

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

I.T.A No.903/Bang/2015
(Assessment Year : 2005-06)

Shri. Siddaraju,
No.101/2, Gurukar Devanna Street,
Fort Mohalla, Mysuru .. Appellant
PAN : AKYPS0517N

v.

Addl. Commissioner of Income-tax,
Range-2, Mysuru .. Respondent

Assessee by : Shri. S. Venkatesan, CA
Revenue by : Smt. Swapna Das, JCIT

Heard on : 21.06.2016
Pronounced on : 29 .07.2016

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

Grounds taken by assessee in this appeal, against an order
dt.17.11.2008 of CIT (A), Mysuru is reproduced hereunder :

1. The orders of the authorities below in so far as they are against the appellant in dismissing the appeal are opposed to law, equity, weight of evidence, probabilities, the facts of the case [please refer to the statement of facts enclosed as **Annexure-1**] and circumstances of the case.
2. The learned CIT[A] failed to appreciate that the order passed by the learned A.O. was bad in law and void-ab-initio, as the learned A.O. had already passed an order on 03/12/2009 purported to be in conformity with the directions of the Hon'ble ITAT and has not reserved any liberty to pass any further order under such order so passed and has thus become functus officio and the impugned order passed was thus without assuming jurisdiction lawfully either u/s.148 of the Act or otherwise to make further assessment order and consequently, the impugned order required to be annulled as one without jurisdiction.
3. Without prejudice to the above, the order was bad in law and void-ab-initio as it was not in conformity with the directions of the Hon'ble ITAT, which was not challenged in appeal before the Hon'ble High Court and the decision of the binding decision of the Hon'ble Supreme Court in 243 ITR 383.
4. Without prejudice to the above, the learned CIT[A] is not justified in sustaining a portion of certain additions made, which were set-aside by the Hon'ble ITAT, findings made and position of law laid down by the Hon'ble ITAT, while setting aside the order which were not challenged in appeal before the Hon'ble High Court u/s.260-A of the Act, which thus become final and binding on the learned A.O. and thus such portions of the additions made by the learned A.O. and sustained by CIT[A] are liable to be deleted as in violation of the principles of natural justice.
5. Without prejudice to the above, the learned CIT[A] is not justified in sustaining the addition of a sum of Rs.5,11,000/- made by learned A.O. by invoking the provisions of Section 2[24][iv] of the I.T.Act under **THE FACTS** and in the circumstances of the appellant's case.
6. The learned CIT[A] is not justified in sustaining the addition of a sum of Rs.33,300/- made by learned A.O. being the peak credit in the bank account u/s.69 of the I.T.Act under **THE FACTS** and in the circumstances of the appellant's case.

7. The learned CIT[A] is not justified in sustaining the addition of a sum of Rs.2,50,000/- made by the learned A.O. being the opening cash balance as unexplained credit u/s.68 of the Act under **THE FACTS** and in the circumstances of the appellant's case.

8. The learned CIT[A] is not justified in sustaining the addition of a sum of Rs.2,49,583/- made by learned A.O. as sundry undisclosed income under the head other sources under **THE FACTS** and in the circumstances of the appellant's case.

9. The learned CIT[A] is not justified in sustaining the addition of a sum of Rs.2,95,000/- made by learned A.O. as unexplained cash introduced u/s.68 of the Act under **THE FACTS** and in the circumstances of the appellant's case.

10. Each one of the above additions made and taken in Ground No.5, 6, 7, 8 and 9, are purely on suspicion and surmise, assumptions and presumptions and contrary to the directions of the Hon'ble ITAT and the addition made requires to be deleted.

11. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s. 234-B of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

12. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

02. Facts apropos are that assessment was originally completed on the assessee on 26.12.2007 for the impugned assessment year inter alia making the following additions :

1. Amount received from M/s. Rishab Associates treated as income under section 69 of the Income Tax Act, 1961.	Rs.385000
2. Loan from Kavitha Mahesh treated as income under section 69 of the Income Tax Act, 1961.	Rs.100000
3. Income under section 2(24)(iv)	Rs.825000
4. Unaccounted credit in ICICI Bank	Rs.96,000
5. Opening cash balance as on 1.4.2004 treated as unexplained and brought to tax under section 68.	Rs.833102
6. Addition on account of drawings from capital account.	Rs.260000
7. Sundry income shown in the cash book.	Rs.2,49,583
8. Unaccounted cash introduced in the cash book treated as income under section 68 of the Income Tax Act, 1961.	Rs.2,95,000

TOTAL .. Rs.30,43,685

03. Assessee had filed an appeal against above additions where upon CIT (A) deleted the additions mentioned at item nos.1 and 2 totalling to Rs.4,85,000/- and sustained the balance additions totalling to Rs.25,58,685/-. Thereafter the assessee chose to move this Tribunal.

04. In further appeal filed by the assessee before the Tribunal against the sustained addition of Rs.25,58,685/- this Tribunal restored all the issues relating to the additions mentioned at sl. Nos.3 to 8 and relevant para 6 to 11.2 of the order of Tribunal is reproduced hereunder:

6. Addition of Rs.8.25 lakhs under section 2(24)(iv) of the Income Tax Act, 1961.

6.1 During the course of assessment proceedings, the Assessing Officer noticed that the assessee has drawn sum of money from the Bank account of M/s. Sukee Constructions and Developers Pvt. Ltd. where the assessee was a Director. The Assessing Officer was of the view that the sum drawn was for personal expenses of the Director and provisions of section 2(24)(iv) were applicable. Before the Assessing Officer, it was submitted that the assessee has transaction with the company and there was a running account between the company and the assessee. The assessee was a creditor of the company. The assessee withdrew a sum of Rs.8,11,000 but the final balance as on 31.12.2005 was Rs.4,85,000. The Assessing Officer has relied on the decision of the Hon'ble Madras High Court in the case of Ravi Prakash Khemka and Others Vs. CIT reported in 295 ITR 33. In that case, the company made the personal expenses and the amount was irretrievable. In the instant case, the facts are different. The assessee has not obtained any benefit from the company. The learned CIT(A) has upheld the addition as according to him there was fund flow from the company's account. The learned CIT(A) has not considered the nature of relationship

between the assessee and the company. It was a running account between the assessee and the company. The assessee has been shown as a debtor of the company.

6.2 On the other hand, the learned Departmental Representative supported the orders of the authorities below.

6.3 We have heard both the parties. As per section 2(24)(iv), the value of any benefit or a perquisite whether convertible into money or not obtained from the company in respect of any obligation which would have been payable by Director or other person is to be treated as income. If the company pays the dues of the Director and does not recover from the Director, it is the benefit to the Director. If the company incurs foreign tour expenses of a Director which were otherwise to be incurred by the Director then it is a benefit. If the huge sums of money are advanced without interest then the benefit is in the form of interest and not the amount since the amount is shown as recoverable. The Hon'ble Apex Court in the case of L. Alagusundaram Chettiar Vs. CIT (252 ITR 893) had an occasion to consider the advancing of loan to the Director. In that case the company advancing large amounts to low paid employee. Employee advancing loans to assessee, i.e. Managing Director of the Company. Loans to assessee given by employee can be treated as dividend. The Hon'ble Apex Court treated the loans to the assessee given by employee as dividend. Section 2(22)(e) deals with the cases of deemed dividend. It has also been held by the Ahmedabad Bench reported in 308 ITR 8 AT (Ahmedabad) that loan advanced to share holders in ordinary course of business cannot be treated as deemed dividend. Similar finding has been given by the Delhi High Court in the case of CIT Vs.

Ambassador Travels reported in 173 Taxman 407. Hon'ble Delhi High Court in the case of Sunil Shetty Vs. DCIT in ITA No. 2131/Depreciation;/07 vide order dt.12.9.2008 had an occasion to consider the issue of deemed dividend when the company made advances to the Director for purchase of site and the site was not purchased and the money was returned. There was resolution of Board of Directors which authorize such advance. Under such circumstances, the Hon'ble Delhi High Court held that it cannot be treated as deemed dividend. Hence in the instant case, the matter is required to be looked into by the Assessing Officer. After ascertaining the fact the Assessing Officer has to draw a conclusion as to whether the amount is taxable under section 2(22)(e) or the benefit in the form of not charging of interest is taxable under section 2(24)(iv). Thus the issue of this addition is restored to the file of Assessing Officer for consideration afresh.

7. Addition of Rs.96,000 on account of HUF.

7.1 It is the contention of the assessee that the HUF was not having any taxable income and therefore returns were not filed. The Bank account belongs to the HUF. The learned CIT(A) has upheld the amounts credited in the Bank account. Copy of the Bank account is available at pages 105 & 106 of the paper book. There is withdrawal of Rs.20,000 on 8.7.2004. A sum of Rs.10,000 has been deposited on 10.7.2004. Similarly there are transactions on 29.4.2004, 20.5.2004 and the deposits are on 26.5.2004, 27.5.2004 and 8.7.2004. One will have to consider the availability of funds as the same have been withdrawn from the Bank. The Assessing Officer is free to make enquiry whether such amounts have been utilized and have been credited in the cash book.

The issue is to whether such amount belongs to HUF is to be seen by the Assessing Officer. The learned CIT(A) has not given any credit for withdrawal as according to him there is a gap between the date of withdrawal and date of deposit. Such argument when gap is not large is not acceptable except when it can be said that the amounts were utilized for other purposes. The Assessing Officer will have to look into the explanation and to come to a conclusion as to how much amount has been added and the Assessing Officer has to consider as to whether the account belongs to HUF and therefore issue also is to be reconsidered.

8. Unexplained opening cash balance.

8.1 The assessee filed cash flow statement. Such cash flow statement is available at pages 16 & 17 of the paper book filed by the learned Authorised Representative. The assessee has shown opening balance of Rs.4,63,433 as on 1.4.2001. To this the assessee has added the receipt shown in the return of income. He has shown drawing of Rs.36,000. The assessee has filed returns of income in the earlier years returned for the A.Y. 2002-03 has been filed on 2.6.2002. Copy of the receipt is available at page 79 of paper book filed by the learned Authorised Representative. Return for the A.Y. 2003-04 has been filed on 15.12.2003 and the receipt is available at page 80 of the paper book. Return for the A.Y. 2004-05 has been filed on 22.12.2005, copy of the receipt is available at page 81 of the paper book. Return for the A.Y. under consideration has been filed on 15.3.2006. The returns for earlier years stands filed and A.O. will have to consider availability of income as per such returns, It cannot be said that the assessee having zero opening balance as on 1.4.2001. The Assessing

Officer has added the entire cash balance by treating it as non-genuine. Obviously the explanation offered by the assessee has not been considered. Hence this issue of addition of Rs.8,33,103 is also required to be considered by the Assessing Officer after providing opportunity to the assessee. The Assessing Officer is free to make any further investigation.

9. Addition of Rs.2,60,000.

9.1 In the paper book filed before us, the learned Authorised Representative has submitted that wife of the assessee has also filed the return of income. Withdrawals made by her also available for household expenses. In the written submission filed by the learned Authorised Representative submitted that even if DD of Rs.2 lakhs is ignored as held by the learned CIT(A) then balance of Rs.1.09 lakhs was available at personal capacity. We feel that the issue has not been considered from the proper angle and the matter is required to be reconsidered.

10. Addition of Rs.2,49,583 as sundry income.

10.1 Before the authorities below it was submitted that the assessee was running a women hostel and a sum of Rs.3,72,190 was spent for earning the rental income. The assessee has disclosed only the net income.

10.2 Before us, it was contended that the learned CIT(A) has ignored the fact that the Assessing Officer during the remand proceedings has not called for any explanation. The assessee would have explained that he has shown gross receipts in the cash book. Expenses have been incurred to earn the income. Hence this net income which was taxable. The net income was shown. Thus, we feel proper

opportunity has not been afforded to the assessee to rebut the addition of Rs.2,49,583. Hence this issue is also required to be reconsidered by the Assessing Officer.

11. Addition of Rs.2,95,000 as unaccounted cash.

11.1 It was submitted that the assessee offered to file the confirmation from those persons who had drawn from the Bank on behalf of the assessee. The assessee was not given any opportunity to produce such confirmation. Whenever the cash was needed, the same was drawn by bearer cheque and the amounts so obtained from the bearer cheques were reflected in the cash book. Hence we feel that the matter is required to be reconsidered by the Assessing Officer.

11.2 In view of the above discussion, we hold that the assessee has not been provided adequate opportunity by the Assessing Officer and the Assessing Officer has not considered the explanation offered by the assessee and hence not done the necessary investigation for completing the assessment. Hence in the interest of justice, the assessment order is set aside and to be made again on the issues on which the assessee has preferred appeal before us.

05. It is to be noted that Department had not filed any appeal against the relief of Rs.4,85,000/- granted to the assessee by the CIT (A) and thus it had become final. Thereafter the AO passed an order dt.03.12.2009 purportedly giving effect to the directions of the Tribunal. Such order is reproduced hereunder:

Total Income as per 143(3) order dated 26/12/2007	Rs.	33,60,975
Add ; Agricultural Income for rate purpose	Rs.	70,500
Assessed Income	Rs.	34,31,475
Less: Relief allowed in CIT(A)	Rs.	4,85,000
Less : Relief allowed in ITAT	Rs.	25,58,685
Revised Modified Income	Rs.	3,17,290
+ Agricultural Income for rate purposes	Rs.	70,500
Tax thereon	Rs.	90,337
Less : Agricultural rebate	Rs.	13,100
Total	Rs.	77,237
Less : rebate u/s 88	Rs.	10,500
Total payable	Rs.	66,737
Add: Education Cess at 2%	Rs.	1,335
Balance Payable	Rs.	68,072
Less: Tax Deducted at Source	Rs.	16,850
Balance Payable	Rs.	51,222
Add: Interest u/s 234 A		4,096/-
Interest u/s 234 B	{6144/-+[(51,222+4096+6144+1895 – 50,000 = 13357×21%] 2,793/-} =	8,937/-
Interest u/s 234 C		1,895/-
Total payable	Rs.	66,150
Less: Tax paid u/s 140(A)	Rs.	50,000
Balance tax payable	Rs.	16,150

06. Subsequently, the AO passed another order u/s.143(3) r.w.s.254 of the Income-tax Act, 1961 ('the Act' in short), on 14.12.2010 after examining the issues set aside by the Tribunal to him. Pursuant to such proceedings an order was passed and the additions as made in the original assessment order, appeared here also.

07. Assessee once again moved the CIT (A). One of the arguments raised by assessee before the CIT (A) was that AO had on 03.12.2009 given effect to the Tribunal directions thereby becoming functus officio. Thus according to the assessee third round of proceedings taken up by the

AO culminating in the order dt.14.12.1010 was neither an assessment order nor an order giving effect to the Tribunal direction. As per the assessee, there was no power with the AO to pass such orders under any of the provisions of the Act. However CIT (A) was not impressed by the above arguments. According to him the first order dt.03.12.2009 was only to give effect to the relief allowed by lower authorities. Second order in which additions were made, was passed pursuant to directions of this Tribunal, after examining the matters set aside by it. Thus according to CIT (A), orders passed by the AO were in accordance with law and in conformity with the direction of the Tribunal. However CIT (A) did not adjudicate on the merits of the additions made by the AO, giving a reason that the issues relating to these were duly addressed by the AO in the assessment order and assessee could not rebut any of such findings.

08. Now before us, Ld. AR strongly assailing the order of CIT (A) reiterated the same contentions taken before the CIT (A). According to him, once the order giving effect to appellate direction was passed by the AO on 03.12.2009, there was nothing more left for him to do. As per the Ld. AR, AO had not issued any notice u/s.148 or u/s.154 of the Act. Thus the assumption of jurisdiction for making a subsequent assessment was

beyond the powers vested on an AO under the Act, as per the Ld. AR. Thus according to him, the proceedings culminating in the order dt.14.12.2010 was illegal was void.

09. Per contra, Ld. DR supported the orders of authorities below.

10. We have perused the orders and heard the rival contentions. Purported order dt.03.12.2009 giving effect to direction of the Tribunal has been reproduced by us at para five above. One of the items on which relief is stated to have been allowed by the Tribunal, in the above order is a sum of Rs.25,58,685/-. However, relevant part of the Tribunal order dt.30.10.2009 has been reproduced by us at para four above. It is evident that Tribunal had set aside all the issues assailed by the assessee before it. Relief given by CIT (A) coming to Rs.4,85,000/- was never challenged by the Department before the Tribunal. Thus in our opinion the order dt.03.12.2009 of the AO did not give effect to the Tribunal order, in the sense that the set aside issues were not examined by the AO. This was taken up by the AO at a later instance and the resultant order was passed by him on 14.12.2010. No doubt the order mentions as one passed u/s.143(3) r.w.s. 254 of the Act. It is clear from the said order that AO had examined all the issues which were set aside by the Tribunal. Hence, we cannot say

that the order passed by the AO pursuant to such proceedings were invalid or bad in law. We do not find any reason to interfere with the order of CIT (A). Nevertheless we also find that CIT (A) had not examined the merit of the additions assailed by the Assessee. We therefore deem it fit to set aside the order of CIT (A) in so far as the merits of the addition are concerned, so that he can adjudicate the grounds taken by the assessee in this regard in accordance with law. Needless to say the additions deleted by CIT (A) in the original round of proceedings cannot be again done.

11. In the result, appeal of the assessee is treated as partly allowed for statistical purpose.

Order pronounced in the open court on 29th day of July, 2016.

Sd/-

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

MCN

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order