<u>आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCHE, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.1007, 1008 & 1541/Ind/2016
Assessment Year: 2010-11,2012-13&2010-11

M/s. Patidar Hospital & Research Centre 12-13,Kshapnak Mark, Freeganj Ujjain (M.P.) (Appellant)	**<u>बनाम</u>**/ Vs.	ITO-2(1), Ujjain (M.P.) (Revenue)
P.A. No.AAJFP1661R		

Appellant by	Shri Ashish Goyal & Shri N.D. Patwa, A.Rs
Respondent by	Shri R.P. Mourya, DR
Date of Hearing:	**26.07.2018**
Date of Pronouncement:	**21.08.2018**

<u>आदेश / O R D E R</u>

<u>PER KUL BHARAT, J.M:</u>

These three appeals by the assessee pertaining to the assessment years 2010-11 & 2012-13 against the orders

dated 22.6.2016, 2.11.2016 & 23.6.2016 of the Ld. CIT(A), Ujjain. All the appeals were taken up together and are being disposed off by way of this consolidated order. First we take up the appeals pertaining to the assessment year 2010-11 i.e. ITA 1007/Ind/2016.

2. The assessee has raised following grounds of appeal:

1. The assessment order is invalid, barred by limitation, illegal, bad in law, void-ab-initio and therefore liable to be quashed.

2. The Ld. CIT(A) erred in sustaining the assessment order which is invalid, barred by limitation, illegal, bad in law, void-ab-initio and therefore liable to be quashed.

3. The Ld. CIT(A) erred in making enhancement income of Rs.10,00,000/- on account of investment in building by not allowing deduction u/s 80IB(11C) on said amount offered in survey.

4. The Ld. CIT(A) erred in making enhancement income of Rs.15,01,852/- in excess cash by not allowing deduction u/s 80IB(11C) on said amount offered in survey.

5. The Ld. CIT(A) erred in confirming in addition of Rs.1,52,588/- for non deduction of TDS on securities charges.

6. The Ld. CIT(A) erred in confirming in addition of Rs.55,000/- for non deduction of TDS on AMC charges paid to Siemen Ltd.

7. The Ld. CIT(A) erred in confirming in addition of Rs.1,42,361/- for non deduction of TDS on Medical and Surgical expenditure. paid to Hoswin Incinerator Pvt. Ltd.

Briefly stated the facts are that the case of the assessee was picked up for scrutiny assessment and assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') was framed vide order dated

23.3.2013. The A.O. while framing assessment made addition by invoking the provisions of section 40(a)(ia) of the Act. It is also pertinent to note that a survey action was carried out at the business premises of the assessee firm on 21.8.2009. The assessee made two disclosures of income in respect of investments made in building of Rs.10 lakhs and excess cash found of Rs.15,01,852/-. These amounts were disclosed in the return as the income from hospital. On these amounts the assessee claimed deduction u/s 80IB(11C) of the Act. This deduction was disallowed by the A.O. However, aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A) who after considering the submission of the assessee and material on record, sustained the disallowance made u/s 40(a)(ia) of the Act and also enhanced the returned income by disallowing the deduction u/s 80IB(11C) of the Act on the amount surrendered during the survey. Against this order of the Ld. CIT(A), the assessee is in appeal before this Tribunal.

3. Ground Nos.1 & 2 are against the legality of the order. In respect of these grounds, the Ld. counsel for the assessee has not made any submissions and submitted that these grounds are general in nature, therefore these

grounds needs no separate adjudication. We hold accordingly. Hence, ground numbers 1 & 2 are dismissed.

4. Ground Nos.3 & 4 are in respect of disallowing the deduction claimed in respect of the amount surrendered during the survey. Ld. Counsel for the assessee reiterated the submissions made in the written submissions. The submissions of the assessee are reproduced as under:

SUBMISSIONS

The appellant is challenging the disallowance on two counts:

I. Power of enhancement
II. Disallowance on merits

I. Enhancement is not valid

1. It is a settled law that the powers of ld CIT(A) are wide. U/s. 251(1)(a), ld CIT(A) has the power to "confirm, reduce, ***enhance*** or annul the assessment".

