

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 296/JP/2019
निर्धारण वर्ष/Assessment Year : 2011-12

Smt. Bhagwati Devi Meel Mohan Kunj, Veer Tejaji Colony Nawalgarh Road, Sikar	बनाम Vs.	The ITO Ward -3 Sikar
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AHBPD 6391 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal, CA
राजस्व की ओर से / Revenue by: Shri A.S. Nehra, Addl. CIT

सुनवाई की तारीख / Date of Hearing : 14/06/2022
उदघोषणा की तारीख / Date of Pronouncement: 16/08/2022

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal has been filed by the assessee against order of the ld. CIT(A)-4, Jaipur dated 3-12-2018 for the assessment year 2011-12 raising therein solitary ground as under:-

“ The ld. CIT(A) has erred on facts and in law in confirming the addition of Rs.44,93,520/- (Rs.3,84,000+Rs.9.09,520+Rs.32,00,000) on protective basis even when the same addition has been confirmed on substantive basis in the hands of firm M/s. Shri Ram Borewell & Construction Company.”

2.1 Apropos solitary ground of the assessee, brief facts of the case are that Assessee is a partner in M/s Shri Ram Borewell & Construction Company. She filed her return of income declaring income of Rs.1,89,250/- for the assessment year 2011-12. The AO received information from the ACIT, Circle Sikar that during the assessment proceedings of M/s Shri Ram Borewell & Construction Company, it was noticed that during the year assessee introduced capital in cash of Rs.32,00,000/- and received interest on partner's capital of Rs.3,84,000/- and remuneration of Rs.9,09,520/-. The AO on perusal of the return of income noted that the assessee has neither established the source of capital nor declared the interest and remuneration received. Accordingly, notice u/s 148 was issued on 11.03.2016 in response to which assessee filed return of income declaring income of Rs.2,20,150/- on 13.12.2016. It is noted that the the assessee vide letter dated 19.12.2016 explained that during the year under consideration neither any capital was introduced by her in the firm nor any remuneration nor interest was received from the firm. It was pointed out that in the appeal filed before Hon'ble ITAT, Jaipur Bench by the firm, the partners stated in their affidavits that they have not introduced any capital in the firm nor received any interest or remuneration but due to miscommunication/ misunderstanding between the tax auditor and the accountant, the incorrect financial statements and audit report was prepared. Therefore, the accounts of the firm were re-audited and submitted in appellate

proceedings. The Hon'ble ITAT in light of new evidences/ submissions, set aside the assessment order and directed the AO to frame denovo assessment in light of the information/ evidences so submitted. The AO, however, observed that since the concerned AO of the firm has not yet verified the submission/ evidences, it cannot be relied upon at this stage. Therefore, he treated the earlier old audit report as correct till fresh assessment is made of the firm and accordingly, made addition of Rs.44,93,520/- (32,00,000+ 3,84,000+9,09,520) in the hands of the assessee on protective basis till the case of the firm is decided afresh. The observation of the AO is as under:-

“7. Considering the submissions of the partner of the assessee firm M/s. Shree Ram Borewell & Construction Company, the Hon'ble ITAT Jaipur has set aside the order passed by the AO and has directed the AO to frame de novo assessment after giving reasonable opportunity.

8. I have considered the facts of the case and information furnished by the assessee. In the light of all the facts, I am of the view that whatever submission have been given by the assessee and other partners of the firm are not verified by the AO concerned. All the information introduced before the Hon'ble ITAT, Jaipur is yet to be verified by the AO while framing de novo assessment. So, new information cannot be relied upon at this stage. Therefore, I treat the facts of the old audit report as correct till fresh assessment is made in the case of the firm for the A.Y. 2011-12 and make addition to the income of assessee on protective basis till the case of the firm is decided afresh.

In the light of the above facts and discussion the income of the assessee for the A.Y. 2011-12 is recomputed as under on the protective basis.

1.	Income declared by the assessee us/ 148	Rs 2,20,150
	Addition on account of interest received on partners capital from M/s. Shree Ram Borewell & Construction Company	Rs.3,84,000
	Addition on account of remuneration received from M/s. Shree Ram Borewell	Rs.9,09,520

	& Construction Company	
	Addition on account of capital introduced in the firm M/s. Shree Ram Borewell & Construction Company in cash	Rs.32,00,000
2.	Total assessed income	Rs.47,13,670/-

2.2 The assessee carried the matter before the Ld. CIT(A), it was submitted that the set aside assessment of the firm was completed on 28.12.2017 wherein after rejecting the fresh information/ evidences, the AO in Para 8 made addition of the alleged capital introduced by the partners in the hands of the firm and also disallowed the interest and remuneration paid to the partners on substantive basis. However, the Ld. CIT(A) held that he is in agreement with the stand taken by the AO about protective addition and accordingly, confirmed the order of AO. The observation of the Ld. CIT(A) is as under:-

“6. I have perused the written submissions submitted by the ld. AR and the order of AO. In the facts and circumstances of the case, I am in agreement with the stand taken by the AO about the protective addition made in the hand of appellant. On the facts and in the circumstances of the case, the protective additions of Rs.3,84,000/-, Rs.9,09,520/- and Rs.32,00,000/- are confirmed.”

