

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER  
and  
SHRI JASON P.BOAZ, ACCOUNTANT MEMBER**

**ITA No.710/Bang/2014  
(Assessment year: 2005-06)**

M/s.Abhilash Software & Development Centre,  
# 2/10, 80 feet Road,  
Poojari Layout, RMV 2<sup>nd</sup> Stage,  
Bangalore. ... Appellant  
*PAN.AAIFM8040N*

Vs.

Income-tax Officer,  
Ward 8(2),  
Bangalore. ... Respondent

Appellant by: Shri S.Parthasarathi, Advocate.  
Respondent by: Dr. P.K.Srihari, Addl.CIT(DR).

Date of hearing : 19/05/2015  
Date of pronouncement: 26/05/2015

**O R D E R**

**Per Smt.P.MADHAVI DEVI, JM:**

This appeal by the assessee is directed against the order of the CIT(A)-V, Bangalore, dated 5/12/2013 for the assessment year 2005-06.

2. The assessee has raised as many as 14 grounds of appeal amongst which ground Nos.1, 2, 13 and 14 are general in nature and need no adjudication. Ground No.3 is that the CIT(A) has

failed to follow the principles of natural justice by not providing the assessee with a reasonable opportunity of being heard before giving enhancing effect of income by changing heads of income and imposing tax on the assessee.

3. Brief facts of the case are that the assessee, a partnership concern, filed its return of income for the assessment year 2005-06 on 31/10/2005 declaring taxable income of Rs.2,64,948/-. During the assessment proceedings u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short], the Assessing Officer (AO) observed that the assessee was in the business of constructing and managing a technology park and that apart from building, huge other assets were added during the year and the assessee had incurred interest expenditure and the entire interest was claimed as deduction from rental income from the building. The assessee was requested to furnish details of interest attributable to land and also towards capital utilized for acquiring other assets which, according to the AO, should have been capitalized as this is the first year of commencement. The assessee could not furnish the details and therefore the AO apportioned 10% of the interest claimed as relatable to loan utilized for acquiring other assets and further held that this being capital in nature, the same is also not allowable as revenue expenditure. He, accordingly added it to the returned income of the assessee. As regards the claim of depreciation, he held that 10% of depreciation claim is

required to be disallowed as it is attributable to the other assets of the assessee.

4. Against the disallowance of both interest and depreciation, the assessee went in appeal before the CIT(A). The CIT(A), after considering the assessee's contentions at length, held that the entire income is to be treated as income from house property and therefore the claim of interest as well as depreciation is not allowable. Against the said order of the CIT(A), the assessee is in appeal before us.

5. The learned counsel for the assessee submitted that the assessee had let out the technology park to its lessee and has offered the rent from the building as 'income from house property' and the rent received for the other amenities as 'income from other sources'. He submitted that interest on loan taken for construction of the building has been claimed as revenue expenditure allowable from the income from house property. He further submitted that from 'the income from other sources' the assessee had claimed depreciation on the movable assets which were given on rent along with amenities. He submitted that before the CIT(A), the assessee had stated that 'income from letting out of movable assets' has to be treated as income from business and depreciation on such movables is to be allowed. He submitted that the CIT(A), without properly appreciating the facts of the case, has held that the entire

income both from building as well as amenities is to be charged as 'income from house property' and only such deductions as are allowable under such heads of income are to be allowed. Thus, it has resulted in enhancement of income and the CIT(A) ought to have issued show cause notice to the assessee prior to such enhancement of income u/s 251 of the Act. He, therefore, submitted that there is violation of principles of natural justice and the order of the CIT(A) needs to be set aside. Copy of the order giving effect to the CIT(A)'s order is also filed before us.

The learned Departmental Representative, on the other hand supported the order of the CIT(A) and submitted that the CIT(A) has only changed the heads of income but has not enhanced the income of the assessee and therefore there was no violation of principles of natural justice.

6. Having regard to the rival contentions and the material on record, we find that the returned income of the assessee was Rs.2,64,958/- while the assessed income was Rs.12,89,620/-. The AO, while giving effect to the order of the CIT(A), has assessed the income at Rs.1,97,66,178/-. Therefore, it is clear that the assessed income has been enhanced by the order of the CIT(A). Sub-section (2) of sec.251 provides that the CIT(A) shall not enhance an assessment or a penalty or reduce the amount of refund unless the assessee has had a reasonable opportunity of showing cause against such enhancement or

reduction. The learned counsel for the assessee argued that no such notice of enhancement has been given by the CIT(A) while the learned Departmental Representative submitted that the CIT(A) had only changed the head of income under which the income was to be charged and therefore no notice was required to be issued. The CIT(A) has plenary powers in disposing of an appeal and the scope of his powers is co-terminus with that of the AO and could do and can also direct the AO to do what he failed to do. In this process, he is empowered to consider a matter placed before him in all its aspects. But, if such change of head of income results in enhancement of income and consequently enhancement of tax, then the CIT(A) has to issue a notice u/s 251(1) of the Act before bringing it to tax. The Hon'ble Allahabad High Court in the case of *Tarkeshwar Nath Agarwal vs. CST* (1974) 34 STC 497 (All), has held that an assessment can be said to have been enhanced only if the tax assessed has been enhanced. In the case before us, the change of head of income has resulted in enhancement of assessed income and tax thereon and therefore the provisions of sec.251(1) are attracted. From the order of the CIT(A) before us, it is clear that before such enhancement of the assessment, by such change of head of income, no notice u/s 251(2) was issued to the assessee. Therefore, in our opinion, the CIT(A) ought to have issued notice u/s 251(2) of the Act. Since such notice has not been issued by the CIT(A), we set aside the order

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of the CIT(A) and remit the issue to the file of the CIT(A) with a direction to re-adjudicate the appeal before him *de novo* in accordance with law after issuing a notice u/s 251(2) of the Act. Ground No.3 is accordingly allowed for statistical purposes. The other grounds are against merits of the additions. Since the assessment itself has been remanded to the file of the CIT(A) for *de novo* consideration, these other grounds are not adjudicated at this stage as it would only result in academic exercise..

7. In the result, the assessee's appeal is treated as allowed for statistical purposes.

*Pronounced in the open court on 26<sup>th</sup> May, 2015.*

sd/-  
**(Jason P Boaz)**  
**ACCOUNTANT MEMBER**  
*eksrinivasulu*

sd/-  
**(Smt. P.Madhavi Devi)**  
**JUDICIAL MEMBER**

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore