under section 147 of the Act could be initiated just on the basis of above information. It is further submitted that in the reasons recorded by the AO, copy of which is

enclosed, it is mentioned that in the absence of return of income, the position could not be 'verified'. It is further a settled position that merely to verify his suspicion, the AO cannot resort to proceedings under section 147 of the Act. But the Ld CIT did not accept this plea.

9.3. It was submitted that even at the time of assessment proceedings, no such information or evidence was confronted to the assessee before making any addition to show that the assessee had made payment of Rs 839191/- to M/s Bhupinder Alloys (P) Ltd., on 09.06.2009. This is an assessment under section 147 in which onus is on revenue to show that the assessee had any income which has escaped assessment. Thus addition has been made without any evidence and without confronting such evidence to the assessee.

9.4 As regards the Ld AO's observation that the assessee has not cooperated in the assessment proceedings, as already explained, the assessee is an illiterate person. He had engaged a Counsel and was of the belief that he was duly attending the proceedings regularly. He was rather shocked to receive the ex parte order making a huge addition. Thus innocent assessee should not be allowed to be punished on the mistake/ negligence on the part of the counsel. Even otherwise income for unexplained expenditure cannot be made under section 68. Addition under section 68 for the unexplained cash credit in the books of the assessee has been wrongly made as no books of account are maintained by the assessee and as such no cash was found credited in the books of the assessee which could be treated as unexplained. Further when factually the assessee did not make payment of the said amount and the entry was just on account of purchases on credit, the addition under the Act cannot be made.

9.5 In view of the aforesaid submission, it was submitted that the appeal of the assessee may kindly be accepted and the addition made by the AO and confirmed by the learned first appellate authority, may kindly be deleted.

10. Per contra the Ld. DR submitted that the AO was in possession of relevant information alongwith data that the assessee has made a payment of Rs. 8,39,191/- on account of scrap purchase apart from payment of TCS of Rs. 8,483/- and on verification, it was found that the assessee has not filed the return of income and hence the source of the payment to the tune of Rs. 8,39,191/- has escaped taxation and therefore the AO recorded reasons and notice under section 148 was issued.

10.1 It was submitted that while recording the reasons and issuance of notice under section 148, absolute certainty regarding escapement of income is not necessary. It was submitted that in the instant case, there was tangible material in the form of TCS deducted on payment of Rs. 8,39,191/- and the assessee failed to explain the source of the same, therefore there was a live link between the evidence in the form of unexplained cash credit and formation of belief that income has escaped assessment. It was accordingly submitted that there is no merit in the contention advanced by the Id AR that notice under section 148 and the proceedings u/s 147 have not been issued in accordance with law.

10.2 On merits of the addition, it was submitted that the ledger account filed by the assessee during the appellate proceedings will be of no help to the assessee and it is only a self serving document without any corroborative evidence. It was submitted that the assessee has not furnished a confirmed copy of the account of the assessee in the books of M/s Bhupindra Alloys (P) Limited. Further the information has been sought under section 133(6) and the notice issued has been returned back un-served by the postal authority and the assessee also could not provide the latest address of M/s Bhupindra Alloys (P) Limited from whom the some inquiries could be made. Further nothing can also be proved with the help of saving bank account, copy of which has been produced during the appellate proceedings as additional evidence. It was accordingly submitted that the assessee could not explain the source of

payment of Rs. 8,39,191/- for the purchase of scrap and therefore the Ld. CIT was correct in sustaining the addition under section 68 of the Act.

10.3 It was submitted that the onus to prove the nature and scope of credit entries in the books of account lies on the assessee and it is for the assessee to file necessary explanation to the satisfaction of the AO and where the assessee failed to do so and identifies the credit entries, his credit worthiness and genuineness of the transaction remained unproved, the sum so credited may be charged to Income tax.

10.4 It was accordingly submitted that various contentions raised by the Ld. AR deserves to be rejected and the order so passed by the Ld. CIT(A) should be sustained.

11. We have heard the rival contentions and perused the material available on the record. The case of the assessee was reopened basis the information in possession of the AO that the assessee has made certain purchases of iron scrap for a sum of Rs. 8,39,191/- on which TCS of Rs. 9483/- has been collected by seller company i.e, M/s Bhupindra Alloys (P) Ltd. On perusal of the record, it is noted that the information in possession of the AO was flagged basis the TCS return filed by M/s Bhupindra Alloys(P) disclosing the specific transaction which also found mention in Form 26AS of the assessee. The copy of the TCS return is not available on the record therefore, if we go by the provision of Section 206C, it provides that every person being a seller shall at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by issue of a cheque or draft or by any other mode whichever is earlier, collect from the buyer of specified goods, a sum equals to the specified percentage of such amount as income tax. Therefore, the liability to collect TCS arise in the hands of the seller either at the time of debiting of the amount to the account of the buyer or at

the time of receipt of amount in cash or by any banking mode whichever is earlier. There is nothing on record or which has been brought to our notice during the course of hearing that there is an actual payment which has been made by the assessee at the relevant point in time basis which the information has been reflected in TCS return and Form 26AS.

12. In such circumstances, where we look at the explanation furnished by the assessee wherein he has stated that he has made the purchase of scrap in two lots on 09/06/2019 on credit and payments were made subsequently in cash from time to time after selling the scrap and in support, copy of the ledger account of M/s Bhupindra Alloys (P) Limited as well copy of the saving bank account wherein the amount have been withdrawn by the assessee have been shown. It is not in dispute that the assessee is engaged in scrap trade and the explanation so furnished by the assessee therefore cannot be discarded summarily without bringing any adverse material on record.

13. Further it is noted that the addition have been made under Section 68 of the Act which by its very nature cannot be invoked as the said provision can be invoked only where certain sum is found credited in the books of account of the assessee and the assessee failed to offer any explanation. In the present case the assessee was not maintaining any books of account and even where the payments so made by the assessee has to be considered, the said sum would be an outflow of funds which would be debited from the account of the assessee rather than the credit in the account of the assessee.

14. Even referring to the provision of Section 69C of the Act which talks about unexplained expenditure, it provides that where in any financial Year, the assessee has incurred any expenditure and he offered no explanation about the source of such expenditure or the expenditure offered is not satisfactory, the amount may be deemed to be income of the assessee for said financial year.

In the present case, we find that the assessee has reasonably explained the source of the expenditure as met out of the subsequent sale of scrap during the same financial year which is not disputed by the Revenue and therefore in our considered view, no addition can be made under Section 69C of the Act. In view of the above discussion, we hereby direct the deletion of addition of Rs. 8,39,191/-.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 09/01/2024.

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 09/01/2024

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar