

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER

ITA No.6695/Del/2018
Assessment Year: 2015-16

Sarvajit Bhatia A-362, Dabua Colony, Pali Road, Faridabad Pan no.AKMPB4292K	Vs	Income Tax Officer Ward – 11 (3) Faridabad
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Rakesh Jain, Advocate
Respondent by	Shri S. L. Anuragi, Sr. DR

Date of hearing:	02/07/2019
Date of Pronouncement:	21/08/2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 29.08.2018 of the CIT(A)-19, Faridabad relating to A. Y.2015-16.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary and sale and purchase of shares. He filed his return of income on 21.08.2015 declaring total income of Rs.4,25,400/- after claiming deduction under chapter VI-A. The case of the assessee was selected for scrutiny through CASS to examine the issue of commodity

transaction / derivative (futures) transaction. Statutory notices u/s. 143 (2) of the Act was issued on 26.07.2016 which was duly served on the assessee fixing the case for hearing on 08.08.2016. The assessee filed a revised return of income on 15.10.2016 declaring total income of Rs.5,90,400/-. The details of income declared in the revised return are as under :-

Income from salary	: Rs.5,90,400/-
Profits and gains from Business and Profession	:(-) Rs.14,73,068/-
Loss on speculation business	: Rs.58,329/-

3. The assessee also filed audited balancesheet and profit and loss account alongwith revised return of income and has shown sale of shares amounting to Rs.33,73,395/- and share purchase amounting to Rs.57,20,755/- and has shown loss of Rs.23,47,360/- and loss from Speculation business of share amounting to Rs.58,329/-. The assessee has also disclosed income of Rs.13,60,000/- under the head portfolio consultancy received during the F.Y.2014-15 in his revised return of Income. On perusal of the balance sheet filed by the assessee, the Assessing Officer noticed that the Balance sheet has been signed by the auditors on 30.09.2016 and Tax Audit Report was signed on 31.07.2015. He, therefore, asked the assessee vide questionnaire dated 30.06.2017 to give reply on the above. The assessee in his reply dated 12.07.2017 submitted that Balance sheet and Tax Audit Report has been signed by the auditor on 31.07.2015. This was a clerical mistake while printing the

balance sheet. The assessee was asked vide questionnaire dated 30.06.2017 and 19.09.2017 to furnish the sources to meet out the huge losses suffered by the assessee. The assessee in his reply submitted that loss to the extent of Rs.13,60,000/- has been met by him from the income earned by him from consultancy portfolio business receipt shown by him in his return of income and balance from the loans from bank and his salary Income. From the details of consultancy charges so received by the assessee, the Assessing officer noted that the same has been received in cash from 101 persons and each amount is below Rs.20,000/-. Rejecting the various explanation given by the assessee the Assessing Officer made addition of Rs.13,60,000/- being the cash deposits made in the bank account u/s. 68 of the IT Act as unexplained cash deposit.

4. So far as the revised return is concerned, the Assessing Officer noted that the assessee has maintained two bank accounts one with State Bank of Hyderabad where his salary was credited and other deposits were made. Besides that he has an account with ICICI Bank and Dmat account with ICICI direct. Financial transaction towards dealing in shares has been made from this account. While examining both the accounts the Assessing Officer noticed that cash and cheques have been deposited on various dates. The assessee was asked to furnish the source of deposit since it is directly relatable to his shares transaction activity. Rejecting the various explanation given by the assessee and relying on the decision of

Hon'ble Supreme Court in the case of CIT Vs. S. Raman Chettiar reported in 55 ITR 630 and various other decisions the Assessing Officer held that the assessee cannot avail himself of the advantage given u/s 139 (5) for filing a revised return. He accordingly held that the loss claimed on sale of shares is not allowable. He, therefore, rejected the loss on sale of shares claimed by the assessee in the revised return and determined the total income of the assessee at Rs.17,85,400/-.

