

Income Tax Appellate Tribunal - Delhi  
Income Tax Appellate Tribunal - Delhi  
Lira Goswami, New Delhi vs Assessee on 31 August, 2012  
IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH : D : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT

AND

SHRI I. C. SUDHIR, JUDICIAL MEMBER

ITA Nos. 50, 72, 49/GAU/2010

Assessment Year: 2005-2006,2005-06,2006-07

Lira Goswami vs. Asstt. Commissioner of Income Tax, C/o. Associated Law Advisers Circle - Jorhat  
Choladhara, Jorhat,

Assam - 785001

(Appellant) (Respondent) AND

ITA No. 1523/DEL/2012

Assessment Year: 2005-2006

Lira Goswami vs. CIT(A)-XXVIII C/o Associated Law Advisers, Hall No. 2, 1st Floor 6th Floor, Antriksh  
Bhawan, (Room No. 105), 22, Kasturba Gandhi Marg, District Centre, Laxmi Nagar, New Delhi - 110 001  
New Delhi 110 092. (Appellant) (Respondent) Appellant by : Shri Salil Aggrawal, Advocate Respondent by :  
Shri K.V.K. Singh, Sr. DR Date of hearing : 27-06-2012

Date of pronouncement : 31.8.2012

ORDER

PER I.C. SUDHIR, JUDICIAL MEMBER

ITA Nos. 50,72/GAU/2010 and 1523/Del/2012 are related to the assessment year 2005-06 whereas the ITA  
No. 49/GAU/2010 is related to the assessment year 2006-07.

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2. In ITA No. 50/GAU/2010 the assessee has questioned first appellate order on the ground that the Ld.  
CIT(A) has erred in upholding the addition of ` 2,47,052/- made by the AO by disallowing the expenses  
incurred wholly and exclusively for the purpose of carrying on the profession as an advocate. In ITA No.  
72/GAU/2010 the assessee has impugned the reasoned order passed under section 263 of the Act. In ITA No.

1523/Del/2012 the assessee has questioned the first appellate order arising out of the assessment order giving effect to the order passed under section 263 of the I.T. Act.

In ITA No. 49/GAU/2010, the assessee has questioned first appellate order for the asstt. year 2006-07.

ITA No. 50/GAU/2010

3. The relevant facts of the appeal is that appellant is practicing advocate and a partner in a law firm, "Associated Law advisers" ( registered u/s 183 of the Act). She is drawing remuneration as well as her share of profit from the said firm. She is in the profession since the year 1985. She claimed to have maintaining a separate office at her residence in the course of exercise of the profession as a lawyer. In her return of income for the assessment year 2005-06 she declared total income at ` 26,71,327/-. She declared income from the profession representing remuneration received from M/s. Associated Law Advisers of ` 27 lakh and the share of profit from the appropriate firm of ` 4605126/-. The aggregate sum of income from 3

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profession thus came to ` 73,05,126/-. The AO proposed to disallow the claimed net loss of ` 71,221.44/- as per profit and loss account. The assessee responded with this submission that she is maintaining an office at her house and also maintains a car and as such the expenses claimed of ` 2,47,052/- and duly debited in the profit and loss account to earn the professional income deserves to be allowed. The AO did not agree with the assessee and framed the assessment disallowing a sum of ` 71,221.44 on the basis that the assessee had claimed deduction of expenditure incurred in computing the income under the head "income from other sources" but allowed the remaining sum of expenditure of ` 1,75,832/- out of the claimed expenditure of ` 2,47,052/-. This action of the AO was questioned by the assessee before the first appellate authority. It was contended that the AO has overlooked that the deduction had been claimed from ` 27 lakhs received as a remuneration from the firm, M/s. Associated Law Advisers, New Delhi, which is her professional income as is provided u/s 28(v) of the Income Tax Act. The assessee could not succeed before the first appellate authority as Ld. CIT(A) has upheld the disallowance of ` 71,221.44 made by the AO. Present appeal has been preferred against this first appellate order.

