

**2017 (4) TMI 609 - ITAT KOLKATA****Radharaman Jew Trust Fund Versus I.T.O., Ward-43 (3) , Kolkata**

I.T.A No. 1632/Kol/2016

**Dated: - 12 April 2017**

Intimation u/s 143(1) by changing the status of the assessee which consequently enhanced the tax liability of the assessee - AO adopted the status of the assessee from an AOP to a person taxable in terms of section 139(4A) - Held that:- The change of status as done by the AO does not fall within any of the clauses from (a) to (e) of section 143(1) of the Act. It cannot also be said that change of status of an assessee would fall within the meaning of the expression "an incorrect claim apparent from any information in the return" as laid down in Explanation (a) to section 143(1) of the Act. There was no inconsistency entries in the return of income. There was no entry on which information was required to be furnished under this act which was omitted to be furnished. There was no deduction claimed beyond the statutory limit by the assessee. Therefore hold that the intimation issued by the AO u/s 143(1) of the Act changing the status of the assessee was not in accordance with the provisions of law. The AO is therefore directed to modify the intimation u/s 143(1) of the Act accepting the return of income of the assessee as it is and issue refund as claimed by the assessee. - Decided in favour of assessee.

**Judgment / Order****Sri N. V. Vasudevan, JM****For the Appellant : Shri G.R.Saha, Advocate****For the Respondent : Shri Nicholas Murmu, JCIT****ORDER**

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order dated 31.05.2016 of C.I.T.(A)-13, Kolkata relating to A.Y.2011-12.

2. The Assessee is a trust having come into existence under deed of settlement dated 15.08.1945. The assessee filed its return of income on 29.12.2011 for A.Y.2011-12 in the status of an AOP. The Assessee did not make claims for exemption of its income u/s.11 of the Income Tax Act, 1961 (Act). It has all along been assessed as an AOP. The AO processed the return of income filed by the assessee u/s 143(1) of the Income Tax Act, 1961 (Act) on 02.03.2013. The assessee had filed its return of income in Form ITR 5 and the status adopted was Status No.6 given in the form namely "any other AOP/BOP artificial juridical person".

3. The AO issued an intimation u/s 143(1) of the Act in which he adopted the status of the assessee from an AOP to a person taxable in terms of section 139(4A) of the Act holding that the applicable form of return

was Form No.7 instead of Form No.5 in which the assessee had furnished the return of income. In the return of income filed the assessee had declared total income of ₹ 8,28,210/- on which the tax liability was ₹ 1,05,537/-. The advance tax and TDS paid by the assessee was a sum of ₹ 1,71,834/-. The assessee was thus entitled to a refund of tax paid in excess.

4. The AO however adopting the status of the assessee as falling within the form of return to be filed in ITR-7 determined the tax liability of the assessee at a sum of ₹ 2,81,826/- and raised a demand of ₹ 1,09,992/- after giving credit to advance tax paid and TDS of ₹ 1,71,834/-. There is no difference in the total income as declared by the assessee and the total income as determined in the intimation u/s 143(1) of the Act. The increased tax liability is because of the AO's action in concluding that the case of the assessee falls within the status of an AOP to which the provision of section 139(4A) of the Act apply. The provision of section 139(4A) of the Act applies to an income derived by a trust which exists only for charitable or religious purposes whose total income without giving effect to the provision of section 11 and 12 exceeds the maximum amount which is not chargeable to income tax. In the case of such trust Rule 12(1)(g) of the Income Tax Rules, 1962 (Rules) requires filing return of income in Form No. ITR-7. The assesseees who are covered by the aforesaid provision are chargeable to tax at a higher rate of tax. The persons who are covered under Sec.139(4A) of the Act are chargeable to tax at a higher rate of tax on their total income. By the action of the AO in holding that the Assessee is also a person who is covered by the provisions of Sec.139(4A), the rate of tax at which total income is assessable and consequent tax liability of the Assessee was determined at a much higher sum than what was claimed by the Assessee in the return of income. The AO processed the return of income filed by the assessee u/s 143(1) of the Income Tax Act, 1961 (Act) on 02.03.2013, making the aforesaid adjustment to the tax payable by the Assessee consequent to his action in treating the Assessee as a person covered by Sec.139(4A) of the Act.

