2023:DHC:7373-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 01.09.2023*

\+ **ITA 440/2023**

DINESH DAHIYA ..... Appellant

Through: Appellant-in-person along with Mr Jayant Tripathi and Mr Sarfaraz Ahmed, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX - DELHI 20 ..... Respondent

Through: Mr Kunal Sharma, Sr Standing Counsel with Ms Zehra Khan, Standing Counsel along with Mr Shubhendu Bhattacharyya, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. We have heard learned counsel for the parties.

2. According to us, the appeal deserves to be admitted.

2.1 It is ordered accordingly. Resultantly, the following question of law is framed for consideration:

(i) Whether the Income Tax Appellate Tribunal [in short, "Tribunal"] misdirected itself on facts and in law, in directing the addition of Rs. 2,50,000/- on the ground that is represented unexplained cash deposit,

without having regard to the loss suffered by the appellant/assessee while trading in equities and commodities?

3. With the consent of learned counsel for the parties, the appeal is taken up for hearing and final disposal at this stage.

4. This appeal concerns Assessment Year (AY) 2011-12.

5. The record shows that the appellant/assessee had not filed his Return of Income (ROI). Consequently, the appellant/assessee was served with a communication dated 12.07.2012 bringing to his notice that no ROI had been filed. The appellant/assessee responded to the said communication *via* letter dated 12.07.2012, declaring that he had earned no taxable income for the AY in issue.

5.1 Thereafter, the appellant/assessee received another communication dated 12.06.2013, which sought information from the appellant/assessee with regard to the cash deposit of Rs. 10,51,885/- made in the bank account maintained by the appellant/assessee.

5.2 The appellant/assessee responded to this communication as well *via* letter dated 14.11.2013. *Inter alia,* the appellant/assessee provided explanation with regard to the cash deposit. The explanation given by the appellant/assessee was, broadly, as follows:

(i) Rs. 3,19,500/- was received as a gift on the appellant/assessee's birthday.

(ii) The balance amount was deposited by him, evidently in cash, from money received in his capacity as employee of Religare Securities Ltd (RSL). He was in the employment of RSL between January 2000 and October 2009. [The employee code, as well as the salary slips, were furnished].

6. The Assessing Officer (AO) was not satisfied with the explanation furnished and, therefore, issued a notice to the appellant/assessee dated 07.03.2018 under Section 133(6) of the Income Tax Act, 1961 [in short, "Act"]. The appellant/assessee was called upon to furnish information with regard to the aspects mentioned therein.

6.1 Concededly, the appellant/assessee did not respond to the aforementioned notice.

7. Resultantly, the AO issued a notice dated 27.03.2018 under Section 148 of the Act. Admittedly, the appellant/assessee filed an ROI in response to the said notice on 18.08.2018.

8. The record also shows that the appellant/assessee was served with a notice under Section 142(1) of the Act on 10.11.2018. In response to the said notice, the appellant/assessee appears to have filed a reply on 21.12.2018. The AO, after issuing a final show cause notice dated 05.12.2018, proceeded to frame the assessment order. The assessment order was framed on 24.12.2018. The operative part of the said assessment order reads as follows:

> *"4. As per ITS information received from ITD system, the assessee has cash deposited in his saving bank account amounting to Rs. 10,51,885/- (There are multi cash credit entries found in his bank statement) during the F.Y. 2010-11. On perusal of reply of the assessee it is cleared that the assessee had received amounting to Rs. 3,19,500/- as gift from his parents and Rs. 1,50,000/- as saving from his past job in Religare Securities Ltd, Bahadurgarh, Haryana. In this regard the assessee has submitted on oath affidavits which is perused and placed on record. Therefore, amount of Rs. 4,69,500/- out of Rs. 10,51,885/- is accepted as explained and balance cash deposit of Rs. 5,82,385/- is computed as unexplained income of the assessee for AY 2011-12. Hence amount of Rs. 5,82,385/- is added back to the income of assessee to tax for the year under consideration as unexplained income received from undisclosed sources u/s 68 of the I.T. Act, 1961.*
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> ***(Addition: - Rs 5,82,385/- u/s 68 of the IT Act)***

I am satisfied that assessee has concealed the particulars of income for the relevant period therefore; penalty proceedings u/s 271(1) (c) of the IT Act are initiated separately.
5. On perusal of records placed on file it has been noticed that you have entered into share transaction amounting to Rs. 1,28,01,92,568/- and on perusal of reply of the assessee net value of profit and loss made in each transactions comes to Rs. 19,89,090/- and net profit at presumptive rate of 8% on 19,89,090/- comes to Rs. 1,59,127/-. Out of share transaction net profit amounting to Rs. 1,59,127/-is presumed as undeclared income of the assessee for the F.Y. 2010-11 relevant to AY 2011-12. In this regard assessee has submitted reply that he got loss in the AY 2011-12. Therefore the net profit at presumptive rate of 8 % is not sustained. The reply of the assessee has been examined and considered.
6. The assessee failed to comply the provisions of section 139(1) of the IT Act. Therefore penalty proceedings u/s 271 has been initiated separately.
7. Assessed at an income of ***Rs. 5,86,860/-.*** *Charge interest of the IT Act accordingly. Give credit of pre-paid taxes. Issue demand notices and challan. Penalty proceedings u/s 271F and 271(1) (c) of the It Act, 1961 have been initiated separately."*

[Emphasis is ours]

9. The matter was carried in appeal by the appellant/assessee to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"]. The CIT(A), *via* order dated 29.11.2019, partly allowed the appeal by reducing the presumptive rate of profit from 8% to 5%. This is evident on perusal of the following:

"6.1.1 The appellant during appeal hearing submitted that the reopening of the case u/s 147 of the Act was not correct as reopening was done by the Assessing Officer wholly and solely upon the bank statement of the assessee. I have perused the assessment order and found that the Assessing Officer has noted that information was received that the assessee has deposited cash of Rs. 10,51,885/- in his savings bank account and had entered into share transactions to the tune of Rs. 1,28,01,92,568/- during the year. The Assessing Officer also got information that the assessee had filed his ITR for the impugned year. The Assessing Officer issued a letter calling for information u/s 133(6) of the Act to the assessee on 07.03.2018 regarding non filing of ITR but there has been no compliance from the assessee to this notice. The Assessing Officer therefore after obtaining approval from the proper authority reopened the case of the appellant u/s 147 of the Act and issued

notice u/s 148 of the Act. The appellant responded to the notice and filed his submission and filed ITR for the impugned year on 18.08.2018. During the assessment proceedings the appellant did not raise any objection regarding the reopening of the assessment proceedings u/s 147 of the act. The reopening of the case by the Assessing Officer is treated to be valid for two reasons. Firstly there was reasonable amount of cash deposit and share transaction of Rs. 128 crores and no information regarding filing of ITR by the appellant. Secondly the appellant has accepted the reopening u/s 147 of the Act by filing ITR in response to notice u/s 148 of the Act and by not raising any objection regarding reassessment proceedings before the Assessing Officer.

6.1.2 The Assessing Officer had collected information regarding cash deposit and out of the cash deposit of Rs. 10,51,885/- found the amount of Rs. 4,69,500/- to be explained and added the balance to the total income of the appellant u/s 68 of the Act. The appellant during appeal hearing did not provide any other reason to refute the finding of the Assessing Officer. The addition made by the Assessing Officer is therefore confirmed. Besides this the Assessing Officer had not accepted the declaration of profit of Rs. 4,470/- by the appellant from share trading business. But the appellant could not substantiate his stand of earning such low income either before the Assessing Officer or before the undersigned. I therefore have no reasons to refute the finding of the Assessing Officer. The Assessing Officer had computed the net profit of the appellant at 8% of net value of profit and loss made of Rs. 19,89,090/-. The Assessing Officer is directed to estimate this income of net profit at 5% of the net value of profit and loss made by the appellant."

[Emphasis is ours]

10. Being dissatisfied, the appellant/assessee carried the matter in appeal to the Tribunal. The Tribunal partly allowed the appeal preferred by the appellant/assessee and thus, reduced the addition to Rs. 2,50,000/-, having regard to the fact that he had made withdrawals during the period under consideration.

11. Insofar as presumptive profit from trading in equity and commodities was concerned, the Tribunal sustained the conclusion arrived at by CIT(A). For the sake of convenience, the relevant part of the Tribunal's order is set

forth hereafter:

> *"6. I have heard rival submissions and perused the material available on record. The objections of the assessee against reopening of assessment are multifold. It is stated that in this case the assessment was reopened after expiry of four years. It is further contended that reopening of assessment is without authority of law as there is no failure on the part of the assessee to disclose the material information. The assessment is barred by time and the lower authorities failed to consider facts and material on record. It is further contended that authorities below failed to provide adequate opportunity. On merit it is stated that cash deposits of Rs. 10,51,885/- was made out of cash withdrawals. The authorities below failed to give set off of such withdrawals. Considering the fact that there was cash withdrawals during the year under consideration, the addition is restricted to a sum of Rs. 2,50,000/, as the probability of utilization of withdrawals cannot be ruled out. The grounds raised against legality of reopening on the basis that there was no failure on the part of assessee, it is recorded by the AO that no return was filed by the assessee and there was huge transaction in shares. The grounds raised by the assessee are dismissed. Thus, addition made in respect of cash deposits is sustained to the extent of Rs.2,50,000/- and in respect of share transactions, the addition made by the Revenue is hereby confirmed. The grounds of appeal are partly allowed."*

[Emphasis is ours]

12. What is not disputed by the appellant/assessee, who appears in person, is that after the notice under Section 148 of the Act was issued, the ROI was filed, in which the nominal income amounting to Rs.4,470/- was shown. It is, however the submission of the appellant/assessee that the nominal income was shown although the appellant/assessee had suffered a loss, as he was advised to do so by the AO.

12.1 In support of his plea that the appellant/assessee had indeed suffered a loss, our attention is drawn to the computation sheet that was filed before the AO [See page 71 of the casefile.] Based on this document, the appellant/assessee claims that he had, in fact, suffered a loss amounting to Rs. 3,39,373.75/-.

12.2 The argument of the appellant/assessee thus, was that the AO, after considering the reply of the appellant/assessee, had dropped the proposed addition made with regard to the presumptive profit earned by him on trading in equity and commodities.

12.3 For this purpose, our attention was drawn to paragraph 5 of the assessment order. For the sake of convenience, the same is extracted hereafter:

> *" On perusal of records placed on file it has been noticed that you have entered into share transaction amounting to Rs. 1,28,01,92,568/- and on perusal of reply of the assessee net value of profit and loss made in each transactions comes to Rs. 19,89,090/- and net profit at presumptive rate of 8% on 19,89,090/- comes ot Rs. 1,59,127/-. Out of share transaction net profit amounting to Rs. 1,59,127/- is presumed as undeclared income of the assessee for FY 2010-11 relevant to AY 2011-12. In this regard assessee has submitted reply that he got loss in the AY 2011-12. Therefore the net profit at presumptive rate of 8% is not sustained. The reply of the assessee has been examined and considered."*

13. It was therefore contended, that the AO had made an addition only with regard to the cash deposit, which the AO had pegged at Rs. 5,82,385/- and thus, pegged the appellant/assessee's income at Rs. 5,86,860/-.

13.1 In sum, the appellant/assessee's submission is that both the CIT(A) as well as Tribunal have failed to notice that the AO had made no addition with regard to the presumptive income said to have been earned by him on

account of trading in equity and commodities, the submission being that if the loss in trading and equity was considered, then the addition made by the Tribunal amounting to Rs. 2,50,000/- would get set-off.

14. Mr Kunal Sharma, learned senior standing counsel who appears on behalf of the respondent/revenue says, that the observations made by the AO in paragraph 5 of the assessment order are clearly an inadvertent error which was corrected by the CIT(A).

15. Mr Sharma thus points out that the only remission that the CIT(A) had made was that he reduced the presumptive rate of profit from 8% to 5%, which was sustained by the Tribunal.

16. We have heard learned counsel for the parties and perused the record.

17. According to us, a plain reading of paragraph 5 does indicate that after considering the reply of the appellant/assessee, the AO dropped the proposed addition with regard to the profit said to have been made by the appellant/assessee while trading in equity and commodities.

17.1 This aspect somehow was not noticed both by the CIT(A) as well as the Tribunal. As noticed hereinabove by us, the Tribunal only dealt with the addition made on account of cash deposit which it chose to scale down to Rs. 2,50,000/- from Rs. 5,82,385/-.

18. Having regard to the aforesaid circumstances, according to us, the question of law, as framed, must be answered in favour of the appellant/assessee for statistical purposes.

18.1 It is ordered accordingly. The impugned order passed by the Tribunal is set aside.

19. The matter is remanded to the Tribunal for a *de novo* examination, against the backdrop of the findings arrived at by the AO in paragraph 5 of

the assessment order.

20. The appeal is disposed of, in the aforesaid terms.

21. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 1, 2023
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