5. In appeal the Ld. CIT(A) upheld action of the Assessing Officer.

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

1. *That under the facts and circumstances of the case and in law, as no reasonable opportunity has been allowed by both the lower authorities, therefore, both the lower authorities have passed the order against principles of natural justice.*

2. *That under the facts and circumstances of the case and in law, both the orders passed by the Ld. AO as well as by the Ld. CIT (A) are without application of mind by ignoring all the documents and details filed before them, therefore, the Assessment Order as well as CIT (A) appeal order is illegal and un - sustainable. (Ground No-1)*

3. *That under the facts and circumstances of the case and in law,*

both the lower authorities have erred in law as well as on merits in disallowing loss of Rs.14,73,068/- earned during the year, therefore, the whole disallowance made is illegal, unsustainable and without application of mind. (Ground No-2)

4 That under the facts and circumstances of the case and in law, both the lower authorities have erred in law as well as on merits in disallowing speculation loss of Rs. 58,239/- earned during the year, therefore, the whole disallowance made is illegal, unsustainable and without application of mind.” Ground No-3)

All the above grounds are mutually exclusive and not linked with each other. The appellant reserves the right to add, alter, amend or withdraw any grounds of appeal either before or at the time of hearing of this appeal.

7. The assessee has also raised the following additional ground :-

"Because the action is being challenged on facts & law for making addition of Rs. 13,60,000/- other than the issues for which assessee's case has been selected for limited scrutiny i.e. examination of commodity transaction & Derivative (Future) transaction overlooking the board instruction in respect of Limited scrutiny. Therefore assessment order passed in violation of Board's instruction, which are binding upon the AO & hence assessment order passed is bad in law & void-ab-initio."

8. After hearing both the sides and considering the fact that all material facts necessary for adjudication of the additional ground are available on record, the additional ground raised by the assessee is allowed in the light of the decision of Hon'ble Supreme Court in the case of NTPC Limited.

9. The Ld. Counsel for the assessee submitted that the case of the assessee was selected for scrutiny i.e. examination of commodity transaction / derivatives (futures) transactions. However, the Assessing Officer has gone beyond the scope of the limited scrutiny. Referring to the CBDT Instruction No.5/2016 dated 14.07.2016 he submitted that it is mandatory on the part of the Assessing Officer to obtain approval of the administrative PCIT/CIT/PDIT/DIT for converting a limited scrutiny case into a complete scrutiny case. Referring to the decision of the Pune Bench of the Tribunal in the case of Suresh Jugraj Mutha Vs. Addl. CIT in ITA No.5/PUN/2016 vide order dated 04.05.2018 for A.Y. 2011-12, he submitted that the Tribunal in the said decision has held that the order of the AO is void ab initio since the limited scrutiny case was converted to a full scrutiny case and no approval of administrative CIT was taken. The Tribunal observed that the reason for which the case was selected for limited scrutiny was for examination of commodity transaction and derivatives / future (transaction). However, the Assessing Officer has gone beyond the scope of the limited scrutiny and made some other addition. Referring to the CBDT Instruction No.5/2016 dated 14.07.2016 he submitted that it is mandatory

on the part of the Assessing officer to obtain approval of the administrative PCIT/ CIT / PDIT / DIT for converting a limited scrutiny case into a complete scrutiny case. He submitted that the Assessing Officer in the instant case has not followed the mandatory requirement of obtaining approval of the administrative CIT. Therefore, the various additions made by the Assessing Officer are not sustainable.

10. So far as the issue relating to filing of the revised return of income is concerned he submitted that since the return was revised u/s. 139 (5), therefore, the original return filed u/s. 139 (1) would not survive and the claim of loss not made in the original return but claimed in the revised return has to be allowed /carried forwarded. For the above proposition he relied on the decision of Hon'ble Gujarat High Court in the case of PCIT Vs. Babu Bhai Ramanbhai Patel reported in 249 taxman.com 470, the decision of the Mumbai Bench of the Tribunal in the case of Gilbarco Veeder Root India Pvt. Ltd. Vs. DCIT vide ITA No.2695/M/2017 order dated 07.09.2018 and various other decisions. So far as the merit of the case is concerned i.e. relating to deposit of cash and cheque in the bank account, he submitted that the assessee has filed the necessary details before the Assessing Officer and, therefore, the revenue authorities are not justified in not considering the same and making the addition.

11. The Ld. DR on the other hand heavily relied on the

decision of the Assessing Officer and CIT(A).

12. I have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the case of the assessee was selected for limited scrutiny to examine the issue of commodity transaction/ derivatives (futures) transactions as mentioned by the Assessing Officer in the body of the assessment order itself. However, the Assessing Officer in the instant case converted the limited scrutiny case to a full-fledged scrutiny case which is evident from the assessment order. I find the CBDT vide Instruction No.5/2016 dated 14.07.2016 and instruction No.225/402/2018 dated 28.11.2018 has issued certain guidelines for converting a limited scrutiny case to complete the scrutiny which is binding on the department. The Board has clearly mentioned that in a limited scrutiny case the Assessing Officer cannot travel beyond the issues for which the case was selected and in case the Assessing Officer wants to expand its scope of enquiry/ investigation other than the issues on which the case was selected for scrutiny, then in that case mandatory approval from the PCIT or CIT or PDIT or DIT has to be obtained.

13. A perusal of the Assessment Order shows that no such approval has been taken. I, therefore, deem it proper to restore the issue to the file of the Assessing Officer with a direction to

verify as to whether such approval has been taken and in case no such approval has been taken then the addition so made by the Assessing Officer and upheld by the CIT(A) stands deleted. The additional ground raised by the assessee is accordingly allowed.

14. So far as the issue relating to revised return is concerned, I find the Assessing Officer did not consider the same on the ground that although the tax audit report was signed on 30.07/2015 and original return was filed on 21.08.2015 i.e. after 21 days from the date of the tax audit report, however, the assessee has not disclosed the loss on sale of shares in the original return. Relying on the decision of Hon'ble Supreme Court in the case of CIT Vs. Raman Chettiar which has been quoted by the Hon'ble Allahabad High Court in the case of Amjad Ali Nazir Ali Vs. CIT reported in 110 ITR 0419, the Assessing Officer held that although the said decision is under the provisions of the old Act, however, the same shall be applicable even to the new Act since the provisions are parimateria and assessee cannot take the advantage of provisions of section 139(5) by deliberately making the omission or wrong statement. I find the Ld. CIT(A) upheld the action of the Assessing Officer. While doing so he relied on the decision of Hon'ble Himachal Pradesh High Court in the case of Veer Bhadra Singh (HUF) Vs. PCIT vide order dated 05.10.2017 and the decisions of Hon'ble Madhya Pradesh High Court in the case of Sulemanji Ganibhai Vs. CIT reported in 121 ITR 373 and in

the case of CIT Vs. Dr. Kumari M. Dubey reported in 171 ITR 144. It is the submission of the Ld. Counsel for the assessee that non disclosure of loss claimed on shares was not willful or deliberate but inadvertent mistake and, therefore, in view of the decision of Hon'ble Gujarat High Court in the case of PCIT Vs. Babu Bhai Ramanbhai Patel(supra) and the decision of Mumbai Bench of the Tribunal in the case of Gilbarco Veeder Root India Pvt. Ltd. Vs. DCIT (supra). The revised return has to be accepted.

15. I find the Hon'ble Gujarat High Court in the case of Babu Bhai Ramanbhai Patel (supra) while deciding an identical issue has observed as under :-

3. *So far as question no. [B] is concerned, brief facts are that for the assessment year 2005- 06, the assessee filed the return of income on 30.11.2005 under Section 139(1) of the Act declaring total income of Rs.53,24,330/-. In such return, the assessee did not claim speculation loss of Rs. 69,93,450/-. Such return was, however, revised under Section 139(5) on 29.11.2006. The Assessing Officer disallowed the carry forward of the speculation loss on the ground that the same was not claimed in the original return but in the revised return. The CIT(A) as well as the Tribunal ruled in favour of the assessee. In particular, the Tribunal was of the view that once a return was revised under Section 139(5) of the Act, the original return filed under Section 139(1) would not survive. It was found that the revised return was filed within the time prescribed. The Tribunal did not accept the Assessing Officer's view that the revised return should be treated as non-est.*

4. *Before us learned counsel for the revenue placed heavy reliance on the provisions contained in sub-section (3) of Section 139 to contend that an assessee who wishes to carry forward any loss must file a return under sub-section (3) within the time permitted and only upon which the same would be treated as return under Section 139(1) of the Act. Counsel for the revenue submitted that when no return in terms of sub-section (3) of Section 139 claiming carry forward or set off loss was filed, such claim cannot be subject matter of a*

revised return. Had the assessee filed such return, the possibility of revising such return on finding any error would arise.

5. *We may notice that under sub-section (1) of Section 139, every person whose income for the previous year exceeds the maximum amount net chargeable to tax, is required to file a * return before the due date. Sub-section (3) of Section 139 provides that any person who has sustained a loss and claims that the loss should be carried forward would file a return of loss within the time prescribed under sub-section (1) and thereupon all the provisions of the Act shall apply as if it was a return under sub-section (1) of Section 139 of the Act. Under subsection 4 of Section 139, a person who has not furnished a return within the time allowed under sub-section (1) may still furnish a return at : ny time before the end of the relevant assessment year or before the completion of the assessment whichever is earlier. Subsection (5) of Section 139 provides that any person having furnished a return under subsection (1) or sub-section (4) discovers any omission or a wrong statement therein, he may furnish a revised return any time before the expiry of one year from the end of relevant assessment year or before the completion of the assessment whichever is earlier.*

6. *Sub-section (5) of Section 139, therefore, gives right to an assessee who has furnished a return under sub-section (1) or sub-section (4) to revise such return on discovery of any omission or a wrong statement. Such revised return, however, can be filed before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. This is precisely what the assessee did while exercising the*

right to revise the return. Sub-section (5) of Section 139 does not envisage a Situation whereupon revising the return if a case for loss arises which the assessee wishes to carry forward, the same would be impermissible. In terms, sub-section (5) of Section 139 allows the assessee to revise the return filed under subsection (1) or sub-section (4) as long as the time frame provided therein is adhered to and the requirement of the revised return has arisen on discovery of any omission or a wrong statement in the return originally filed. Accepting the contention of the revenue would amount to limiting the scope of revising the return already filed by the assessee flowing from sub-section (5). No such language or intention flows from such provision.

7. *The Allahabad High Court in case of Dhampur Sugar Mills Ltd. vs. Commissioner of Income Tax, Delhi Central reported in [1973] 90 ITR 236, in the context of the Income Tax Act, 1922 held that the assessee is given a right to file a correct and complete return if he discovers an error or omission in the return filed earlier. The assessment can be completed only on the basis of the correct and complete return. The earlier return, after a revised return has been filed, cannot form the basis of assessment although it may be used to indicate the conduct of the assessee. There is a clear*

distinction between a revised return and a correction of return. Once a revised return is filed, the original return must be taken to have been withdrawn and substituted by a fresh return for the purpose of assessment.

8. *The Madras High Court in the case of Commissioner of Income Tax vs. Periyar District Cooperative Milk Producers Union Ltd. reported in [2094] 266 ITR 705 held that once the assessee had filed a return claiming carry forward loss under sub-section (3) of Section 139, a revised return could be filed in respect of such a return. We are conscious that we are not directly concerned with such a situation.*

9. *In view of the above discussion, we do not find any error in the view of the Appellate Tribunal. Tax appeal is, therefore, dismissed.*

16. I find the Mumbai Bench of the Tribunal in the case of Gilbarco Veeder Root India (P) Ltd. following the decision of Hon'ble Gujarat High Court cited (supra) has allowed the depreciation claimed in the revised return amounting to Rs.23,93,31,090/- which was not claimed in the original return.

17. So far as the decisions relied on by Ld. CIT(A) are concerned I am of the considered opinion that those decisions are not applicable to the facts of the present case. In all those decisions there were deliberate concealment in the original return for which it was held that the revised return would not supplant the original return. However, in the instant case, I am of the considered opinion that it is not a deliberate omission but an inadvertent error. Further, there is no decision of the Hon'ble Jurisdictional High Court on this issue. It is the settled proposition of law that when two views are possible on an issue, the view which is favourable to the assessee has to be followed. In this view of the matter I hold that the Ld. CIT(A) should not have upheld the action of the Assessing Officer in not considering the revised return filed. I, therefore, set aside the

order of the CIT(A) and direct the Assessing Officer to consider the revised return as in accordance with law. The ground raised by the assessee is accordingly allowed.

18. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 21.08.2019.

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 21.08.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	21.08.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	