4. It is pertinent to mention here that during the pendency of above stated first appeal the CIT initiated proceeding u/s 263 of the Act by issuing a show cause notice dated 17 / 18.9.2008. Ld. CIT was of the view that in finalizing the assessment the AO has erred in disallowing ` 71,221/- 4

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instead of disallowing the entire claimed expenses of ` 2,97,053/-, being incurred in connection with earning of salary or interest from saving. A show cause notice u/s 263 was issued to this effect. The assessee contended that she being aggrieved by the disallowance of the expenses had filed an appeal before the Ld. CIT(A) and as the disallowance of the expenses has been made of ` 71,221/- out of aggregate expenditure of ` 2,47,032/- which is proposed to be disallowed, remained the subject matter of the appeal, hence the proposed action u/s 263(i) was in violation of clause (c) of the Explanation 2 of section 263(1) of the Act. It was contended further that u/s 28(v) of the Act any interest, salary, bonus, commission or remuneration, by whatever name called out to, or received by a partner of a firm from such firm each chargeable to tax under the head "profits and gains of business or profession". It was submitted that the remuneration of ` 27 lakhs received by the assessee as partner of M/s. Associated Law Advisers is chargeable to income tax under the head "profit and gains of business or profession " and thus the assessee was entitled to the claim of deduction

of expenditure incurred in the computation of the tax profits, which expenditure had been incurred by her for the purpose of the profession carried out by her as an advocate. It was submitted further that the remuneration from the aforesaid firm constituted her professional income and thus expenditure incurred of ` 2,47,052/- is to be allowed as a deduction u/s 37(1) read with section 28(2) and section 29 of the Act. The 5

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Ld. CIT did not agree with the assessee and held the action of the AO as erroneous in so far as prejudicial to the interest of revenue. He set aside the assessment orders with direction to the AO to include the sum of ` 2,47,053/- to the total income of the assessee. This order of Ld. CIT passed u/s 263 of the Act has been questioned by the assessee before the Tribunal in ITA No. 72/GAU/2010.

5. In support of the ground Ld. AR has reiterated the submission made before the authorities below. He submitted that the authorities below have ignored these material facts that in the return of income, in computing the income under the head "income from other sources", no deduction has been claimed in respect of expenses and that the expenditure disallowed has been claimed as deduction against the remuneration from M/s. Associated Law Advisers chargeable under the head "profits and gains of business or profession". Thus the claim for deduction is clearly admissible u/s 28 (V) read with section 29 of the Act. Ld. AR submitted that the assessee who is a partner of the firm cannot be denied the claimed deduction of the expenses incurred in computing the taxable remuneration received from the firm. The assessee did not carry on any independent business or profession and was thus entitled to deduct the claimed expenses from the remuneration received from the firm. The Ld. AR submitted that remuneration received by the assessee who is a partner of the firm is not assessable u/s 17 of the Act but is assessable u/s 28 (v) of 6

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the Act under the head "profits and gains of business or profession". Section 29 goes on to provide that the income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D of the Act. He also pointed out that in the case of the other partners of the firm, the AOs have allowed a deduction in respect of expenditure incurred by the partners against the partners' remuneration from the firm in all the regular assessments made u/s 143(3) of the Act. The Ld. AR placed reliance on the following decisions :-

1. CIT vs. Ramniklal Kothari 74 ITR 57 (SC)

2. Basantlal Gupta vs. CIT 50 ITR 541 (Madras)

3. Jitmal Bhuramal Vs. CIT 44 ITR 887 (SC)

6. The Ld. DR on the other hand tried to justify the orders of the authorities below.

7. Having gone through the orders of the authorities below we find that the AO disallowed the loss of ` 71,221.44 and assessed income of ` 2,46,257/- under the head "income from other sources". The Ld. CIT(A) has affirmed this action of the AO with this observation that there is no provision for claiming expenses from income from other sources. The contention of the assessee remained that the AO has disallowed the sum of ` 71,221.14 on the erroneous assumption that the assessee had claimed a deduction of expenditure incurred in computing the income under the head "income from other sources", but has allowed the remaining sum of 7

