

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**Before Shri Waseem Ahmed, Accountant Member &
Shri Soundararajan K, Judicial Member**

ITA No.358/Coch/2024 :Asst.Year 2017-2018

Sri.Unnikrishnan Vadakkanthra 42/432 Kannaki Nagar Vadakkanthra Palakkad - 678012. PAN : ACQPU0810J.	v.	The Income Tax Officer Ward 2 Palakkad.
(Appellant)		(Respondent)

Appellant by : Sri.Sivadas Chettoor, CA
Respondent by :Smt.Girly Albert, Sr.DR

Date of Hearing : 26.09.2024	Date of Pronouncement : 30.09.2024
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ORDER

Per Bench :

This is an appeal filed by the assessee challenging the order of the NFAC/CIT(A), dated 21.02.2024 in respect of the assessment year 2017-2018.

2. Brief facts of the case are that the assessee had not filed its return of income and therefore the AO issued notice u/s.142(1) and thereafter the AO collected the bank account statements and the certificate on specified bank notes by issuing notice u/s.133(6) of the Act and assessment was made u/s.144 of the Act based on the available material. The assessee challenged the said order before the Id. CIT(A)and contended that the assessee was not granted sufficient

opportunity to substantiate that the amount deposited during the demonetization period represents the business receipts. The assessee also filed some documents in support of his case and prayed that sec.69A could not be applied to the facts and circumstances of the case. The Id.CIT(A) had decided the appeal without granting a personal hearing and therefore the various documents could not be produced before him. The assessee challenged the said order before the Tribunal with the following grounds of appeal:-

“Ground-1

The order of the Hon'ble Commissioner of Income Tax (Appeals), National faceless appeal center, Dethi in so far it is prejudicial to the interest of the appellant is opposed to law, facts and circumstances of the case.

Ground-2

Section 69 A applies only when the source and nature of cash deposited is not explained or satisfactorily explained. The appellant clearly explained that the source is from business carried on by him. and represents proceeds received by way of SBN. Both the lower authorities accepted the fact that the appellant is carrying on business and hence ought to have accepted the source as from his business. The AO himself had assessed the said deposits under the head income from other sources which itself is a recognition that the appellant has a definite source of income as per the income tax act. Hence, section 69A is not applicable. It is also submitted that the Hon'ble Commissioner of Income Tax (Appeals) has not given any clear reasons for rejecting the argument of the appellant regarding the applicability of 69A.

Ground-3

As per section 115BBE, if the total income includes any income referred to in section 69A and is reflected in the ITR or if the total income determined by the AO includes income referred to u/s 69A, tax will be charged at the rate of 60%. But as per section 14, total income shall include only those income which can be classified under the five heads. But the unexplained money referred to in section 69A is income without any source. Therefore, it cannot be classified under any of the five heads of income as mentioned in section 14.

Hence, it is headless. By a combined reading of section 4, 5, 14, 69A and 115BBE, the unexplained money cannot be made taxable in the hands of the appellant.

Ground-4

The appellant had submitted an affidavit from his part-time accountant that the latter had misplaced the rough cash book presented to him by the appellant for finalizing accounts and hence could not file the return of income. The Hon'ble Commissioner of Income Tax (Appeals) has not considered the affidavit in its merit which he is duty bound to consider. The part time accountant Mr Vijayan clearly affirmed that cash book was misplaced in his office. Attention is invited to the decision of the apex court in "Messrs Mehta Parikh & Co vs The Commissioner Of Income-Tax, Bombay on 10 May, 1956" , hereby attached as Annexure 1 wherein it was held that once an affidavit is furnished, it should be presumed to be a correct statement of facts. If these facts are to be controverted, either the deponent must be examined or evidence contrary to facts must be led. In the absence of these the affidavits could not be ignored. Therefore a direction may be given to the lower authorities to act upon the affidavit or appropriate orders may be passed in this regard.

Ground-5

It is submitted that provisions of Section 69A are not applicable in the facts and circumstances of the case. The said provision applies only when there is a specific finding by the AO that the impugned money and others specified therein are not recorded in the books of accounts. Since the appellant has not maintained any books of accounts, the provisions of Section 69A cannot be applied to the facts and circumstances of the case. Attention is invited to the High Court decisions in the cases of *Arbindo sanitary stores vs CIT* reported in 276 ITR 549 and *Usha Kanth Patel vs CIT* reported in 282 ITR 553 attached hereby as Annexure 4. A detailed note shall be submitted at the time of hearing.

Ground 6

In case the ITO applied the provisions of Section 115BBE read with section 68/69A/69B for application of tax rates it is submitted that the said section is totally inapplicable to the facts and circumstances of the case and shall be fully explained in detail at the time of hearing of this appeal. Section 115BBE, it is submitted that, has no legs to stand in view of the combined and harmonious reading of sections 2(24), 4, 5, 14, 56, 68.69, 69A, 69B, 69C etc. along with the scheme of the IT Act 1961.

Ground 7

It is submitted that as per the Specified Bank Notes (Cessation of Liabilities) Act, 2017 accepting the specified bank notes is perfectly legal and such notes are legal tender till 31-12-2016 and there is nothing illegal in part of the appellant in accepting such specified bank notes and the AO has erred in treating such deposits as income from unexplained sources.

Ground 8

The Ld. CIT (A) agreed with AO's calculation of the GP rate of 8% which the AO relied on the return of income in which the income was offered under 44AD that too for the assessment year 2013-14 which cannot be compared with the much later assessment year. The CIT (A) accepted this calculation without giving opportunity to the appellant to put forward his explanation. It is for the ITO to justify with supporting evidences and materials the basis for adoption of the GP at 8%.

Ground-9

It is submitted that the Commissioner of Income Tax (Appeals) committed a grave error in law while acting upon the adverse remand report submitted by the ITO while rejecting the additional evidences filed by the appellant. It is now settled law that if the remand report contains adverse findings or observations prejudicial to the appellant the Commissioner of Income Tax (Appeals) should furnish a copy of the remand report to the appellant giving an opportunity to rebut the same. In this case, the Commissioner of Income Tax (Appeals) straight away considered the remand report containing adverse remarks against the appellant and thus he committed an illegality relying upon the same without giving opportunity to the appellant. It is therefore submitted that the order passed by the Commissioner of Income Tax (Appeals) a maybe set aside with a direction to give a copy of the remand report and an opportunity to rebut the same. The appellant would rely on the decision of the PATNA HIGH COURT in Abdul Razack vs CIT (1935) 3 ITR 361(Pat) and the decision of the Honorable Allahabad high court in Gopinath Naik vs CIT (1936) for ITR 41 attached hereby as Annexure 2 and 3 respectively

Ground-10

It is to be noted that as per the law, a personal hearing is to be granted to the appellant. Granting of personal hearing is a statutory right of the assessee as well as a natural right. In this case, even though the final opportunity for personal hearing was scheduled on 20-02-2024, the appellant did not receive the link for the same and was unable to provide oral

submissions. The CIT(A) however stated that nobody appeared for VC which is factually incorrect. Hence it is requested that an opportunity of personal hearing may be granted. The appellant being an uneducated person and lacking knowledge on tax laws and accounts wanted to represent his case through a chartered accountant but the learned CIT(A) failed to grant such a facility. There were so many legal and factual issues that could have been raised during personal hearing and the appellant feels that if the representative was heard the decision of CIT (A) would have been different.

Ground-11

It is submitted that one more opportunity may be granted to the appellant to furnish full details of the SBN notes received by him during demonetization period which was deposited into bank. The appellant produced confirmation letters from various parties who confirmed that cash in SBN form was given to appellant in discharge of their obligation to settle accounts. The CIT(A) did not consider the evidences properly and rejected the same by stating that the same were not corroborated with accounts. It may be noted that the very same CIT(A) refused to entertain the request of the appellant to produce books of accounts and thus acted illegally. Hence one more opportunity may be granted to prove the truth of the matter.

Ground-12

For these amongst other grounds that may permitted to be raised and evidences adduced at the time of hearing it is prayed that the justice be done to the appellant by quashing or modifying the impugned order of assessment.”

3. At the time of hearing, the ld.AR submitted that even though the CIT(A) had sent the notice for appearing through video conferencing but the link was not made available to the assessee and therefore the assessee was not able to appear before the CIT(A). Further the ld.AR submitted that the ld.CIT(A) got the remand report from the AO and decided the appeal without furnishing the copy of the remand report. In these circumstances the assessee prayed to set aside the order.

4. The Id.DR relied on the orders of the authorities below and prayed to dismiss the appeal.

5. We have heard the arguments of both the parties and perused the material available on record. We have also perused the order of the Id.CIT(A) in which the Id.CIT(A) has pointed out that five notices were issued on various dates but the assessee had not responded to any of the notices. It is the specific case of the assessee that they are accepting that the Id.CIT(A) had issued notices on various dates but the only grievance is that they were not granted the link for appearing before the Id.CIT(A) through video conferencing and therefore the assessee was aggrieved with the non-granting of VC hearing, Further in the order of the Id.CIT(A), he got the remand report from the AO and based on the remand report, he had decided the appeal ex parte without furnishing the copy of the remand report to the assessee. We are of the view that the order of the Id.CIT(A) is bad in law since the assessee was not provided with the copy of the remand report and no link for appearing through the VC was not made available and therefore, in the interest of justice, we are inclined to set aside the order of the Id.CIT(A). Further we have also perused the order of the AO and find that the said order was also an ex parte order passed u/s.144 of the Act and therefore, we are remitting the issue to the file of the AO to decide the issue afresh after considering the various documents to be filed by the assessee and also after granting a personal hearing.

6. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 30th day of September, 2024.

Sd/-
(Waseem Ahmed)
ACCOUNTANT MEMBER

Sd/-
(Soundararajan K)
JUDICIAL MEMBER

Cochin ; Dated : 30th September, 2024.
Devadas G*

Copy to :S

1. The Appellant.
2. The Respondent.
3. The CIT Concerned.
4. The DR, ITAT, Cochin.
5. Guard File.

Asst.Registrar/ITAT, Cochin