4. The assessee was aggrieved by the intimation dated 02.03.2013 issued by the AO and he filed an appeal before CIT(A) contending that while processing the return u/s 143(1) of the Act the AO cannot unilaterally change the status of the assessee from an AOP to which form No. ITR-5 is applicable to a person falling within the ambit of section 139(4A) to whom ITR-7 form in which return of income has to be filed. This contention was rejected by CIT(A). The following were the relevant observations of CIT(A) :-

*“ In this case perusal of submission of the appellants shows that the appellant had filled its return in form NO.5. form which is to be used only by a firm, AOP, BOI, artificial judicial persons, co-operative society and legal authority to file their income tax return. As submitted the appellant case is claimed to be religious trust which has been created for the benefit of deity and also in favour of various beneficiary by creating various heads of funds in favour of poor and indigent widow and the other related family members, to the retired farmer servants of the trust and claimed exemption.*

*The nature of activity, objective of the society and documents submitted required to file return in Form No. ITR 7, as per instruction issued by C8DT, which is applicable to the persons mentioned below:-*

*1. Return under section 139( 4A) is required to be filed by every person in respect of income derived from property held under trust or other legal obligation wholly for charitable or religious purposes or in part only for such purposes.*

*2. Return under section 139(48) is required to be filled by a political party if the total income without giving effect to the provisions of section 139( 4A) exceeds the maximum amount which is not chargeable to income tax.*

3. Return under section 139( 4C) is required to be filed by every scientific research association, news agency, association or institution referred to any section 10(238) fund or institution or university or other educational instituting or any hospital or other medical institution.

4. The return under section 139(4D) is required to be filed by every university, college or other institution which is required - to furnish return of income or Joss under any other provision of this section.

Keeping in view of the aforesaid instruction for filing of ITR-7 in case of exemption claimed, the AO has rightly assessed the case which is covered in ITR 7 other than ITR 5 filed by the appellant. It is since qua non for AOP that it must be one in which two or more person join in a common purpose or common action. In CIT V/s Ibrahimji Hakimji (1949) 8 ITR 501 (Sind), it was held the trustees form AOP but this could not make them owners. The definition of the word person given in the Act under section 2(31) is enumerative. The last category of the person defined in the Said section is 'every juridical person, not falling within any of the preceding sub-clauses'. Therefore, if a person falls within any of the preceding sub-clauses, then it cannot be termed as Artificial juridical Person. A Hindu may dedicate for religious or charitable objects all property which he can validly dispose of by gift or by will for the purpose of endowment. Even in the case of dedication to an idol, which cannot itself physically hold lands in trustees. The mere execution of a deed, though it may purport on the face of it to dedicate property to an idol, it is not enough to constitute a valid endowment. Therefore, this is a prima facie mistake committed by the appellant by filing ITR-5 whereas it was supposed to file ITR-7 which has been correctly done by the AO and this is in the scope of section 143(1)(a)."

5. Aggrieved by the order of CIT(A) the assessee has preferred the present appeal before the Tribunal raising the following grounds of appeal :-

**"FOR THAT ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE, THE COMMISSIONER OF INCOME TAX (APPEALS) ERRED IN LAW IN HOLDING THAT THE ASSESSING OFFICER CAN CHANGE THE STATUS OF THE APPELLANT WHILE PROCESSING THE RETURN OF INCOME UNDER S. 143(1)(a) OF THE INCOME TAX ACT;**

**2. FOR THAT ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE, THE CIT(A) ERRED IN LAW IN HOLDING THAT THE APPELLANT CLAIMED EXEMPTION FROM LIABILITY TO INCOME TAX U/S 11 OR AT ALL WHEN ALL THAT THE APPELLANT ASKED FOR WAS THAT BEING AN ARTIFICIAL JURIDICAL PERSON SRI SRI ISWAR RADHARAMAN JEW, THE BENEFICIARY DEITY, SHOULD BE TAXED AS AN ASSOCIATION OF PERSONS;**