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expenditure of ` 1,75,832/- out of the expenditure incurred of ` 2,47,052/-. In other words the AO proceeded to disallow ` 71,221.44 out of an aggregate expenditure of ` 2,47,052/- on the basis that though the assessee claimed that this expenditure was incurred to earn professional income, yet the assessee has deducted the above expenditure from income from other sources which is not permissible under the law. The AO has thus overlooked this material facts that deduction of expenses had been claimed from ` 27 lakh received as a remuneration from the firm M/s. Associated Law Advisers, which is the professional income of the assessee. Thus the claimed expenditure is under the provisions of section 28(v) of the Act as per which "any interest, salary, bonus, commission or remuneration, by whatever claimed called, due to , or received by a partner of a firm from such firm is chargeable to tax under the head "profits and gains of business or profession". We do not find reason to disagree with this submission of the assessee that the remuneration from the aforesaid firm constituted professional income of the assessee and thus expenditure incurred of ` 2,47,058/- is to be allowed as a deduction u/s 37(1) read with section 28 (2) and section 29 of the Act. We are of the view that while computing the tax liability of an assessee the AO is obliged to compute the correct income of the assessee and once in substance he is in agreement that the expenditure has been incurred for earning the professional income, no disallowances is sustainable in law. Nowhere the AO has doubted that the 8

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expenditure claimed as deduction has been incurred by the assessee. In alleging that the expenditure has been deducted in computing the income from other sources, the AO has ignored the fact that in the return of income, the gross amount of interest income, without any deduction, has been shown under the head "income from other sources" and the income under the head "profits and gains of business or profession" has been shown in the tax return on net basis after deducting the expenditure incurred. Under these circumstances we are of the view that the AO was not justified in disallowing ` 71,221.44 out of the claimed expenditure of ` 2,47,052/-. We thus while setting aside orders of the authorities below in this regard direct the AO to delete the addition of ` 71,221.44. The ground is accordingly allowed. In the result, the appeal i.e. ITA No. 50/GAU/2010 is allowed.

ITA No. 72/DAU/2010

8. The assessee has questioned original order passed u/s 263 of the Act whereby the Ld. CIT while holding the assessment order as erroneous and prejudicial to the interest of revenue has set aside the assessment order with direction to the AO to include the sum of ` 2,47,052/- to the total income of the assessee.

9. We have narrated the facts of the case herein above in para Nos. 3 and

4. In these paragraph of the order we have also discussed the basis on 9

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which CIT has invoked the provision u/s 263 of the Act against the assessment order as well as the objections of the assessee thereto.

10. While reiterating the submissions made before the Ld. CIT, Ld. AR asserted that the subject matter of the first appeal clearly identifies the question in dispute in the first appeal and since the issue on which Ld. CIT has revised the order of the assessment was within the scope of the first appeal before the Ld. CIT(A) which is decided by the Ld. CIT (A), as such same was outside the jurisdiction of the Ld. CIT u/s 263 of the Act. In this regard the Ld. AR has placed reliance on the following decisions :-

1. CIT vs. Edward Keventer (Successors) Pvt. Ltd. 123 ITR 200 (Delhi)
2. Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83 (SC.)
3. CIT vs. Shri Arbuda Mills Ltd. 231 ITR 50 (SC)
4. CIT vs Tony Electronics LTd. 320 ITR 378 (Delhi)

11. Ld. DR on the other hand placed reliance on the original order passed u/s 263 of the Act.

12. Having gone through the revisional order impugned, we find that the grievances of Ld. CIT remained that the AO should have disallowed the entire claimed expenditure of ` 2,47,053/- instead of restricting the disallowance to ` 71,221.44 out of the said claimed expenditure. Ld. CIT was of the view that all the expenses relating to the profession has been claimed by the firm itself while arriving at the net income from the profession. The assessee thus was not supposed to incur any expenditure 10

