

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

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 198/JP/2013
निर्धारण वर्ष /Assessment Year : 2007-08

DCIT Central Circle-1, Jaipur	बनाम Vs.	Shri Ram Babu Gupta, 12-13, Patel Colony, Sardar Patel Marg, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACPG7427A		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

राजस्व की ओर से /Revenue by : Shri R.A.Verma (Addl.CIT)
निर्धारिती की ओर से /Assessee by : Shri S.L. Poddar (Advocate)

सुनवाई की तारीख / Date of Hearing : 14/02/2017
उदघोषणा की तारीख / Date of Pronouncement: 28/03/2017

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue against the order of
Id. CIT(A), Alwar dated 18.12.2012 for A.Y. 2007-08 wherein Revenue
has taken the following grounds of appeal.

*"(i) On the facts and in the circumstances of the case, the Ld. CIT(A),
Alwar has erred in directing "to allow set off of Rs. 2,51,60,000/-
instead of Rs. 1,28,00,000/- notwithstanding the fact that assessed
income would fall to Rs. 7,37,94,94,065/- i.e. below the returned
income of Rs. 8,27,40,410/-", which directions are against the*

findings of CIT(A) and ITAT in original appellate orders reproduced by the AO in the set-aside assessment order.

(ii) On the facts and in the circumstances of the case, the Ld. CIT(A), Alwar has erred in directing to compute the income below the income declared by the assessee himself in his return of income.

(iii) On the facts and in the circumstances of the case, the Ld. CIT(A) has exceeded his powers in directing to allow the set off over and above the amount determined by the appellate authorities in the original appellate proceedings.

2. It is noted that this is the second round of appeal where the matter has reached the Tribunal. The genesis of this appeal lies in the the additional ground of appeal which was taken by the appellant in the first round of appeal before the Tribunal. Here it would be relevant to refer to the findings of the Id CIT(A) in the first round of appeal which was the subject matter of appeal before the Coordinate Bench and which formed the basis of filing the additional ground of appeal before the Tribunal:

“As regards to addition of undisclosed profit from the sale of Mahala property amounting to Rs. 12800000/- it is submitted that the sale of property under question was made on 3.7.2006 which is beyond the AY under appeal i.e. the same relates to AY 2007-08. Thus no addition can be made in the year relevant assessment year the

undisclosed profit from the sale of Mahala Property amounting to Rs. 12800000/-. More over the Id A/R submits that since the property is owned by the company no addition can be made in the case of assessee individual. This argument of the A/R is found unacceptable as above on the ground that the assessee himself taken the responsibility to pay the additional tax on the income arising out of undisclosed transactions of the individuals or companies of assessee group in his statements u/s 132(4) of the IT Act. Since the undisclosed transactions are carried out by the assessee individual capacity on behalf of other individual or company the undisclosed income arising out of undisclosed transactions is correctly assessed in the hands of the assessee individual on his own expressed taking of responsibility. The total sale of property under question is found by the AO Rs. 37660000 on the basis of seized papers as against Rs. 12500000/- as per sale deed in the name of company as against purchase by the company for a sum of Rs. 24805000 on the basis of seized materials. Therefore, there was undisclosed transactions of purchase and sale of this property other than the sale deeds in the name of company. Thus the profit arising out of the undisclosed transactions Rs. 12800000 can be assessed in the hands of the assessee individual. However the property stands sold on 3.7.2006 as per date of sale deed. Therefore the undisclosed profit is to be considered in the

year of its sale i.e. in AY 2007-08 and the addition of undisclosed profit Rs. 12800000 during this year is deleted. However a due set off should be allowed if similar profit arise in AY 2007-08 from the purchase and sale of this property with the surrendered amount of undisclosed investments from properties by the assessee group in AY 2007-08."

2.1 In the above background, the additional ground of appeal was filed by the appellant and we now refer the observations and the finding of the Coordinate Bench in respect of the said additional ground of appeal filed by the appellant which reads as under:-

"49. After going through the written submission and taking into consideration the arguments of the parties, we find that facts are not clear in respect of the issue raised through additional grounds. Addition directed to be made for AY 2007-08 has not been challenged by the assessee. However assessee is asking to allow set off of undisclosed profit of Rs. 1.28 crores against the amount surrender by the assessee. Since the facts are not clear, therefore, we are of view that this matter should go back to the file of AO to consider the submission of the assessee. There is no dispute that set off is allowable against surrendered amount. However, onus is on the assessee to prove that the surrendered amount was available with the assessee for allowing set

off against the income added by the AO or by the Id. CIT(A). If the set off is not allowed, then it will tantamount to double taxation. Therefore, the set off has to be allowed.

50. One of the contentions of the assessee that the AO is not allowing set off for the reason that if set off is allowed, then the assessed income will be reduced or not. The question is to allow set off. The AO has added the amount for AY 2006-07. However the Id CIT(A) has directed to add this amount for AY 2007-08. Therefore, for this reason if the assessed income of the AY 2006-07 becomes less than the disclosed income, then effect has to be given as per direction of Id CIT(A) as assessee has not filed any appeal against such findings of Id CIT(A).

51. In view of these facts and circumstances, we set aside this issue to the file of AO to examine the additional grounds in the light of our observation as above and after taking into consideration the written submission filed on behalf of the assessee here before the Tribunal. The assessee may be allowed reasonable opportunity of being heard. We order accordingly.”

2.2 In view of the above directions of the Coordinate Bench in respect of the additional ground of appeal, the matter was again taken up for fresh consideration by the Assessing officer and the relevant finding of

the Assessing officer are contained at para No. 17 to 20 of its order which is reproduced as under:-

"17. Above submissions are carefully considered and the same are found to be not acceptable being beyond the directions of the higher authorities. There is no directions of set off of entire sale proceeds of Mahala property either by the CIT(A) or by the ITAT. Where the directions of the CIT(A) are clear that set off be allowed of profit earned, if the same profit is part of surrender in AY 2007-08. The directions of the ITAT are that set off of profit be allowed to the assessee subject to proof by the assessee that surrendered amount was available with the assessee for allowing set off against the income added by the AO. Assessee has never claimed set off of entire sale proceeds before the CIT(A) or the ITAT. So there is no question of allowing of set off of profit of Rs. 1.28 crores against the investment in AY 2007-08. Now the A/R wants to travel beyond the directions of the higher authorities which cannot be done in set aside/restored proceedings. In such proceedings the AO is restricted to act strictly in accordance with the directions of the higher authorities.

17. It may be seen from the order of the Id CIT(A) that set off of profit part could only be allowed if the same profit arises in AY 2007-08

from sale and purchase of this property with the surrendered amount of undisclosed investment from properties in AY 2007-08. The assessee has not been able to provide any details in this respect. Undisputedly the profit was earned in AY 2007-08 instead of AY 2006-07 and therefore the same amount was excluded from the assessed income of AY 2006-07 and it was required to be added separately in AY 2007-08 subject to specific observation of the CIT(A) that a due set off should be allowed if similar profit arises in AY 2007-08 from purchase and sale of this property with the surrendered amount of investment. The assessee has not been able to provide any details as to how he has computed the revised income before the AO at the time of giving effect to the order of CIT(A). It may be seen that the assessee has declared following undisclosed income in AY 2007-08 as referred in para 5.1 of the asstt order:-

S. No.	Details of income surrender	Amount
1.	<i>Undisclosed investment made in the property at NRI colony Jaipur on the basis of seized Annex A-1 and other papers</i>	<i>Rs. 5340000</i>
2.	<i>Undisclosed investment made in the property at Shri Nath Nagar, Jaipur on the basis of seized annexure A-4 Page 6 and other seized annexures</i>	<i>Rs. 816000</i>
3.	<i>Undisclosed investment made in the property at C-10, Jai Singh Highway, Jaipur on the basis of Annexure A-4, page 1 to 24, A-15 page</i>	<i>Rs. 16500000</i>

