

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER, AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

QUANTUM APPEAL u/s 143(3) r.w.s 153A

ITA No. 1832/DEL/2018 [A.Y. 2006-07]

&

PENALTY APPEAL u/s 271(1)(c)

ITA No. 2413/DEL/2018 [A.Y. 2006-07]

Smt. Saloni Narang
No. 5, Dr. G.C. Narang Marg
Cavalry Lane, Delhi

Vs.

The A.C.I.T.
Central Circle - 15
New Delhi

PAN - AAFPN 2692 C

(Applicant)

(Respondent)

Assessee By : Dr. Rakesh Gupta, Adv
Shri Somil Agarwal, Adv
Shri Bharat Beriwal, Adv

Department By : Shri Vizay B Vasanta, CIT- DR

Date of Hearing : 13.06.2023
Date of Pronouncement : 19.06.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two separate appeals by the assessee are preferred against two separate orders of the Id. CIT(A)-26, New Delhi dated 17.01.2018 and 19.02.2018 respectively pertaining to A.Y 2006-07.

2. In ITA No. 1832/DEL/2018 the assessee has challenged the additions made by the Assessing Officer and confirmed by the Id. CIT(A). In ITA No. 2413/DEL/2018, levy of penalty u/s 271(1)(c) of the Act has been challenged. Since both the appeals were heard together, they are being disposed of by this common order for the sake of convenience and brevity.

3. Vide letter dated 06.01.2023, the assessee has prayed for admission of additional grounds:

“1. In view of the facts and circumstances of the case, the assessment order dated 05.03.2015 ought to have been quashed on the ground that the assessment order passed u/s 153A r.w.s 143(3) was barred by limitation.

2. *In any view of the matter in any case, the assessment order passed on 05.03.2015 is barred by limitation as per the provisions of section 153B more so when reverence u/s 90 could not be made for A.Y 2006-07.*

3. *That having regards tot eh facts and circumstances of the case, the ld. CIT(A) has erred in law and on facts in confirming the addition of Rs. 1,59,10,486/- [USD 3,57,538] which ould not be so confirmed in view of the decision of the jurisdictional Delhi High Court in the case of CIT Vs. Kabul Chawla 281 CTR 45.”*

4. Since the additional ground goes to the root of the matter, we decided to address the same first.

5. Briefly stated, the facts of the case are that a search was conducted at the residential premises of the assessee on 23.08.2011. Original return of income for the impugned A.Y. was filed by the assessee on 04.07.2006 declaring income of Rs. 2,13,160/-. During the course of scrutiny assessment proceedings, the Assessing Officer was of the opinion that the assessee was having bank account with HSBC, Geneva, Switzerland and on the basis of information, assessment was framed u/s 153A of the Act by making an addition of Rs. 1,59,10,486/- vide order dated 05.03.2015.

6. The challenge before us is that the assessment order so framed is barred by limitation as the same ought to have been framed on or before 31.03.2014.

7. The ld. DR vehemently stated that the reason for passing assessment order on 04.03.2015 is that a reference u/s 90 of the Act was made to Swiss authority and no information till the time of passing the assessment order was received, hence the time limit was extended by one year under Explanation ix to Section 153B of the Act.

8. The ld. counsel for the assessee stated that reference referred to by the ld. DR was in itself an invalid reference and, therefore, an invalid reference could not have extended the period of limitation provided u/s 153B r.w. Explanation ix of the Act.

9. We have given thoughtful consideration to the rival submissions and have carefully perused the relevant documentary evidence brought on record in light of Rule 18(6) of the ITAT Rules. The entire quarrel revolves around the reference made by the department to the Swiss authority requesting for information under DTAA under the provisions of Exchange of Information Article of the DTAA with Switzerland on the fact that the appellant appears to have opened a bank account through

information so sought relating to bank account number, copy of bank account opening form, statement of bank account for the period beginning from 01.04.1995 to 31.03.2012.

10. The letters issued by the department and heavily relied upon by the Id. DR are as under:

Dated 14.05.2013

*The Under Secretary (FT&TR-IV)
CBDT, Department of Revenue
Hudco Vishala Building
9th floor, Bhikaji Cama Place New Delhi.*

Sir,

*Subject: Request for information from Swiss Tax authority
under DTAA through FT&TR- division of CBDT -
regarding*

Please refer to above,

*I am enclosing here with proforma/checklist duly filled in the
specific proforma in the following cases for seeking information
FT&TR section of the CBDT in relation to Swiss Tax authority under
DTAA:*

- 1. Sangita Sawhney*
- 2. Praveen Sawhney*
- 3. Sneha Lata Sawhney.*

Yours faithfully,

Sd/-

*[Meeta Nambiar]
Commissioner of Income Tax
Central -1, New Delhi*

Dated 11 June 2013.