2.3 During the course of hearing, the ld. AR of the assessee prayed that once the addition is confirmed in the hands of the firm M/s. Shri Ram Borewell & Construction Co. on substantive basis then the same addition cannot be confirmed in the hands of the assessee on protective basis and the same should be deleted. To this effect, the ld. AR of the assessee filed the following written submission.

‘1. It is submitted that the assessee along with Smt. Sumitra Devi and Shri Rameshwar Lal Chopra entered into a partnership by introducing capital of Rs.21,000/- each during the year under consideration under the name of M/s Shri Ram Borewell & Construction Co. During the year, the firm was engaged in pilling work of various structures on land at Paradeep, Cuttack. As the turnover of the firm exceeded the limits specified, audit u/s 44AB was conducted. However, due to the some miscommunication between the accountant and the partners, there remained certain discrepancies based on which incorrect financial statements and audit report was prepared and filed.

2. While framing the assessment order in case of the firm, AD made addition of the capital introduced in the firm and disallowed the interest and remuneration paid to the partners. The order of the AO was confirmed by Ld. CIT(A) against which appeal was filed to Hon'ble ITAT. Before the Hon'ble ITAT, additional evidences by way of affidavit of the partners and the correct financial statements/ audit report were submitted. Considering the same, Hon'ble ITAT set aside the assessment order and directed the AO to frame denovo assessment. In set aside assessment of the firm, the AO vide order dated 28.12.2017 (copy enclosed) again made addition of the capital introduced and disallowed the interest and remuneration paid to the partners ignoring that in the revised financial statements no such capital introduction/ payment of interest and remuneration to the partners is claimed.

3. The AO in the assessment of the assessee again made the addition for the alleged capital introduction and interest & remuneration received from the firm on protective basis for the reason that fresh assessment of the firm is not yet completed. After the order of the AO, fresh assessment of the firm was made on 28.12.2017 where the AO again made addition on account of alleged introduction of capital by the partners in the firm and also disallowed alleged interest/ remuneration paid to the partners by not accepting the recasted financial statements. Still the Ld. CIT(A) confirmed the protective addition without appreciating the fact that in the fresh assessment order of the firm all these amounts have been added/ disallowed. Therefore, the protective addition confirmed in the hands of the assessee is unjustified and uncalled for.

4. Hon'ble ITAT Ahmedabad Bench in case of Prakash Wine Agencies vs. ITO 38 TTJ 39 has held that right to make protective assessment is given to ITO but the appellant authority cannot evade the issue brought before it by way of appeal either by an assessee who is substantially assessed or one who is protectively assessed. Again Hon'ble Allahabad High Court in case of Smt. Hemlata Agarwal vs. CIT 64 ITR 428 held that Tribunal as a fact finding body cannot confirm the protective assessment. Therefore, once the addition is confirmed in the hands of firm M/s Shri Ram Borewell & Construction Co. on substantive basis, the same addition cannot be confirmed in the hands of the assessee on protective basis.

In view of above, protective addition made by the AO and confirmed by the Ld. CIT(A) cannot stand and the same be directed to be deleted.”

2.4 On the other hand, the ld. DR strongly relied on the orders of the lower authorities.

2.5 We have heard the counsel of both the parties and perused the materials placed on record including the decisions cited by the respective parties. From the records, we noticed that the assessee is a partner in M/s Shri Ram Borewell & Construction Co. and filed the return of income declaring income of Rs.1,89,250/-. However, the AO received information from ACIT, Circle, Sikar that during the assessment proceedings of M/s Shri Ram Borewell & Construction Co., it was noticed that during the year under consideration the assessee had introduced the capital in cash of Rs.32.00 lacs and received interest on partner's capital of Rs.3,84,000/- and remuneration of Rs.9,09,520/-. Since according to the AO, the assessee could not establish the source of capital nor declared the interest and

remuneration received, therefore, the AO initiated the proceedings for reopening the assessment. The assessee submitted the affidavits of the partner and her reply dated 19-12-2016 explaining that during the year under consideration, neither any capital was introduced by her in the firm nor any remuneration and interest was received from the firm. It was also pointed out by the assessee that in the appeal filed before the ITAT, Jaipur Bench, by the firm, the partners stated in their affidavit that they have not introduced any capital in the firm nor any interest or remuneration but due to miscommunication/ misunderstanding between the tax auditor or Accountant, the incorrect financial statement and audit report was prepared. Therefore, the ITAT Jaipur Bench in the light of submissions made by the assessee, set aside the assessment order and directed the AO to frame de novo assessment after verifying the information / evidences so put forth by the assessee. The AO however, through reassessment proceedings again upheld the addition and made the addition in the hands of the firm and accordingly made the addition in the hands of the assessee on protective basis till the case of the firm is decided. It is important to mention here that set aside assessment of the firm was again **completed on** 28-12-2017 wherein after rejecting the fresh information / evidences the AO again made the addition of capital introduced by the firm in the hands of the firm and AO disallowed the interest and remuneration paid to the partners on substantive basis. As per the ld. AR, although the firm has challenged the order of

the AO wherein addition was again upheld, before the Id. CIT(A) and the matter is still pending before the Id. CIT(A). Thus, in this way, the addition made by the AO in the hands of the firm has not attained finality. Thus, the Id. CIT(A) while passing the impugned order had categorically held that he is also in agreement with the stand taken by the AO about the protective addition made in the hands of the assessee. It is an admitted fact that the assessee is a partner in the firm and in the case of the assessee protective addition has been made by the respective AO, however, substantive addition has already been made in the hands of the firm M/s Shri Ram Borewell & Construction Co. and the appeal of M/s Shri Ram Borewell & Construction Co. is still pending before the Id. CIT(A) and it has attained finality. We are cautious of the fact that there is no statutory provision in the Income Tax Act to make addition on protective basis. In fact, as per provision of the Income Tax Act, the income is to be assessed only in the hands of the person to whom it belongs and it cannot be assessed in the hands of other person. This is a very basis of levy of Income Tax. However, it may so happen in certain cases that Income Tax Authorities are not clear as to whom income belongs. Hence, in such cases, only option is left with the Income Tax Authorities in order to safeguard the Revenue is to make two assessments for the same income on two different persons i.e. one on substantive basis and other on protective basis. It is for these reasons that Courts have recognized the concept of protective assessment, although there

is no such provision in the Income Tax Act to make protective assessment. It is imperative to mention that Hon'ble Gauhati High Court in the case of Jagannath Bawri and Others vs CIT and Others, 234 ITR 464 has explained the concept of protective assessment in following manner.

“As regards the contention of Ms. Hazarika, Id. Counsel for the petitioners about the income tax returns, on perusal of annexure-A series it can only be said that those documents are only intimation which is sent to the assessee specifying the sum so payable u/s 143(1)(a). At any rate, the assessments made are only protective assessments. Under the law, it is open to the Department to make assessments on two persons in respect of the same income where there is some ambiguity as to the liability to charge. Such assessments are made to protect the interest of the Revenue so much so, unless such protective or alternate assessment is made, assessment proceedings against the party finally found to be liable may become barred by time. It has now become an established practice that in the case of a doubt as to the person who will be and deemed to be in receipt of the income, it is open to the Department to make protective or alternative assessment.”

After having meticulously gone through the facts and circumstances of the case, we are of the view that protective assessments are a particular type of assessment that focuses on those assessments which is made to protect the interest of the Revenue. Although, there is no provision in the Income Tax Act authorizing the levy of income tax on a person other than whom income tax is payable but the object of the protective assessment is that in case substantive addition is made in the hands of other person and in case assessment fails then in that eventuality the Department must get the tax from the person in whose hands protective assessment

is made or ultimately if substantive addition made is confirmed then in that eventuality protective addition cannot survive. Therefore, keeping in view the above proposition and also keeping in view the judgement discussed by us herein above , we are of the view that in the present facts and circumstances of the case, no loss is going to suffer by the assessee, in case, we uphold the order of the ld. CIT(A) in upholding the protective addition made by the AO in the hands of the assessee. In this view of the matter, the appeal of the assessee is dismissed.

3.0 In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 16/08/2022.

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

Sd/-

(संदीप गोसाईं)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 16 /08/2022

*Mishra

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Smt. Bhagwati Devi Meel, Sikar
2. प्रत्यर्धी / The Respondent- ITO, Ward -3, Sikar
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 296/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar