IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(IT)A No.765/Bang/2024
Assessment year : 2016-17

Shri Rahul Agarwal, A4-1503, Elita Promenade, J.P. Nagar 7th Phase, Puttenahalli, Bengaluru – 560 078. **PAN : AAMPA 9917E**	Vs.	The Deputy Commissioner of Income Tax, International Taxation, Circle 1(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Bharadwaj Sheshadri, Advocate & Shri K. Sheshadri, CA
Respondent by	:	Shri Senthil Kumar N., CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	18.06.2024
Date of Pronouncement	:	28.08.2024

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the final assessment order passed u/s. 147 r.w.s. 144C(13) of the Act dated 2016017 passed by the Assessing Officer for the AY 2016-17 on the following grounds:-

Sl. No.	Grounds of Appeal	Tax Effect
1.	The impugned directions of the Dispute Resolution Panel (DRP) and order of the Assessing Officer (AO) are, bad in law, lacking in jurisdiction, violative of the principles of natural justice, non-speaking and deserve to be quashed.	52,19,475
2.	The DRP/ AO erred in treating the Appellant as a non-resident and assuming jurisdiction and ought to have noted that the Appellant was a resident and thus not an *"eligible assessee"* as per section 144C(15)(b).	52,19,475
3.	The DRP/ AO, having accepted the fact that the Appellant was resident in India during the relevant previous year, ought to have held that the AO had no jurisdiction to assess the Appellant.	52,19,475
4.	The impugned order deserves to be quashed as the initiation of proceedings under section 148 read with sections 147 and 148A is bad in law.	52,19,475
5.	The DRP/ AO erred in confirming the addition of tax-free dividend from mutual funds of Rs. 1,36,96,832 and in denying exemption under section 10(35) in that respect.	47,40,200
6.	Without prejudice and in the alternative, the DRP/ AO, having reached a finding that Rs. 1,36,96,832 was in fact a return of capital, ought not to have subjected the amount to tax as income from other sources.	47,40,200
7.	The DRP/ AO erred in denying the benefit of carrying forward the short term capital loss under section 111A of Rs. 13,84,865.	4,79,275
8.	The addition of Rs. 1,36,96,832 ought to be deleted as the DRP/ AO relied exclusively on the survey report of another entity, a copy of which was not furnished to the Appellant in violation of the principles of natural justice, and the nexus and relevance of the survey findings specifically to the Appellant or his transactions with them were not established.	52,19,475

9.	The Appellant craves leave to add to, amend, alter, vary and/ or withdraw any or all these grounds of appeal which are prejudice to one another. For these and other grounds that may be adduced at the time of hearing, the impugned order of the DRP/ AO may be set aside in the interests of justice.	Not Applicable
	Total Tax Effect	52,19,475

2. The Briefly stated the facts of the case are that the assessee is a non-resident for AY 2016-17. Consequent to the order of the Hon'ble Supreme Court in the case of UOI v. Ashish Agarwal dated 04.05.2022 & CBDT Instruction No.01/2002, notice u/s. 148 was issued to the assessee and deemed to be notice u/s. 148A(b) of the Act. The assessee filed reply through e-filing and submitted that at the time of filing return for AY 2016-17 dated 23.07.2016 and same was picked up for scrutiny and assessment was completed u/s. 143(3) of the Act on 18.12.2018 accepting the returned income. Accordingly the assessee objected for reopening the assessment u/s. 148. Further the assessee claimed that Rs.1,36,96,832 pertains to Mutual Fund Dividend received from JM Financial Mutual Fund on 30.03.2016 through Kotak Mahindra Prime Limited Loan account and duly offered in his return. The AO noted that the reason to issue notice u/s. 148 is based on information regarding escapement of income based on sham dividend and fictitious losses which was not disclosed by the assessee nor available to the AO which was received after completion of scrutiny proceedings. The issue of escapement has emerged after the date of completion of scrutiny assessment on consequent survey action u/s. 133A of the Act conducted in the case of JM Financial Asset

Management Ltd. by DDIT, Unit 3(1), Mumbai on 15.02.2021. In the light of above facts and material available on record, order dated 30.06.2022 was passed u/s. 148A(d) of the Act that the case of the assessee is a fit case for issuance of notice u/s. 148 after due approval from the competent authority. Accordingly the objections of the assessee for reopening the assessment was disposed off.

3. The AO noted that a survey u/s.133A was carried out in the case of J.M. Financial Asset Management Ltd. by DDIT, Unit 3(1), Mumbai on 15.02.2021 and it was found that a number of investors had claimed fictitious losses in equity/derivative trading. It was found that assessee had claimed divided exempt from tax to the tune of Rs.1,30,96,832 for AY 2016-17. During the course of survey it was found that JM Balanced Fund – Quarterly Divid Plan of JM Financial had manipulated in accounting methodology so as to artificially inflate the distributable surplus. In the process, the SEBI guidelines have been flouted by J M Mutual Fund by classifying a portion of capital as distributable surplus and thereafter artificial pay-out to the investor in the form of dividend. In the case of assessee, dividend received is from sham transaction generated using colourable devices. The dividend received is not on account of appreciation of investment but is return of a part of the capital itself. As such, it cannot qualify as dividend.

4. During the course of survey action statement of the key persons responsible for the management of the mutual fund was recorded. Shri

Sanjay Chhabaria, fund manager, admitted that the there has been no application of mind in managing the fund and as per the advice of Shri Bhanu Katoch, CEO, he has increased the distributable surplus. Mrs. Diana D'sa the Compliance Head, JM AMC admitted that SOP has not been followed and documents are created to show that the SEBI guidelines are followed.

5. Considering the receipts and also the fact that losses claimed by the assessee for the AY 2016-17 is fictitious, the AO deemed the income chargeable to tax has escaped assessment. The assessee in the current year has claimed an income as dividend which is falsely attributed by camouflaging the actual returns, subsequently the assessee has claimed short term capital loss which has been set off against the capital gains income in the later financial years. The assessee has shown only the dividend income considering the same as exempt and the AO noted that since this is actually not a true dividend income, it is not eligible for exemption u/s. 10(35) of the Act. He therefore denied exemption and added back Rs.1,36,96,832 as dividend income under the head income from other sources. He noted that the assessee being non-resident is an eligible assessee as per section 144C(b)(ii) of the Act and passed draft assessment order u/s 144 C(1) of the Act .

6. The assessee filed objections before the DRP on 30.06.2023. The ld. DRP admittedly accepted that during the AY 2016-17, the assessee was a resident, but during the FY 2021-22 the assessee was a

non-resident residing in USA. The DRP held that from the issuance of notice u/s. 148 till completion of order u/s. 147 r.w.s. 144C the assessee was a non-resident and covering the period of 30.6.2022 (date of notice u/s. 148) to 31.5.2023 (date of draft assessment order), the assessee was filing return in India in the status of a non-resident. Therefore, even though the assessee was a resident for the FY 2015-16, the current status of the assessee when the case was reopened was of non-resident and accordingly the current jurisdiction of the assessee was with AO, DCIT, Intl. Taxation, Circle 1(1), Bengaluru. The ld. DRP held that the AO (International Taxation) has correctly assumed the jurisdiction and reopened the case.

7. The ld. DRP after considering the issue on merits did not accept the submissions of the assessee and passed order on 26.02.2024. In consequence the AO passed the final assessment order on 05.03.2024. Aggrieved, the assessee is in appeal before the ITAT.

8. The ld. AR reiterated the submissions made before the lower authorities and strongly argued that the AO, JCIT(OSD), Intl. Taxation, Circle 1(1) has wrongly issued notice to the assessee. The jurisdiction of the assessee is not lying with International Taxation Officer and the assessee was not eligible assessee as per section 144C(1) and eligible assessee has been defined in section 144C(15)(b)(ii) of the Act. The assessee filed return of income as resident on 13.07.2016 and case was taken up for scrutiny and assessment was completed in the status of resident. In the remand

report after verifying the passport o the assessee, the AO has observed for FY 2015-16 the status of assessee was treated as resident and the ld. DRP has also not disputed this fact. Further the ld. AR submitted that notice issued by the JCIT, International Taxation is not valid because of lack of jurisdiction. The notice ought to have been issued by the AO who has completed the assessment u/s. 143(3) who has jurisdiction of the assessee. The date of residential status should be seen for the relevant AY for which the case pertain, but not form the date of issue of notice u/s. 148. This is the fundamental principle of law. For completing the assessment law should be applicable for the relevant assessment year, but not on the applicable law on the date of issue of notice. Here the revenue authorities have wrongly issued notice without jurisdiction. In support of this arguments, he relied on the judgment of the Hon'ble Apex Court int eh case of Shree Choudhary Transport Company v ITO [2020] 118 taxamann.com 47 (SC) dated 29.7.2020. He also relied on various judgments which is placed at page 1 to 269 of PB. The ld. AR reiterated the submissions made before the lower authorities on merits of the case.

9. The ld. DR relied on the order of the lower authorities and submitted that the assessee was involved in scam transactions and during the course of survey conducted in JM Financial Asset Management Ltd. it was noticed that assessee is one of the beneficiary. The assessee has claimed exempt income on the assets distributed by the JM Financial Mutual Fund and subsequently the value of mutual funds got down, resultantly the assessee has claimed capital loss also.

The assessee did not file return of income after issue of notice u/s. 148A(b). There is statement of income and during the course of assessment proceedings u/s. 143(3), the AO accepted that only dividend income was exempt. The argument of the ld. AR of the assessee cannot be accepted that the AO had accepted the returned income filed by the assessee and there was no occasion available to the AO. The AO had reason to believe that income of assessee has escaped assessment and after following the due procedure notice was issued to the asse and order has been passed u/s. 147 r.w.s. 144C(1). During the course of survey it was found that JM Financial Asset Management Ltd. has violated SEBI Rules & Regulations and did not file information within the due time, therefore dividend received from JM Financial and claimed as exempt income is escapement of income. He reiterated the case laws relied on by the ld. DRP.

10. Considering the rival submissions, we note that assessee was issued notice u/s. 148 on 30.06.2022 for AY 2016-17 by JCIT(OSD), Intl. Taxation, Circle 1(1), Bangalore, after recording reasons and approval. The assessee has challenged the legal issue regarding jurisdiction of the AO for issuing notice. During the remand proceedings, the AO after examining the passport observed that for the relevant AY 2016-17, the assessee was resident and the ld. DRP also accepted that during relevant assessment year, the assessee was a resident. However, the ld. DRP has considered the residential status on the date of issuing notice u/s. 148 which is not correct. It is well settled that the law applicable for the relevant AY should be seen. The

assessee is not an eligible assessee as per section 144C(15). The Hon'ble Apex Court has settled this issue in the case of Shree Choudhary Transport Company v. ITO]2020] 118 taxmann.com 47 (SC) in which it has been held as under:-

> ***17.4*** *It needs hardly any detailed discussion that in income tax matters, the law to be applied is that in force in the assessment year in question, unless stated otherwise by express intendment or by necessary implication. As per section 4 of the Act of 1961, the charge of income tax is with reference to any assessment year, at such rate or rates as provided in any central enactment for the purpose, in respect of the total income of the previous year of any person. The expression "previous year" is defined in section 3 of the Act to mean 'the financial year immediately preceding the assessment year'; and the expression "assessment year" is defined in clause (9) of section 2 of the Act to mean 'the period of twelve months commencing on the 1st day of April every year'.*
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> ***17.5*** *In the case of CIT v. Isthmian Steamship Line [1951] 20 ITR 572 (SC), a 3-Judge Bench of this Court exposited on the fundamental principle that 'in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied.' This decision and various other decisions were considered by the Constitution Bench of this Court in the case of Karmtharuvi Tea Estate Ltd. v. State of Kerala [1966] 60 ITR 262 (SC) and the principles were laid down in the following terms (at pp. 264-266 of ITR):-*
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> > *'Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force.*
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> ** ** **
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> > *The High Court has, however relied upon a decision of this court in Commissioner of Income-tax v. Isthmian Steamship Lines, where it was held as follows :*
> >
> > *"It will be observed that we are here concerned with two datum lines : (1) the 1st of April, 1940, when the Act came into force, and (2) the 1st of April, 1939, which is the date mentioned in the*

amended proviso. The first question to be answered is whether these dates are to apply to the accounting year or the year of assessment. They must be held to apply to the assessment year, because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. The first datum line therefore affected only the assessment year of 1940-41, because the amendment did not come into force till the 1st of April 1940. That means that the old law applied to every assessment year up to and including the assessment year 1939-40."

This decision is authority for the proposition that though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied. The facts of the said decision are different and distinguishable and the High Court was clearly in error in applying that decision to the facts of the present case."

(emphasis supplied)

***17.6** We need not multiply on the case law on the subject as the principles aforesaid remain settled and unquestionable. Applying these principles to the case at hand, we are clearly of the view that the provision in question, having come into effect from 1-4-2005, would apply from and for the assessment year 2005-06 and would be applicable for the assessment in question. Putting it differently, the legislature consciously made the said sub-clause (ia) of section 40(a) of the Act effective from 1-4-2005, meaning thereby that the same was to be applicable from and for the assessment year 2005-2006; and neither there had been express intendment nor any implication that it would apply only from the financial year 2005-06.*

11. On plain reading of the above judgment, we note that in income tax matters, the law to be applied is the law in force for the relevant assessment year, unless otherwise stated or implied. Here in the case on hand, for the impugned assessment year, the assessee was resident. However, the revenue authorities have considered the residential status as Non- Resident of the assessee on the date of issue of notice u/s. 148 which is not correct. Accordingly, respectfully following the above judgement the assessee is not eligible assessee as per section 144C(15)(ii) of the Act for the impugned assessment year being a

resident. In view of this the entire proceedings in the status of non-resident is not sustainable in the eyes of law and accordingly the same is quashed. Accordingly we allow the legal issue raised by the assessee and do not go into the merits of the case.

12. In the result, the appeal of the assessee is allowed as above.

Pronounced in the open court on this 28th day of August, 2024.

Sd/-	Sd/-
(BEENA PILLAI)	(LAXMI PRASAD SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th August, 2024.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. Pr.CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.