Further, u/s. 251(2), an opportunity of being heard shall be provided before enhancement of assessment. Also, under Explanation to section 251, it has been clarified that in disposing of an appeal, the CIT(A) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

There is no doubt that the CIT(A) can "enhance the assessment". It is undisputed that within the four corners of the sources processed by the AO, the CIT(A) can enhance the assessment. This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory.

2. The power of enhancement has been a matter of judicial consideration. It has been settled by the various courts that the powers of enhancement are wide, but they are not unfettered.

Ld CIT(A) can do enhancement of "assessment". So he can do enhancement only on points which were subject matter of assessment.

3. The appellant relies on the following cases:

a. ***CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC),*** wherein it was held that It was held *inter alia* that in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering a new source of income not considered by the ITO in the order appealed against.

b. ***CIT* v. *Rai Bahadur Hardutroy Motilal Chamaria*** **[1967] 66 ITR 443 (SC)**

It was held that the power of enhancement under section 31(3) was restricted to the subject matter of assessment or the source of income, which had been considered expressly or by clear implication by the Assessing Officer from the point of view of taxability and that the AAC had no power to assess the source of income, which had not been taken into consideration by the Assessing Officer.

c. ***CIT vs Sardari Lal & Co. 251 ITR 595 (Del.)(FB)***

…….the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in *Union Tyres'* case (*supra*) of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of.

d. ***CIT vs B.P. Sherafudin 399 ITR 524 (Ker.)***

In a very recent decision, the Kerala High Court after considering the entire law on the subject held that the powers of ld CIT(A) are wide enough but they do not go to the extent of displacing the powers u/s. 147/ 148 or u/s. 263.

e. ***Bikram Singh (2017) 82 taxmann.com 230 (Del. Trib)***

The assessee purchased and sold certain land during relevant year and also earned agricultural income. The Assessing Officer disallowed brokerage claimed by the assessee in respect of land transaction. The Commissioner (Appeals) however directed the Assessing Officer to tax capital gain on sale of land.

Held that the Commissioner (Appeals) acted beyond its power by directing the Assessing Officer to tax the capital gains in respect of sale of land though there was no addition made by the Assessing Officer in the assessment order to that respect of Capital gain is an independent and different source of income and was not the subject matter of appeal before him nor was the issue considered by the Assessing Officer by framing an assessment order. Instead the Assessing Officer termed the same as commission on the sale of land. Thus, order of the Commissioner (Appeals) could not be sustained.

The Commissioner (Appeals) cannot touch upon an issue which does not arise from the order of assessment and was outside the scope of the order of assessment.

In the present case, the issue regarding deduction u/s. 80IB(11C) was not before the ld CIT(A) nor did it arise out of the order of assessment. The only addition which was challenged before the ld CIT(A) was disallowance u/s. 40(a)(ia).

The appellant therefore claims that the ld CIT(A) exceeded his jurisdiction in making an enhancement in the given case. The addition is therefore unjustified and uncalled for.

II. <u>Deduction u/s. 80IB(11C) – on surrender during survey u/s. 133A</u>

A survey u/s. 133A was conducted at the business premises of the assessee firm. The surrender during survey was on account of unaccounted cash and investment in building.

The very important fact as quoted by ld Assessing Officer is as under (at pg. 2 para 2):

"2. The assessee firm is running Hospital & Research Center. The assessee has shown gross receipts to the tune of Rs. 2,55,89,106 as against Rs. 78,72,081 shown in the immediately preceding year. The disclosures of Rs. 10,00,000/- on account of investment in building and excess cash of Rs. 15,01,852 made during the course of survey proceedings u/s. 133A conducted on 21/08/2009 were duly offered for taxation in Profit and Loss account as "Income from Hospital"."

Thus, the same was shown as income from hospital and same fact was not denied by the ld CIT(A). No other source from where the same could have been earned was pointed by the ld CIT(A).