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on earning professional income as she is not practicing the profession in her individual capacity. Ld. CIT was also of the view that the assessee cannot claim expenditure on the income from interest which is assessed as "income from other sources". As we have also discussed in ITA No. 50/GAU/2010 hereinabvoe, the assessee has questioned disallowance of ` 71,221.44 made by the AO out of the claimed expenditure of ` 2,47,052/-, which has been upheld by the Ld. CIT(A). Thus even without going into the merit of the disallowance or the validity the claimed expenditure which we have already discussed in ITA No. 50/GAU/2010, it is apparent that the issue on which Ld. CIT has invoked provisions of section 263 of the Act has remained the subject matter of the first appellate order passed on 22.1.2010. The Ld. CIT has passed the revisional order u/s 263 of the Act on 5.3.2010. The Hon'ble jurisdictional High Court of Delhi in the case of CIT vs, Tony electronics Ltd. (Supra) has been pleased to hold that once the appeal against the order passed by the authority is preferred and is decided by the appellate authority, the order of the said authority emerges into the order of the appellate authority. The Hon'ble Supreme Court in the case of CIT vs. Shri Arbuda Mills (supra) has been pleased to hold that the consequences of the amendment made in section 263 with retrospective effect from 16.9.88 is that the powers u/s 263 of the Commissioner shall extent and shall be deemed to have always extended to such matters as has not been considered and decided in an appeal. Thus where an order of 11

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adjudication of the lower authority has been merged in the order of the higher or superior authority , Ld. CIT has no jurisdiction to revise order of the appellate authority. In the present case the order of the assessing authority has merged with the order of the Commissioner (Appeals) the same can not be subjected to the revisioned jurisdiction under section under section 263 of the Act. We find that the issue on which order u/s 263 of the Act has been passed, remained the subject matter of the decision of the first appellate authority thus the revisional order is in violation of the provisions laid down u/s 263 of the Act hence the revisional order is

not valid in law. The same is thus held as not valid and hence it is quashed. The ground is thus allowed in favour of the assessee. Consequently appeal is allowed.

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This appeal has been preferred by the assessee against the first appellate order arising out of the assessment passed in compliance of the revisional order passed under section 263 of the Act. This appeal has now been infructuous in view of our finding in ITA No. 72/GAU/10 holding the revisional order passed u/s 263 as invalid. The appeal is thus dismissed as such.

ITA No. 49/GAU/2010

13. Ground No. 1 The assessee has questioned the first appellate order whereby the Ld. CIT (A) has upheld the addition of ` 2,22,314/- as against 12

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disallowance of ` 2,79,875/- made by the AO out of the expenses claimed to have incurred for the purpose of carrying on the profession as an advocate.

14. Ground No. 2 It is general in nature, wherein the assessee has contended that the orders of the authorities below are passed on incorrect assumption and as such the addition sustained by Ld. CIT(A) is not based on any legal or factual basis.

15. Ground No. 3 It has been further contended by the assessee in the appeal that the AO has calculated the tax on short term capital gain twice once as short term capital gain and again as the normal tax rate due to which total tax liability has been further increased by ` 30,850/-. Ground No. 1 & 2

16. The relevant facts are that during the year the assessee in her return of income had declared total income of ` 28,70,920/-. The assessee had received a sum of ` 55,72,046.95 as her share of profit from the law firm M/s. Associated Law Advisers and remuneration of ` 27 lacs as a partner of the said firm. In addition the assessee had received interest on saving bank account and NSC etc amounting to ` 4,02,728.23 which was shown as income from other sources and assessed as such. The assessee had also earned short term capital gain of ` . 96,521/- which was reflected in the return. The AO noted that in the income from profession assessee had included ` 57,661/- at net profit as per profit and loss account and had 13