	<i>1 to 40 and other seized Annexures</i>	
<i>4.</i>	<i>Undisclosed investment made in the property at Subhash Chowk Amer Road Jaipur on the basis of seized annexure A-6, page 44, A-10 page 12 to 18, A-13 page 1 to 39 and other seized Annexures</i>	<i>Rs. 3015000</i>
<i>5</i>	<i>Undisclosed investment made in the excess stock found during the course of search in the business concern</i>	<i>Rs. 28000000</i>
		<i>Rs. 48336340</i>

19. It may be seen that the above details of undisclosed income nowhere prescribes the profit earned on sale of Mahala property as directed by the Id CIT(A) and therefore question of giving set off has no relevance. From the order of the Id CIT(A) it may further be seen that the disclosed investment in the said property was only of Rs. 10936055 whereas the AO found undisclosed investment in the said property of Rs. 1.50 crores in this property which stands considered in AY 2006-07 and also partly confirmed by the CIT(A). Now the only question remained is of set off of profit of Rs. 1.28 crores on the date of sale of the property if the same is part of surrender in AY 2007-08 as per the directions of the Id CIT(A) but it is not so as is evident from the chart of unaccounted income surrendered in the return, details of which are reproduced

above. As such the assessee does not deserve any set off, if the directions of the Id CIT(A) are considered.

20. However, the directions of the ITAT are on different footings directing to set off of this amount of profit as available for undisclosed investments surrendered by the assessee in AY 2007-08 because if it was not done it would amount to double taxation once in the form of earning of profit and then in the form of undisclosed investment. Accordingly, following the directions of the ITAT set off of profit earned from this property is allowable, if it is used for investment in other properties which have been surrendered in AY 2007-08 are made after the sale of the Mahala property i.e. 3.6.2007 or before this date, the assessee was specifically asked to provide the date wise details of undisclosed investment in AY 2007-08. But the assessee has not furnished date wise details of investment in AY 2007-08 but has claimed that such set off is allowable against surrender of stock of Rs.2.80 crores. Since search was carried out on 1.11.2006 whereas the property was sold on 3.7.2006, set off of profit can be allowed against this disclosure of stock on 1.11.2006. Accordingly set off of profit of Rs.1.28 crores is allowed against undisclosed/excess stock surrendered.

With these remarks income of the assessee is computed as under giving effect to the order of the ITAT and present proceedings.

<i>Income as per order u/s/154/143(3)/153A dated 28.1.2009</i>	<i>Rs.89551227</i>
<i>(LTCG Rs9519089+Rs.80032138)</i>	
<i>Less relief allowed by the Id CIT(A)</i>	
<i>(i) On account of un-named property (-) Rs.2000000</i>	
<i>(ii) On account of MI Road property (-) Rs.3075000</i>	<i>(-)Rs.5075000</i>
<i>Less:- LTCG on MI Road property to be Considered based on DVO report</i>	<i>Rs.2270079</i>
<i>Add:- Capital gain on MI Report as per DVO reports as discussed</i>	<i>Rs.1002862</i>
<i>Add:-Part Investment in Mahala property pertaining to This year as per order of the CIT(A)</i>	<i>Rs.4504000</i>
<i>Add:- Profit on sale of Mahala property</i>	<i>Rs.12800000</i>
<i>Less:- Set off for investment in undisclosed Stock surrendered as discussed</i>	<i>Rs.12800000</i>
<i>Total Income</i>	<i>Rs. <u>NIL</u> Rs.87713010</i>

2.3 Being aggrieved with the above order of AO, the assessee carried the matter in appeal before the Id. CIT(A) and his findings are contained at para 4.3 of its order which is reproduced below:-

"4.3 I have considered the assessment order of the AO u/s 254/250/154/143(3) dated 28.12.2011 and the submissions made by the AR of the appellant.

(i) I am inclined to agree with the observation of the AO that the AO has to act strictly in accordance with the findings and directions of the higher authorities in set aside proceedings and while giving effect to appellate orders. The findings and directions by the Id.