The appellant relies on **<u>CIT vs Allied Industries 229 CTR 462 (H.P.)</u>, where it was held as under:**

The assessee-firm had offered a sum of Rs. 2,50,000 for taxation to cover up all types of discrepancies. It was nowhere the case of the assessee or the revenue that this was income derived from undisclosed sources. The addition of Rs. 2,50,000 was made to the income of the business itself. Therefore, it would have to be deemed to be income from the business of the company. If it was income derived from the business then such income was to be considered while working out the deduction allowable under section 80-IB. Since the entire profits of the business were entitled for 100 per cent deduction, the addition on account of such discrepancy would only result in the enhancement of the income of the business and would be entitled for such deduction.

In the instance case, the declaration was offered in the regular return filed and offered for taxation in Profit & Loss account – Income from Hospital. Thus, the source was established and thus is eligible income u/s 80IB(11C).

GROUND NO 5 TO 7: DISALLOWANCE U/S 40(a)(ia)

FACTS

1. The appellant- firm has made the following payments without deducting TDS on following:-

Ground No.	Particulars	Amount (Rs.)
5	For security Charges	1,52,588
6	For AMC Charges	55,000
7	For Medical and Surgical expenses	1,42,361
	Total	**3,49,949**

2. As per the provisions of Section 40(a)(ia), the amount from which tax is bound to be deducted and not deducted from payment of chargeable income to a resident are not allowed as deduction. Thus, the ld Assessing Officer referring to the above provisions disallowed the total amount of Rs.3,49,949/-

3. The appellant submitted that its income is eligible for deduction u/s 80IB(11C), so any disallowance u/s 40(a)(ia) which will be added as "eligible" income of the assessee; on which assessee would get deduction u/s 80IB(11C).

4. The ld CIT(A), confirmed the disallowance.

SUBMISSIONS

The submissions of the appellant are two fold:

I. In any case, deduction is admissible for disallowance u/s. 40(a)(ia)

II. Disallowance u/s. 40(a)(ia) is not called for.

I. Chapter VI-A is admissible on the profit so enhanced by the disallowance

In any case, and without prejudice, if the profit is enhanced u/s. 40(a)(ia), the effect of same would be that the "eligible" income from "Business or Profession" shall be enhanced from the hospital business. The same would qualify for deduction u/s. 80IB(11C).

1. The same has been accepted by CBDT in its ***Circular no 37/2016 dated 02.11.2016*** where the board has accepted the settled position that the disallowance made under section 32, 40(a)(ia),40A(3), 43B etc of the act and other specified disallowances, related to the business activity against which the Chapter VI-A is admissible on the profit so enhanced by the disallowance.

2. Further reliance is placed on the following judgments

a. ***Kewal Construction [2013] 354 ITR 13 (Gujarat)***

"*Even if a certain expenditure which was incurred by the assessee for the purpose of developing housing project was not allowable by virtue of section 40(a)(ia) of the Act, since the assessee had not deducted the tax at source as required under law, it cannot be denied that such disallowance*

would ultimately go to increase the assessee's profit from the business of developing housing project. Whatever be the ultimate profit of assessee as computed even after making disallowance under section 40(a)(ia) of the Act, would qualify for deduction as provided under the law."

b. ***CIT-IV, Nagpur v.Sunil Vishwambharnath Tiwari 290 CTR 234 (Bombay)***

"disallowance under Section 40[a][ia] cannot be treated separately and it gets added back to the gross total income of the assessee. Section 40 itself points out that due to error of assessee, such expenditure cannot be deducted while computing income chargeable under the head "profit and gains of business or profession".