Sir/ Madam,

Sub: Request for information under 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Convention - Enquiry into the tax affairs of Mr. Praveen Sawhney - Reg.

Your request for administrative assistance from received on 2013-05-20 on the above mentioned subject has been received in Exchange of Information Cell, Foreign Tax & Tax Research Division of Central Board of Direct Taxes.

2. A request for administrative assistance has been made to the Switzerland Tax Authorities on the 11 June, 2013 by the Joint Secretary, FT & TR - I, the competent authority of India, under the provisions of 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Agreement.

3. Efforts are being made for the timely response to your request for administrative assistance and the information will be made available to you as soon as the Exchange of Information Cell receives any response from Competent Authority office.

4. This information is requested under 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Agreement and its use and disclosure is strictly governed by it.

Yours faithfully,

Sd/-

P.S.SIVASANKARAN

US (FT&TR-III) (2)"

11. On the strength of these two letters, the revenue is contending that since a reference has been made to the Swiss Tax Authority, one year extended time became available to the Revenue for passing the assessment order in terms of Explanation ix to Section 153B of the Act and, therefore, the Assessing Officer could pass the assessment order on or before 31.03.2015 and since the assessment order is framed on 04.03.2015, it is well within the period of limitation.

12. Now the entire controversy boils down to the issue whether the aforementioned reference is a valid reference and, if not, then can an invalid reference extend the period of limitation?

13. It would be pertinent to refer to the relevant clauses of the DTAA between India and Switzerland which reads as under:

SWISS CONFEDERATION

Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Swiss Confederation for the avoidance of double taxation with respect to taxes on income has entered into force on 29th December, 1994, after the notification by both the Contracting States to each other of the completion of the procedures required under their laws for bringing into force of the said Agreement in accordance with paragraph 1 of Article 26 of the said Agreement;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.

NOTIFICATION : NO.GSR 357(E), DATED 21-4-1995, AS AMENDED BY NOTIFICATION NO.GSR 74(E), DATED 7-2- 2001 AND NOTIFICATION NO. SO 2903(E), DATED 27-12-2011

ANNEXURE

AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of India and the Swiss federal council

Desiring to conclude an Agreement for the avoidance of double taxation with respect to taxes on income, have agreed to

XXXX

XXXX

XXXX

ARTICLE 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by the

Agreement insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (order public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of Paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information because it has no domestic interest in such information.

In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State shall, therefore, have the power to enforce the disclosure of information covered by this paragraph. notwithstanding paragraph 3 or any contrary provisions in its domestic laws.”

10. Substituted by Notification No. SO 2903(E), dated 27-12-2011. Prior to its substitution, Article 26 as amended by Notification No. GSR 74(E), dated 7-2-2001 read as under:

**"ARTICLE 26
EXCHANGE OF INFORMATION**

1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those concerned with the assessment and collection of the taxes which are the subject of this Agreement. No information as aforesaid shall be exchanged which would disclose any trade, business, industrial or professional secret or trade process.

2. In no case shall the provisions of this Article be construed as imposing upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or Public policy or to supply particulars which are not procurable under its own legislation or that of the State making application."

14. A perusal of the aforementioned relevant clauses of the DTAA shows that the same is effective from 01.04.2011. This is further clarified from the following notification:

"NOTIFICATION NO. S.O. 2903(E) [NO. 62/2011 (F. NO. - SECTION 90 OF THE OME- TAX ACT, 1961 - DOUBLE TAXATION AGREEMENT - AMENDMENT OF AGREEMENT FOR AVOIDANCE OF DOUBLE TAXATION

**AND PREVENTION OF FISCAL EVASION WITH FOREIGN COUNTRIES -
SWISS CONFEDERATION**

**SECTION 90 OF THE INCOME-TAX ACT, 1961 - DOUBLE TAXATION
AGREEMENT - AMENDMENT OF AGREEMENT FOR AVOIDANCE OF
DOUBLE TAXATION AND PREVENTION OF FISCAL EVASION WITH
FOREIGN COUNTRIES- SWISS CONFEDERATION**

**NOTIFICATION NO. S.O. 2903(E) [NO. 62/2011 (F. NO. 501/01/1973-
FTD-I)], DATED 27-12-2011**

Whereas a Protocol amending the Agreement between the Republic of India and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income with Protocol, signed at New Delhi on the 2nd day of November, 1994, as amended by the supplementary Protocol signed at New Delhi on the 16th day of February, 2000, was signed at New Delhi on the 30th day of August, 2010;