CIT(A) with respect to Mahla property in order dated 19.05.2009 are as under:-

(a) Para 1,2 & 3 page 31:

- *The undisclosed investment in the form of cash payment for purchase of Mahla property at Rs. 95,15,000/- is confirmed. Balance Rs. 328,390/- is deleted.*
- *Outstanding liability for payment for purchase Rs. 45,04,000/- is to be considered in next year as investment on actual payment basis. Similarly sale proceeds of this purchase may be set off with the available surrender of the investment in next assessment year if co-related.*
- *Thus the profit arising out of the undisclosed transactions Rs. 128,000,000/- can be assessed in the hands of the assessee individual. However, the property stands sold on 03.07.2006 as per the date of sale deed. Therefore, the undisclosed profit is to be considered in the year of its sale i.e. in AY 2007-08 and the addition of the undisclosed profit of Rs. 128,00,000/- during the relevant assessment year is deleted. However, a due set off should be allowed if similar*

profit arises in assessment year 2007-08 from the purchase and sale of this property with the surrendered amount of undisclosed investment for properties by the assessee group in AY 2007-08.

Thus, there is a clear finding of Id. CIT(A) that undisclosed investment of Rs. 45,04,000/- in Mahla property and similar profit arising on its sale is to be assessed to tax in AY 2007-08 as against addition of Rs. 1.28 crores made by the AO in AY 2006-07. Further, there is a direction to give set off of sale proceeds of this purchase and of profits arising on its sale in AY 2007-08.

The AO has accordingly added Rs. 45,04,000/- and Rs. 1.28 crores in AY 2007-08 and has observed that the assessee does not deserve any set off, if the directions of the Id. CIT(A) are considered since assessee has not correlated the sale proceeds of Mahla property (which was sold on 03.07.2006) with the surrender of income of Rs. 4.83 crores by way of undisclosed investment in various properties and in excess stock (of Rs. 2.8 crores) of business found on the date of search i.e. 01.11.2006.

However, the AO has been gracious enough to allow set off of Rs. 1.28 crores being profit on sale of the said property by following the

directions of the Hon'ble ITAT, otherwise it would amount to double taxation. Further, the AO has simply ignored/excluded the set off of Rs. 26723945/- allowed by AO in order dated 29.06.2009.

(ii) The appellant had taken following additional ground before the ITAT for AY 2007-08 in ITA No. 646/JP/09.

"The learned CIT(A) has erred in not given direction to the Assessing Officer to give effect to the following findings given by him in the order for AY 2006-07-

Undisclosed profit of Rs. 1,28,00,000/- on sale of Mahla property required to be considered in AY 2007-08. Set off of this profit required to be allowed with the surrendered amount of undisclosed investments for properties by the assessee group in AY 2007-08".

The Hon'ble ITAT set aside this issue to the file of AO to consider the issue of set off of undisclosed profit of Rs. 1.28 crores against the amount surrender by the assessee since facts in that regard were not clear

(iii) The AR has submitted that the said Mahla property was sold on 3.7.2006 as per date of sale deed and the Id. CIT(A) directed the AO to give set off of sale consideration and profit in the year of sale

which is available for other investment made by the assessee in the AY 2007-08.

It has been submitted by the AR that the said property was sold for Rs. 3,76,60,000/- as per sale deed and the purchase cost as per registered deed is Rs. 109,36,055/-. So set off of Rs. 267,23,945/- should be allowed since the sale consideration was received out of books on 3.07.2006 and was found as investment in stock of Rs. 2.80 crore on the date of search on 01.11.2006. It has been further submitted that profit from the sale of said property of Rs. 15,63,945/- was recorded/disclosed in the regular books of accounts of the company M/s Mahla Real Estate Pvt. Ltd. and therefore unaccounted profit which requires to be added in the hands of assessee at Rs. 112,36,055/- (Rs. 128,00,000-15,63,945).

(iv) I find from orders and submissions that as per seized documents, the value of sales recorded is Rs. 3,76,60,000/- as against the sales recorded in registered sale deed at Rs. 125,00,000/-. Therefore, unrecorded sales proceeds work out to Rs. 251,60,000/-. Cost of the land as per seized documents has been worked out at Rs. 248,55,000/-. Further, cost of property as recorded in registered deeds is Rs. 109,36,055/-. Thus profit of Rs.