II. Disallowance u/s. 40(a)(ia) is not called for

The original obligation to pay the tax is of the payee. Our obligation as the payer is to deduct the tax and deposit the same. If the tax is paid by the payee; the obligation of the deductor ends and the deductor shall not be penalized. The legislature, considering the same, brought a clarificatory amendment in form of second proviso to section 40(a)(ia) as under:

"*Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of Section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso"*

The above proviso is also applicable in our case as the PAN numbers of the parties are provided on **PB 13-14:**

a. Hoswin Incinerator Pvt ltd – PAN AACCH1534K
b. Siemens Ltd – PAN AAACS0764L

Disallowance in our case, would be triggered, only when the deductees failed to pay their taxes directly to the government. The department ought to have verified that the deductees had paid the tax directly or not.

The same is supported by :

a. ***Ansal Land Mark Township (P.) Ltd 377 ITR 635***

Second Proviso to section 40(a)(ia) is declaratory and curative and it has retrospective effect from 1-4-2005. Thus it is applicable for our appeal which is for A.Y. 2010-11.

b. **Malwa Education [ITA No. 917/ IND/ 2016 Order dt. 10.01.2018]**

Following the judgment of Delhi High Court in Ansal Land Mark (supra), the matter was remanded to the ld Assessing Officer to examine whether the deductee has paid the taxes directly or not.

Thus, in light of the above submissions, it is prayed that the addition on account of Sec 40(a)(ia) amounting to Rs. 3,49,949/- may kindly be deleted or in alternate the matter may be remanded back to ld Assessing Officer for examination as to whether deductee has paid taxes directly or not.

5. On the contrary, Ld. D.R. opposed these submissions and supported the orders of the authorities below. He submitted that there is no evidence suggesting that the amount so surrendered during the course of survey was related to the receipts from hospital. In rejoinder, the Ld. Counsel for the assessee submitted that the revenue has not brought any material suggesting that the assessee was having any other source of income whereby he could have earned such income. He submitted there that the Ld. CIT(A) erred in rejecting the claim of deduction on this amount and secondly enhancing the income without giving opportunity to the assessee.

6. We have heard the rival contentions, perused the material available on record and gone through the orders of the authorities below. The Ld. CIT(A) disallowed the deduction on this amount relying on the provisions of section 69A of the Act. For the sake of clarity, section 69A of the Act is reproduced hereunder:

"Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any,

maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.]"

7. Admittedly, the amount surrendered during the course of survey was not found to be recorded in the books of accounts of the assessee. The contention of the assessee is that the revenue has not brought on record any other source of income. Therefore, these investments were out of the receipts of the hospital. We failed to understand the logic of the assessee for not recording such receipts if they are earned from the hospital as the assessee was entitled for deduction u/s 80IB(11C) of the Act. Merely stating that this amount pertains to the receipts from hospital would not absolve the assessee from the burden to prove that these amounts were part of the receipts from the hospital. The assessee has not placed any second material suggesting that the amount pertained to the receipts from hospital. Therefore, we do not see any reason to interfere into the decision of the Ld. CIT(A). Further, the contention that the Ld. CIT(A) was not empowered for enhancement as this was not subject matter of the assessment. This averment of the assessee is contrary to the record. The

assessee itself had claimed deduction on this amount u/s 80IB(11C) of the Act. Therefore, the contention is devoid of any merit, hence rejected. Ground Nos.3 & 4 of the assessee are dismissed.

8. Ground Nos.5 to 7 relates to the addition made by invoking provisions of section 40(a)(ia) of the Act for non-deduction of TDS on security charges. Ld. Counsel for the assessee reiterated the submissions made in the written submissions.

9. Ld. D.R. opposed these submissions.

10. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The submission of the assessee is that these amounts have been duly declared by the payee. We find merit in the contention of the assessee that the disallowance cannot be made where the deductee have disclosed the amount in their respective returns. Therefore, we direct the A.O. to delete this amount. Ground Nos.5 to 7 are partly allowed. Appeal of the assessee is partly allowed.

ITA No.1541/Ind/2016:

11. The assessee has raised following grounds of appeal:

> *1. The Ld. CIT(A) erred in levying the penalty of Rs.7,73,073/- u/s 271(1)(c).*

12. The only effective ground is against imposition of penalty by the Ld. CIT(A) u/s 271(1)(c) of the Act. The facts in brief are that in quantum proceedings during the appellate proceedings, Ld. CIT(A) disallowed deduction in respect of the amount disclosed during the course of survey and also initiated penalty on this disallowance and subsequently imposed the impugned penalty. Ld. Counsel for the assessee reiterated the submissions as made in the written synopsis.

13. On the contrary, Ld. D.R. opposed these submissions.

14. We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The only contention of the assessee against the penalty proceedings is that the notice issued u/s 274 r.w.s. 271 of the Act is defective. The Ld. Counsel for the assessee has drawn our attention to the paper book page no.15, wherein this notice is enclosed. For the sake of clarity, this notice is reproduced as under:

NOTICE UNDER SECTION 274 READ WITH SECTION 271

OF THE INCOME TAX ACT, 1961

No.CIT(A)/UJN/2016-17/3026
PAN:AAJFP1661P

Office of the
Commissioner of Income Tax (A)
Ujjain, dated 22.6.2016

To

M/s. Patidar Hospital & Research Centre,

12-13, Kshapnak Marg,

Freeganj, Ujjain (M.P.)

Whereas in the course of proceedings before me for the assessment year 2010-11 it appears to me that you:-

**have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the India Income Tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income Tax Act, 1961, No._____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.*

**have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income Tax Act, 1922 or under section 142(1)/143(2) of the Income Tax Act, 1961 No._____*

Have concealed the particulars of your income or _____furnished inaccurate particulars of such income.

You are hereby requested to appear before me at 11.00A.M. on 08.07.2016 and show cause why an order imposing a penalty on you should not be made under section 271 of the Income tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.

Yours faithfully,

Sd/-
(H.P. Meena)

**Delete inappropriate words and*
Paragraphs

Commissioner of Income Tax (Appeals)

15. Ld. Counsel for the assessee has relied upon the judgement of the Hon'ble Karnataka High Court rendered in the case of CIT Vs. Manjunath Cotton Mills 359 ITR 565 and also the judgement of the Hon'ble Supreme Court in the case of CIT Vs., Reliance Paper Products 322 ITR 158. From the above notice issued by Ld. CIT(A), it is clear that the Ld. CIT(A) failed to strike off one of the charge, therefore, respectfully following the Hon'ble Karnataka High Court decision in the case of CIT Vs. Manjunath Cotton Mills (supra), we hereby delete the penalty. This appeal of the assessee is allowed.

ITA 1008/Ind/2016:

16. The assessee has raised following grounds of appeal:

1. The assessment order is invalid, barred by limitation, illegal, bad in law, void-ab-initio and therefore liable to be quashed.

2. The Ld. CIT(A) erred in sustaining the assessment order which is invalid, barred by limitation, illegal, bad in law, void-ab-initio and therefore, liable to be quashed.

3. Ld. CIT(A) erred in confirming addition of Rs.1,55,778/- for non deducting of TDS on payment made to M/s. Hoswin Incinerator Pvt. Ltd., Indore.

17. Ground Nos.1 & 2 are general in nature and hence no separate adjudication is required. Hence, ground numbers 1 & 2 are dismissed.

18. The only effective ground is Ground No.3, which is against confirming the addition of Rs.1,55,778/- for not deducting tax on payment made to M/s. Hoswin Incinerator Pvt. Ltd. The submission of the assessee is that this amount has been duly declared by the payee. We find merit in the contention of the assessee that the disallowance cannot be made where the deductee have disclosed the amount in their respective returns. Therefore, we direct the A.O. to delete this amount. Ground Nos.3 is allowed.

19. In the result, ITA No.1007/Ind/2016 is partly allowed, ITA No.1541/Ind/2016 is allowed and ITA No1008/Ind/2016 is partly allowed.

Order was pronounced in the open court on 21.08.2018.

Sd/-	Sd/-
(MANISH BORAD)	(KUL BHARAT)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Indore; दिनांक Dated : 21/ 08/2018

VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Sr. Private Secretary, Indore