**3. FOR THAT ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE, THE CIT (A) ERRED IN LAW BY CLUBBING THE APPELLANT WITH THREE OTHER TRUSTS SETTLED BY THE SETTLOR THROUGH THE SAME INSTRUMENT OF SETTLEMENT WHEN ALL THE LATER THREE TRUSTS ARE ABSOLUTELY INDEPENDENT, SEPARATE HAVING UNRELATED OBJECTS;**

**4. FOR THAT ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE, BEING A PRE-1970 TRUST, THE RATE OF TAX APPLICABLE TO ITS INCOME IS NOT LIABLE TO BE AT THE MAXIMUM MARGINAL RATE AND THE RESTRICTION OF S. 164(3) THIRD PROVISOR AS REGARDS THE SHARES IN THE INCOME OF SEVERAL BENEFICIARIES BEING INDETERMINATE; BECAUSE THE SETTLEMENT IS IN FAVOUR OF ONE PERSON ONLY BEING THE DEITY SRI SRI ISWAR RADHARAMAN JEW AND THE DEITY BEING CAPABLE OF HOLDING THE DEDICATED PROPERTIES ABSOLUTELY, IS NOT APPLICABLE. THE CIT(A) ERRED IN HOLDING OTHERWISE AND SO HIS ORDER NEEDS TO BE CANCELLED.**

*4. ON THE FACTS AND IN THE CIRCUMSTANCES OF THE CASE, THE ORDER OF THE CIT(A) NEEDS TO BE CANCELLED BEING BASED ON IRRELEVANT GROUNDS OR INCORRECT FACTS AND THE APPELLANT SHOULD BE TAXED AT NORMAL RATES AS IN THE FIRST SCHEDULE, PART I TO THE FINANCE ACT OF THE ASST. YEAR UNDER APPEAL.*

6. I have heard the rival submissions. The question for my consideration is whether the action of AO while issuing an intimation u/s 143(1) of the Act by changing the status of the assessee which consequently enhanced the tax liability of the assessee was permissible. Section 143(1) of the Act provides that where a return was made u/s 139 of the Act is made such a return shall be processed in the following manner :-

*“ (a) the total income or loss shall be computed after making the following adjustments, namely:-*

*(i) any arithmetical error in the return; or*

*(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;*

*(b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);*

*(c) the sum payable by; or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause*

*(d) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;*

*(d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and*

*(e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee.” Explanation (a) to section 143(1) provides as follows :-*

*“ Explanation-For the purposes of this sub-section,-*

*(a) “ an incorrect claim apparent from any information in the return” shall mean a claim, on the basis of an entry, in the return, -*

*(i) of an item, which is inconsistent with another entry of the same or some other item in such return;*

*(ii) In respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or*

*(iii) In respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;”*

7. It is clear from the aforesaid statutory provision that the change of status as done by the AO does not fall within any of the clauses from (a) to (e) of section 143(1) of the Act. It cannot also be said that change of status of an assessee would fall within the meaning of the expression “an incorrect claim apparent from any information in the return” as laid down in Explanation (a) to section 143(1) of the Act. There was no inconsistency entries in the return of income. There was no entry on which information was required to be furnished under this act which was omitted to be furnished. There was no deduction claimed beyond the statutory limit by the assessee. I therefore hold that the intimation issued by the AO u/s 143(1) of the Act changing the status of the assessee was not in accordance with the provisions of law. The AO is therefore

directed to modify the intimation u/s 143(1) of the Act accepting the return of income of the assessee as it is and issue refund as claimed by the assessee. I hold and direct accordingly and allow the appeal of the assessee.

8. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 12.04.2017.

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**Citations:** in 2017 (4) TMI 609 - ITAT KOLKATA

1. [Commissioner of Income-Tax, Bombay Versus Ibrahimji Hakimji and others - 1940 \(7\) TMI 18 - SIND HIGH COURT](#)