15,63,945/- has been recorded/booked in the case of Mahla Real Estate Pvt. Ltd. Therefore, undisclosed profit from sale of said property would work out to (Rs. 128,05,000-Rs. 15,63,945)= 112,41,055/-.

(v)Ld. CIT(A) in order dated 19.05.09 had directed that undisclosed profit is to be considered in the year of its sale and quantum of this profit was required to be worked out by the AO for AY 2007-08. In view of above discussion, the AO is directed to assess the undisclosed profit from this property at Rs. 112,41,055/- for AY 2007-08 instead of Rs. 128,00,000/- in order dated 28.12.2011.

The addition of Rs. 45,04,000/- is found to be in order as it is as per directions of the Id. CIT(A). Therefore, ground No. 2 in this regard is dismissed.

(vi) However, the set off would be available against the undisclosed stock surrender of Rs. 2.8 crores found at the time of search out of sale proceeds realized out of books of Rs.251,60,000/- (Rs. 376,60,000- Rs. 125,00,000) on 03.07.06 since there is no material/evidence on record that this amount was invested elsewhere and in view of the clear directions of the Id. CIT(A) in his order dated 19.05.09.

Further, the Hon'ble ITAT has also observed in this regard in their order dated 26.11.2010 (para 49) that effect of set off has to be given as per direction of Id. CIT(A) since the AO has added the amount for AY 2006-07, whereas the Id. CIT(A) has directed to add this amount for AY 2007-08. Thus, in this case there is shifting of income from AY 2006-07 to AY 2007-08 and the ratio of the Hon'ble Supreme Court decision of CIT Vs Shelly Products 261 ITR 367 is not applicable.

In view of above discussion, the AO is directed to allow set off of Rs.251,60,000/- instead of Rs. 128,00,000/- in the order dated 28.12.11, notwithstanding the fact that the assessed income would fall to Rs. 737,94,065/- i.e. below the returned income of Rs. 827,40,410/-. In fact, it is also seen that the although the assessed income would fall below the returned income in AY 2007-08 by Rs. 89,46,345/- but at the same time, the assessed income has gone up by Rs. 94,15,000/- in AY 2006-07 on account of additions relating to the Mahla property. The AO is directed to work out the revised income and relief as directed above.

In view of the above, the ground No. 1,4 & 5 are partly allowed on above terms, ground No. 3 is allowed and ground No. 2 is dismissed. "

2.4 Now the Revenue is in appeal before us. Ld. DR has vehemently argued the matter, took us through the orders of Coordinate Bench in the first round of appeal and the order of the Id CIT(A) in the first round of appeal and the latest CIT(A) order under challenge. He supported the order of the Assessing Officer and submitted that the AO has correctly given effect to the directions of the ITAT in the first round of appeal and there is no infirmity in such order.

2.5 The Ld. AR relied on and supported the order of the Id CIT(A) and submitted that broadly two issues are involved in this case. First issue is regarding set off against surrendered income and secondly shifting of income from assessment year 2006-07 to 2007-08 and also whether assessed income can be below the return income. On each of this matter, Ld. AR has submitted as under:-

1. Issue of set off against surrendered income:-

It was submitted that the issue involved revolves around the immovable property titled as Mahla Property. Although this property has been

purchased in the hands of the M/s Mahla Real Estate Pvt. Ltd. but the unaccounted investment/profit in respect of this property has been considered in the hands of the assessee. The assessee being a director in this company had offered the unaccounted investment and the income pertaining to the purchase and sale of this property in his individual hands. The facts of purchase and sale of this property as per registered deed and as per seized papers found during search are as under:-

Particulars of purchase and sale of Mahla Property:

Mahla Property	Purchase amount	Sale amount	Profit
As per registered deed	10936055	12500000	1563945
As per seized documents	24855000	37660000	12805000

The admitted facts are that whereas the property was purchased in Assessment Year 2006-07 it was sold in Assessment Year 2007-08. The assessee had claimed that on the sale of this property funds over and above and in addition to that accounted for on sale of this property amounted to Rs. 2,51,60,000/- (37660000-125000000) were received. The property actually was sold as per seized documents for a sum of Rs.