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deducted ` 2,79,875/- as income considering it separately from her income from profession of ` 27,00,000/- (declared as income from salary/remuneration received from the said law firm). The assessee had offered balance amount of ` 24,77,078/- for taxation under the said head. The AO noted from profit and loss account that the assessee had credited interest from Bond at ` 1800/- and interest from saving bank account at ` 2,78,075/- which was offered for taxation separately under the head "income from other sources". He noted further that assessee has debited a total amount of ` 2,22,314/- towards profession fee, telephone expenses membership fee, salary, traveling expenses, entertainment expenses, general expenses, electricity expenses, newspaper and subscription, bank charges and depreciation as a result the assessee claimed to have derived net profit of ` 57,661/-. The AO proposed to disallow the deduction of ` 2,79,875/-. The assessee contended that the deduction in respect of ` 2,79,875.23 was claimed under the head "profit and gains of business and

profession " and not under the head "Income from other sources". It was submitted that against the income from profession from M/s. Associated Law Adviser of ` 82,72,046.95 only a small amount of ` 2,79,875.23 has been claimed as deduction towards expenditure in respect of telephone, salary, traveling, entertainment, electricity etc. The AO did not agree with this explanation of the assessee and disallowed the claimed deduction of ` 2,79,875/- on the basis that the same cannot be included under the head 14

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"income from profession" as is shown by the assessee in her computation of income filed alongwith return of income. The Ld. CIT(A) has also upheld the action of the AO. He however has restricted the disallowance of ` 2,22,314/- with this direction to the AO to reduce ` 27,661/- from the total income of the assessee since this amount shown as net profit by the assessee in the profit and loss account has been added twice. This action of the Ld. CIT(A) has been questioned before the Tribunal.

17. In support of the grounds Ld. AR contended that the AO was totally unjustified in holding that the assessee has deducted the expenditure against interest income and the Ld. CIT(A) has also erred in upholding the order of the AO on this ground. He submitted that the authorities below have relied upon the profit and loss account, wherein the assess's claim was shown in the later part of the profit and loss account. They have completely ignored these material facts that in the return of income no deduction has been claimed against income, that the gross amount of interest was offered for taxation under the head "income from other sources" and that the deduction was claimed only against professional income which was shown in the tax return on the net basis after deducting the expenditure included. The Ld. AR adopted the arguments advanced by him on an identical issue in ITA No. 50/GAU/2010 discussed hereinabove.

18. The Ld. DR on the contrary tried to justify the orders of the authorities below.

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19. Under similar facts an identical issue has been decided in ITA No. 50/GAU/2919 hereinabove for the assessment year 2005-06. Following the decision taken therein we while setting aside first appellate order in question direct the AO to delete the disallowance of ` 2,22,314/-. The ground Nos. 1 & 2 are thus allowed.

Ground No. 3

20. In this ground the assessee has questioned the calculation of tax on short term capital gain made by the AO. Her grievance is that the AO has calculated the tax on short term capital gain twice once @ on short term capital gain and again at the normal tax rate due to which total tax liability has been further increased by ` 30,850/-. On perusal of the record we find that no such ground was raised before the Ld. CIT(A). We thus in the interest of justice remand this ground to the file of the Ld. CIT(A) to adjudicate upon the issue after affording opportunity of being heard to the parties.

21. Ground No. 3 is thus allowed for statistical purposes.

22. In the result, appeal is partly allowed. 16

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23. In summary ITA No. 50 & 72/GAU/2010 are allowed, ITA No. 49/GAU/2010 is partly allowed and ITA No. 1523/Del/2012 is dismissed. Order pronounced in the open court on 31st August, 2012. Sd/- sd/- ( G.D. AGRAWAL ) ( I.C. SUDHIR ) VICE PRESIDENT JUDICIAL MEMBER Dated 31.8.2012

\*Veena

Copy of order forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Deputy Registrar, ITAT