And whereas the date of entry into force of the said Protocol is the 7th day of October, 2011, being the date of later of the notifications of satisfaction of all legal requirements and procedures as required by the respective laws for entry into force of the said Protocol, in accordance with Paragraph 2 of Article 14 of the said Protocol;

And whereas sub-paragraph (a) of Paragraph 2 of Article 14 of the said Protocol provides that the provisions of the said Protocol shall have effect in India in respect of income arising in any fiscal year beginning on or after the first day of April next following the calendar year in which the Amending Protocol entered into force;

And whereas Paragraph 3 of Article 14 of the said protocol provides that with respect to Article 26 of the Agreement, the exchange of information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the first day of January of the year next following the date of signature of the said Protocol;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Protocol, as set out in the Annexure hereto, shall be given effect to in the Union of India in respect of income arising in any fiscal year beginning on or after the 1 st day of April, 2012 and with respect to Article 26 of the Agreement, the exchange of information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the 1st day of April, 2011.

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME WITH PROTOCOL, SIGNED AT NEW DELHI ON 2 NOVEMBER 1994, AS AMENDED BY THE SUPPLEMENTARY PROTOCOL SIGNED AT NEW DELHI ON 16 FEBRUARY 2000

ARTICLE 8 Article 26 [Exchange of information] of the Agreement shall be deleted and replaced by the following Article:

Article 26

Exchange of information

1. *The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by the Agreement insofar as the taxation there under is not contrary to the Agreement. The exchange of information is not restricted by Article 1.*

2. *Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.*

3. *In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:*

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the

administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. *If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.*

4. *In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State shall, therefore, have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws."*

15. The aforementioned Notification No. 2903 (E) is loud and clear and has specifically mentioned that Exchange of Information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the 1st day of April 2011 and if the said notification is read with the reference made by the department, we find that the specific periods for which the reference has been made calling for information is 01.04.1995 to 31.03.2012. Therefore, qua the notification, information called by the Revenue by issuing the said reference was invalid for the period prior to 01.04.2011.

16. On a specific query by the bench as to whether any information has been actually received till date, the Id. DR showed his ignorance and inability. This shows that even in the year 2023, the Revenue has not received any information for the transactions prior to 01.04.2011.

17. A reference to the decisions for analogous provisions can throw some light on this issue. The Hon'ble High Court of Rajasthan was considering the reference for Special Audit u/s 142(2A) of the Act in the case of Bajrang Textiles 294 ITR 561 and held as under:

“Direction of the AO for special audit of assessee’s accounts under s. 142(2A) one day before the expiry of limitation for completing the block assessment being merely to get extension of time and AO having asked the special auditor to prepare the books of account in the form of cash book and ledger on the basis of seized documents/papers and also trading and P&L a/c which is apparently beyond the scope of the provisions of s. 142(2A), the direction for special audit was illegal and consequently, the assessment was barred by time”

18. Similarly, the Hon'ble Allahabad High Court in the case of Sadana Electric Stores 219 Taxation 0294 held as under:

“Assessment—Time limit for completion—Order passed beyond limitation period—Sustainability—Assessee was subjected to special audit by approval of CIT—Assessee was asked to obtain special audit report u/s 152(2A)—Accounts audited in report was submitted—However limitation for completion of assessment u/s 153(1)(b) expired—Assessee contended that subsequent assessment order passed by AO was time barred—Held, in case of Sadana Electric Company vs. Commissioner of Income Tax and another ITA No.167 2008 , 152(2A), identical facts were dealt wherein Court held that section 153(1)(a) reads that no order of assessment shall be made u/s 143 or Section 144 at any time after expiry of two years from end of A.Y. in which income was first assessable—Order of assessment had been passed in violation of period prescribed in aforesaid provision, therefore, order passed by AO, CIT and ITAT was set aside—Therefore order passed by lower authorities including Tribunal could not be sustained as facts and circumstances were identical.”

19. Similar view was taken by the co-ordinate bench in the case of Consulting Engineering Services India Pvt Ltd & Anr. 198 TTJ 0121 [Del]. Relevant findings read as under:

“15. We have given a thoughtful consideration to the orders of the authorities below and have carefully perused the records qua the issue. It is true that noticed dated 21.11.2011 was for both the A.Ys i.e. 2008-09 and 2009-10. However, each A.Y is considered to be a separate unit and, therefore, for each A.Y, the Assessing Officer must bring out his case. A perusal of the said notice, which is exhibited at pages 67 to 70 of the paper book, clearly reveals that though the notice pertained to accounts of A.Y 2008-09, but entire financial details referred to therein pertain to A.Y 2009-10. Even the order u/s 142(2A) of the Act dated 27.12.2011 which is exhibited at pages 91 to 98 of the paper, the ACIT has specifically mentioned that “the special audit u/s 142(2A) of the Act in the case of captioned assessee for A.Y 2009-10 is ordered accordingly”. This clearly proves that while making a reference u/s 142(2A) of the Act and thereafter passing the order u/s 142(2A) of the Act, the Assessing Officer did not apply his mind and mechanically adopted the figure of A.Y 2009-10 and passed the order u/s 142(2A) of the Act for A.Y 2009-10 without realizing that he is dealing with A.Y 2008-09.

16. The contention of the Id. DR that the letter to the appellant referred to both the A.Ys i.e. 2008-09 and 2009-10 and, therefore, there is no error in the same. We do not find any force in this contention of the Id. DR. As mentioned elsewhere, since each A.Y is considered as a separate unit the Assessing Officer should have made out a case for A.Y 2008-09 only and since the order framed u/s

142(2) of the Act also refers to A.Y 2009-10, then the same cannot be used for A.Y 2008-09.

17. The quarrel before us is as to whether the assessment order framed u/s 143(3) is passed within the period of limitation period prescribed under the Act or not. In our considered opinion, for coming to such a conclusion, we can examine whether the order passed u/s 142(2A) of the Act is in accordance with law or not. It is true that the order passed u/s 142(2A) of the Act is not appealable but when an assessment order is challenged, then the different aspects, which are integral to the process and ultimate completion of the amount can be challenged in appeal and since the ground before us is challenged for assessment being barred by limitation, we are well within our rights to consider all material aspects which were considered while framing the assessment order u/s 143(3) of the Act.”

20. The co-ordinate bench in one of the group cases of Late Bhushan Lal Sawhney through his L/H wife Smt. Sneha Lata Sawhney ITA Nos. 427 to 432/DEL/2017 & 434 to 439/DEL/2017 had the occasion to consider reference to Swiss authority and reply received by Swiss authority. It would be pertinent to refer to the said observation of the Co-ordinate Bench which reads as under:

“Learned Counsel for the Assessee also placed on record letter Dated 26.06.2015 issued by Swiss Competent Authority addressed to the Government of India in which it is specifically mentioned that information as required could be provided from F.Y. 2011-2012 as

the prior years are not covered by temporal scope of [Article 26](#) of the Amended Double Taxation Avoidance Agreement between India and Switzerland. Therefore, such information could be provided from 01.04.2011. Learned Counsel for the Assessee also placed on record Notification Dated 27.12.2011 between India and Switzerland Confederation for avoidance of double taxation. These would clearly show that these are applicable after assessment years under appeals and as per information provided vide letter Dated 26.06.2015 no such information could be provided prior to 01.04.2011. Therefore, Swiss Authorities have not provided any information to Revenue Authorities in India about assessee's bank account with HSBC, Geneva, Switzerland ITA.Nos.427 to 432/Del./2017 & ITA.Nos.434 to 439/Del./2017 Late Shri Bhushan Lal Sawhney through his L.R./ Wife Smt. Sneha Lata Sawhney, New Delhi. for assessment years under appeals i.e., A.Ys. 2006-2007 to 2011-2012.”

21. In light of the aforementioned discussion, we are of the considered view that the information called for by the department from Swiss authorities could not have been received by them for the period prior to 01.04.2011. Therefore, it would be a futile exercise to wait for such information, and that too, by an invalid reference. Therefore, in our considered opinion, the period of limitation could not be extended as claimed by the Revenue. The impugned assessments are clearly barred by limitation and deserve to be quashed.

22. The additional ground in the captioned appeal is allowed.

23. Since the assessment order has been quashed, we do not find it necessary to dwell into the merits of the case.

24. Since the assessments have been quashed and the basis have been removed, penalty so levied has no legs to stand. We, accordingly, direct the Assessing Officer to delete the impugned penalty on the captioned appeals.

25. Before parting, the Id. DR vehemently submitted that there is no bar for making reference to collect information prior to 01.04.2011.

26. We have given thoughtful consideration to this submission of the Id. DR. We do not find any merit in the contention of the Id. DR. We are of the considered view that if such contention is allowed, then, for getting benefit of extended period of limitation, irrelevant references will be made. Moreover, we have only decided whether the extended period of limitation is available to the Assessing Officer or the impugned assessment is barred by limitation.

27. In the result, both the appeals of the assessee in ITA Nos. 2413 & 1832/DEL/2018 are allowed.

The order is pronounced in the open court on 19.06.2023.

Sd/-

**[SAKTIJIT DEY]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 19th JUNE, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other 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	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	