3,76,60,000/- whereas as per sale deed the sale was shown only for a sum of Rs. 1,25,00,000/-. Thus actually assessee was in receipt of on money funds of Rs. 2,51,60,000/- (37660000-125000000). The set off of this amount was sought against surrendered investments in other properties in Assessment Year 2007-08. The Learned CIT(A) has allowed the same as per para (vi) on page 19 of the appellate order. The Learned CIT(A) has correctly held that the set off of this amount of Rs. 2,51,00,000/- would be available against the undisclosed stock surrendered by the assessee at the time of search of Rs. 2.8 Crores. The Learned CIT(A) has further observed that there is nothing on record which may show that this amount of Rs. 2,51,60,000/- was invested elsewhere. The finding of the Learned CIT(A) is perfectly in order. This finding of the Learned CIT(A) is in tune with the earlier order dated 19.05.2009 wherein the Learned CIT(A) had directed that the sale proceeds of the purchase of this property require to be set off with the available surrender of the investment.

2. Shifting of income from Assessment Year 2006-07 to 2007-08

It was submitted that the Learned CIT(A) has further correctly held that as per the earlier order dated 19.05.2009 the profit on sale of this property was required to be considered in Assessment Year 2007-08

instead of in Assessment Year 2006-07. Thus the income on sale of this property of Rs. 1,28,05,000/- was wrongly taken in Assessment Year 2006-07 was shifted/transferred to Assessment Year 2007-08. The profit on sale of this property was further corrected. It was held that the assessee as per registered sale deed declared profit of Rs. 15,63,945/- in the books of accounts as is clear from the table above. Whereas the profit as per seized documents worked out to Rs. 1,28,05,000/-. Thus only the difference between the two which comes to Rs. 1,12,41,055/- (12805000-1563945) was assessable as income in Assessment Year 2007-08 as income to the extent of Rs. 15,63,945/- already stood declared by the assessee in the books of accounts. The directions of the Learned CIT(A) are perfectly lawful, legal and justified. There is no case for the Revenue for agitating the matter.

3. Issue of assessed income being below the returned income:-

It was submitted that the Revenue has also agitated the matter on the ground that the direction of the Learned CIT(A) would result in determination of income lesser than shown in the return by the assessee. This issue had cropped up in the first round of appeal before the Hon'ble ITAT and the same was decided in cross-objection no. 127/JP/2009 and ITA no. 645, 646/JP/2009 order dated 26.12.2010.

The relevant directions of the Hon'ble ITAT are in the context of this very property the same appear in para no. 49 & 50 of page 37 of the order dated 26.11.2010 of the ITAT. The same are quoted below:-

"There is no dispute that set off is allowable against the surrendered amount(Para 49) One of the contention of the assessee that the Assessing Officer is not allowing set off for the reason that if the set off is allowed then the assessed income will be less than the disclosed income. This is not a question whether returned income will be reduced or not. The question is to allow the set off."(Para 50)

In view of the aforesaid finding and observation of the Hon'ble ITAT the matter stands settled. The direction of the Learned CIT(A) are in tune with the observations of the Hon'ble ITAT. The Revenue's appeal on this point does not hold good and fails. The decision of the Learned CIT(A) deserves to be confirmed. It is further submitted that it is also the established position of law that the income of the assessee has to be determined as per provisions of law and the same can be assessed lesser than shown in the return. The following decisions are quoted in support:-

(i) SUSHIL KUMAR DAS vs. INCOME TAX OFFICER (2011) 11 ITR 0017

The moot question arising out of this appeal is whether the income determined by the AO on the basis of the return filed by the assessee can be a figure lower than the income returned by the assessee. It is a well settled that the principle for determining the taxable income of the assessee under the IT Act should be within the purview of the law in force. If the taxable income determined by the AO is not in accordance with such principle it is open to the assessee to contend the same before the higher authorities to follow the correct application of law to determine the actual taxable income of the assessee. In our considered view, the lower authorities, not expected, to say that merely because the assessee has returned income which is higher than the income determined in accordance with legal principles such returned income can be treated as lawfully assessed. An assessee is liable to pay tax only upon the taxable income. The law imposed by the AO to assess the income according to law and determined the tax payable thereon. In doing so, the AO cannot assess the income of the assessee an amount which is not taxable as per law though shown by the assessee in the return. It is always open to the assessee to take a plea that the taxable income though shown as income is not taxable under law before the higher authorities.

(ii) UNITED PHOSPHOROUS LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (2012)67 DTR -395

In view of the provisions of the IT Act, there can be determination of income under the provisions of the Act less than the returned income due to various factors. There is no bar in determining the total income/undisclosed income less than the returned income if facts so warrant.

(iii) NIRMALA L.MEHTA vs. BALASUBRAMANIAM, COMMISSIONER OF INCOME TAX & ORS. (2004) 269 ITR 0001

It may be held that merely because the petitioner offered the prize money won in the lottery of the Sikkim Government, to tax under the IT Act, 1961, that shall not take away her right in contending that the said prize money was not chargeable and assessable to tax under the IT Act in the revisional jurisdiction.

In view of the aforesaid facts it was submitted that the order of the learned CIT(A) is perfectly lawful and deserves to be confirmed. The directions given by him are in accordance with the law and facts of the case. The appeal of the Revenue deserves to be dismissed.

2.6 We have heard the rival submissions and pursued the material available on record including the order of the Id CIT(A) and the Coordinate Bench in the first round of appeal as well as the latest order of Id CIT(A) under challenge before us and the Id AR's contentions as reproduced above. The limited issue under consideration is the nature of directions issued by the Coordinate Bench in the first round of appeal and whether the same has been given duly effect to by the AO. The directions of the Coordinate Bench are clear that "the assessee is asking to allow set off of undisclosed profit of Rs 1.28 Crores against the amount surrendered by the assessee and since the facts are not clear, therefore, we are of the view that matter should go back to the file of the AO to consider the submissions of the assessee." And "we set aside this issue to the file of the AO to examine the additional ground of appeal in the light of our observations as above and after taking into considerations the written submissions filed on behalf of the assessee."

2.7 Undisputedly, the impugned proceedings are set-aside proceedings with directions to consider the additional ground as submitted before the Co-ordinate Bench in terms of examining the set off of undisclosed profit of Rs 1.28 Crores against the amount surrendered by the assessee. And in light of these directions, the AO

has considered the submissions of the assessee and has stated that since the sale of Mahala property has happened on 3.7.2006, the profit arising from such sale of Mahala property amounting to Rs 1.28 Crores (after considering the sale consideration of Rs 3.76 Crores and cost of purchase of Rs 2.48 Crores as per seized documents) has been worked out and the same was allowed set off against the surrender of stock of Rs 2.8 Crores. In our view, the AO has rightly given effect to the directions of the Coordinate Bench and we see no infirmity in the same.

2.8 At the same time, we are not in agreement with the findings of the Id CIT(A) where he states at para 4.3 (vi) of his order that set off OF sale proceeds would be available against the undisclosed stock surrender of Rs 2.8 crores found at the time of search of sale proceeds realized out of books of Rs 2.51 crores since there is no material/evidence on record that this amount was invested elsewhere and in view of the clear directions of the Id CIT(A) in his order dated 19.5.09." The reason for the same is that there is no such directions by the Id CIT(A) in the first round and that's precisely the reason why the assessee took the additional ground before the Coordinate Bench and which has been rightly given effect to by the AO.

In light of above discussions, we set aside the order of the Id CIT(A) and restore the order passed by AO. In the result, the appeal filed by the Revenue is allowed.

Order pronounced in the open court on 28/03/2017.

Sd/-

(कुल भारत)
(Kul Bharat)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 28/03/2017.

Ganesh.

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

1. अपीलार्थी / The Appellant- DCIT, Central Circle-1, Jaipur
2. प्रत्यर्थी / The Respondent- Shri Ram Babu Gupta, 12-13, Patel Colony, Sardar Patel Marg, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 198/JP/2013}.

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar