

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA Nos. 457 & 458/Mum/2023

And

SA 49 and 50/M/2023

(Assessment Years: 2014-15 & 2015-16)

Bridge India Fund
New Delhi
C/o CA Vipul Agarwal,
2g, Gopala Tower, 25
Rajendra Place, New Delhi,
Delhi-110008

Vs.

ACIT (Int. Tax)
Circle 1(3)(2)
Room No.1810,
Air India Building,
Nariman Point,
Mumbai-400 021

(Appellant)

(Respondent)

PAN No. AADCC3273B

Assessee by : Shri S. Krishnan, AR

Revenue by : Shri Soumendu Kumar Das, DR

Date of hearing: 02.05.2023

Date of pronouncement : 01.08.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. These are the two appeals filed by BRIDGE INDIA FUND, New Delhi (The Assessee/Appellant) for assessment year 2014 – 15 and 2015 – 16 against the assessment orders passed by the learned assessing officer, involving common grounds of appeal, both the parties argued them identically; therefore both these appeals are disposed of by this common order.

02. ITA number 457/M/2023 is filed by the assessee for assessment year 2014 – 15 against the assessment order passed by The Assistant Commissioner Of Income Tax, International Taxation Circle, 1 (3) (2), Mumbai dated 23/1/2023 under section 147 read with section 144 of The Income Tax Act (The Act) determining total income of the assessee at ₹ 168,572,010/- against the return of income filed on 29/9/2014 at a total income of ₹ 68 lakhs.
03. The assessee has raised several grounds of appeal as under.

"A. On the facts and in the circumstances of the case and in law, the CTT(DRP-1), Mumbai, erred in holding Form 35-A dated 28.04.2022 as filed before the Dispute Resolution Panel (the Panel') to be ineligible for any directions to be issued, by it

1. Rule 4 of the Income tax (Dispute Resolution Panel) Rules 2009 merely require Form 35-A to be filed either "in person" or "through his agent". It does not stipulate as to under whose signature the said Form 35-A is to be filed.

2. Form 35-A has duly been filed "in person" or physically on 28.04.2022 before the Secretariat, as required under sub-rules (1) & (2) of Rule 4.

3. The second proviso to clause (a) to Rule 4(3) specifically provides discretion to the Panel to accept or reject objections as filed, BEFORE notice as postulated in Rule 5 is issued, given that Rule 5

permits issuance of notice to an ELIGIBLE Assessee, specifying date and place of hearing of Objections.

4. Notice u/s.142(1) was issued to the Assessee on 26.08.2022, enquiring as to status of the matter, in response to which, Form 35-A along with all annexures was duly uploaded on ITBA portal by Assessee, vide acknowledgment dated 04.09.2022. Given that ITBA access is to the Assessee only, this would cure any notional defect in the original filing, if any.

5. Notice of hearing dated 13.10.2022 under Rule 5 has been issued in respect of Form 35-A dated 28.04.2022, requiring appearance for hearing on 21.10.2022, as well as for filing of written submissions in the matter and for filing several documents specifically requisitioned. The issuance of notice of hearing as provided in Rule 5 specifically means that the Panel was satisfied with the Form as filed, in terms of Rule 4.

6. On the evening of 20.10.2022, counsel for the Assessee was telephonically informed by Secretariat of Panel (Mr.Diwakar Chaudhary - 87508 06540) that hearing dated 21.10.2022 shall not take place since certain members of the Panel would be on leave, given Deepawali festival was on 22.10.2022.

7. Thereafter, link for online hearing on 01.11.2022 was emailed by Secretariat of the Panel to counsel for the Assessee on 31.10.2022.

8. On 01.11.2022, the Panel heard detailed submissions on all the issues raised in Form 35-A. Counsel was specifically directed by the Panel to file a Synopsis in respect of averments made, as also to file a note on treaty implications to the transactions themselves.

9. The Synopsis was filed for AY 2014-15 on 03.11.2022 by email, while the note was filed on 09.11.2022. Thus, contrary to the version of the Panel, the matter was heard at length and on merits, as all grounds raised in Form 35A.

B. Without prejudice to the contentions in Ground A above, the DRP's observations as to Form-35-A being ineligible for directions to be issued are violative of principles of natural justice, given that no notice whatsoever in this regard issue was ever issued to the Assessee before the Panel's completely unreasoned and non-speaking directions were framed. On the other hand, at each stage, i.e. acceptance of the Form 35-A by the Secretariat, duly stamped after scrutiny on 28.04.2022, on 04.09.2022, when the form & annexures were uploaded on ITBA portal, on 13.10.2022 when notice for hearing as contemplated in Rule 5 was issued, on 31.10.2022 when link for online hearing was sent, as well as on 01.11.2022 when the Objections were heard in detail on every single ground, the Panel consistently proceeded on the basis the form 35A as filed had been accepted and was fit for being adjudicated upon.

C. Without prejudice to contentions in Grounds A & B above, Form 35-A in the subject case is duly protected under section 292-B of the Act for its regularity and validity which

D. the Panel has arbitrarily ignored. On the facts and in the circumstances of the case and in law, the impugned order dated 23.01.2023 as passed u/s.144 read with section 147 of the Act, is bad in law and unsustainable, since none of the objections as raised in the 35A have been considered or adjudicated:

1. The impugned proceedings are time-barred, having been initiated on the basis of a notice u/s.148 of the Act dated 30.06.2021. A perusal of the approval memo u/s.151 as provided to the Assessee demonstrates that Reasons Recorded have been submitted for approval by Assessing Officer from ADIT, International Tax Range 1(3), Mumbai, as well as from CIT(IT)-1, Mumbai, only on 20.04.2021, and

also that approval by the said officers was granted only on 30.06.2021, which means that no valid notice u/s.148 could have been issued on 31.03.2021.

2. The impugned proceedings are bad in law, having been initiated under the provisions of section 147, 148, and 149 of the Act, as they stood prior to their substitution by Finance Act, 2021, and without following the mandatory procedure as laid down in section 148-A of Act, as notified from 01.04.2021 onwards.

3. *The impugned proceedings are bad in law, for the reason that Objections dated 11.09.2021 to Reasons Recorded have not been disposed off by passing a speaking order, as mandated in GKN Driveshafts (India) Ltd. v. ITO [(2003) 259 TTR 019 (SC)].*

4. *The charge of escapement of income in the present case is in itself a fallacy, since no entity claiming exemption from tax on capital gains in India would need to generate losses, genuine or otherwise, to set off such gains against. The AO admits as much at Para 9.2 of the impugned order, but the Reasons Recorded make out no case whatsoever in this regard.*

5. *The impugned proceedings are bad in law, being based on third party data reproduced at Pages 6 to 88 of the impugned order were never confronted to the Assessee, prior to passing of draft order dated 31.03.2022 and have been leveraged at the Assessee's back, without providing any opportunity of rebuttal.*

6. *Without prejudice to the contentions in Ground D-5 above, the material forwarded to the Assessing Officer and copy-pasted at pages 4 to 88 of the impugned order, forming the basis of the adverse conclusion, do not form any basis for the said inference, because:*

a. None of the parties stated to be trading in the scrip "Odyssey Financial Services Limited" ("Odyssey") have been shown to be related or

connected to the Assessee or its trading transactions;

b. The tabulation of financial performance of Odyssey as reproduced at Page 10 of the impugned order itself refutes the subsequent finding as to the said company being a paper company;

c. References at Page 6 & 22 of the impugned order to the line of business that Odyssey was engaged in, are themselves vague and inane. The AO has not even bothered to understand or bring on record what business / sector Odyssey was involved in;

d. The admitted stock price chart placed at Page 27 of the draft order, omitted in impugned assessment order, is rebuttal of the charge of Odyssey being a penny stock, given that the stock price from 2011 till 2014 has ranged from Rs.20 to almost Rs.300;

e. The comparison of the Odyssey stock price is attempted with a public sector company engaged in hydro-electric power sector, which has no correlation whatsoever;

f. All conclusions formed on the basis of the stock price of Odyssey are merely speculation, and in the nature of generic ratio analysis, not based on any evidence. Neither the

Investigation Wing nor the AO are experts in stock market operations and valuations, and their opinion as to the movement of a quoted scrip transacted exclusively through stock market is of no evidentiary value;

g. Even the conclusions and analysis as obtaining in the impugned order, as never confronted to the Assessee, is inane and amateurish, with findings of the tenor of the following, amongst other instances:

i. Page 22-There is an attempt to show that Odyssey is a bogus company for the reasoning that employee expenses have increased in two years despite operating revenue reducing;

ii. Page 45 to 83-Trading pattern of two investors unknown to the Assessee has been analysed. While in both cases, it is admitted that purchase and sale of the Odyssey scrip took place within mere days or months, the AO has failed to note that this very analysis demonstrates that the Assessee's case is completely different on facts;

iii. Page 45 to 83- None of the counter parties as tabulated in the various charts have been shown to relate to or having transacted with the Assessee;

iv. Page 82 & 83 - It is alleged that 10 parties as tabulated have not been filing returns of income tax, while the tabulation itself admits that except for the party at serial number 8 thereof, all entities are regularly filing returns.

h. Action by SEBI, which is the nodal authority for the determination or otherwise of genuineness of trading process in a scrip, has to the AO's own admission at Page 95 of the impugned order, has taken place in Odyssey's case only in September 2019, and related to late disclosures by the said company, and not on account of any share price manipulation;

i. Contrary to the AO's assertions, trading in the Odyssey scrip is active even as on date.

7. The AO has erred in repeatedly holding that the Assessee has incurred Short Term Capital Loss (STCL) of Rs 3,08,77,605/- in the Odyssey scrip, and even directed disallowance of the same as well as non-allowance of carry-forward thereof, when the Assessee has neither suffered nor claimed any STCL on the Odyssey scrip whatsoever, and has in fact pointed out the same to the AO, to his own admission, at Page 92 of the impugned order.

8. The AO erred in holding the Assessee's trades in Odyssey to be manipulated, in view of inter-alia, reasoning at Page 84 of the impugned order, despite admitting disclosure at Page 91 & 93, that all

transactions of purchase as well as sale were on BSE terminal, at the rates the stock was listed.

9. The AO has erred in repeatedly alleging non-compliance and non-filing of complete particulars by the Assessee, without specifying even one document or material which according to him, was ever requisitioned and was not provided.

10. The AO has erred in not considering any of the material placed on record, and returning perverse findings of fact at various places in the impugned order, including with regard to the false charge of the Assessee having purchased 12,00,840 shares of Odyssey during FY 2013-14 and claimed STCL, as noted by the AO at Pages 2, 5, 84, 87 & 94 of the impugned order, while he has dutifully copy-pasted but otherwise ignored:

a. Page 91-Averment as to demat account being filed before him,

b. Page 91-Specific submission as to NIL purchase during FY 2013-14,

c. Page 92-Transaction statement upload on 14.03.2022, and

d. Page 92 Reiteration that no shares of Odyssey have been purchased by the Assessee in FY 2013-14, and therefore, there could have been no STCL.

11. The AO has erred in disallowing claim of STCL, when no STCI. was in fact incurred or claimed by the

Assessee. 12. The AO has erred in holding at Page 94 of the impugned order that traders or investors in the stock market such as the Assessee are required to justify their business decisions to the income tax authorities.

13. The AO has erred in making adverse inferences in respect of the Assessee's alleged non-compliance to the requirement to file return in response to the impugned notice u/s.148, while at the relevant time, it was the AO's portal that was dis-functional.

14. The AO has erred in not giving provision for answer to the notice u/s.133(6) sent to Bombay Stock Exchange (BSE), at the fag end of proceedings leading to draft order dated 31.03.2022, and not stating in the impugned order whether any response was indeed received thereafter for BSE.

15. The AO has erred in holding the purchase value of 12,00,840 shares of Odyssey, amounting to Rs.15,70,60,202/- to be unexplained investment within the meaning of section 69 of the Act, despite the fact that:

a. No investment of this nature stands made in FY 2013-14 relating to AY 2014-15, and therefore, the disallowance cannot be made in this year.

b. The investment was made in 2011, and duly disclosed in the Assessee's accounts for the said

year. When an investment is recorded in the books of account, section 69 has no application.

16. The AO has erred in putting to tax notional commission of Rs.47,11,806/, when the AO himself has no material or basis to show that any such amount has been paid.

E. Without prejudice to other Grounds as raised in the present appeal, the Assessing Officer has also erred in making modifications in the impugned order, qua contents of the draft order dated 31.03.2022 in:

1. Omitting graphs & charts in the impugned order, which featured at pages 6, 27, 30,31, 35, 39, 44, 47, 49, 51, 52, 55 & 97 of draft order;

2. Omitting Sl. No. 4 in the "Table of Clients", at page 55 of the impugned order and page 44 of draft order.

The Assessee seeks leave to add to, modify, forego, or otherwise alter all or any of the grounds of appeal as above."

04. Brief facts of the case shows that assessee is a resident of Mauritius and foreign portfolio investor (FPI) registered with Securities and Exchange Board of India. It carries on portfolio investment activity and derives income from investment activities in the secondary market and sale securities in accordance with the regulation made by the securities and exchange board of India.



05. For assessment year 2014 – 15, assessee filed its return of income on 29/9/2014 declaring total income of ₹ 68 Lacs. This income was interest income offered under the head income from other sources being received from PTI infrastructure Ltd taxed at a special rate under section 196D of the act.
06. Subsequently information was received from inside Portal under CRU/VRU risk cases that assessee is one of the beneficiaries of bogus long-term capital gain/short-term capital loss pertaining to financial year 2013 – 14 in script name on the Odysseys Corporation Ltd, (listed at Bombay stock exchange vide script number 531996 and falls under penny stock category in equity/ cash market segment wherein the assessee has allegedly bought 12,00,844 shares at ₹ 157,060,202 and sold the same quantity of shares at ₹ 126,182,597 resulting into a loss of ₹ 30,877,605. Thereafter, after obtaining the necessary approvals under section 151 (1) of the Act, case of the assessee was reopened on 31/3/2021 by recording the reasons and issuing the notice on the same date.
07. In response to the above notice the assessee did not file any return of income. Assessee submitted its reply on 27 September 2021 stating that that assessee is making an effort to file the return of income in response to notice under section 148 of the act through e- filing portal but it is unable to file the return of income after the launch of new efiling income tax portal. Therefore assessee

requested to not to take any adverse view for non-filing of income tax return under section 148 of the act as the reasons stated above are beyond the control of the assessee. The assessee also requested that that it will intimate the AO as soon as the e-filing acknowledgement is available.

08. As the assessee did not file any return of income, another notice under section 148 was issued on 30 June 2021. The assessee was also asked to specifically furnish details in respect of the transactions in shares for which the reopening was made. Assessee submitted part of the details on various dates. As the assessee did not submit the required details, a notice under section 133 (6) dated 14 March 2022 was issued to the Bombay stock exchange to examine the genuineness of the transaction done by the assessee. However the Bombay stock exchange did not reply to communication of AO. The assessee also raised an objection against the reopening of the assessment. The objection raised by the assessee were perused, considered by the AO but were rejected. Assessee also challenged the approval under section 151 of the act which was also rejected. Therefore the learned AO intimated that all the prescribed provisions have been followed by the assessee as per the provisions of section 147 read with section 148 of the act. A fresh notice under section 142 (1) was issued. The learned assessing officer recorded the fact of the huge short-term capital loss which was found to be suspicious on detailed investigation of the issue. The learned AO also stated that

finding of the investigation wing of the income tax Department in the company in which the assessee has incurred loss on trading at Bombay stock exchange was also analyzed in deep. The learned AO extracted the financial of the company, its statutory auditors, its information and management as well as the various price sensitive information and results. Based on this , he held that these figures are not palatable to prove that assessee has incurred the loss genuinely. Therefore on the basis of the information available, enquiry by the AO and analysis of trading data of the company for each financial year, discussion about trading transaction of each of the client, Id AO issued a show cause notice to the assessee to hold that why the value of the purchase amount of ₹ 157,060,202 should not be held as unexplained investment under section 69 of The Income Tax Act and further why not to tax commission on fictitious trade incurred by the assessee to be taxed under section 69C of the act as unexplained expenditure. This notice was replied by the assessee on 24/3/2022 denying all the allegations. The learned AO rejected all the arguments of the assessee and held that assessee has failed to discharged its onus, there is an ignorance of the assessee about the shares and penny stock companies, financial analysis of the penny stock companies do not support the trading by the assessee, there is an adverse order of the securities and Exchange board of India, there is a cash trial available in the accounts of the entry providers and therefore these are

arranged transactions and are bogus. The learned AO thereafter held that the claim of total short-term capital loss of the assessee amounting to ₹ 30,877,605 is not allowable to be carried forward to subsequent year and the amount of ₹ 157,060,202/- paid towards the alleged bogus purchase of share is chargeable to tax under section 69 of The Income Tax Act. Further sum of ₹ 4,711,806 is an alleged commission paid at the rate of 3% on obtaining the total purchase transaction of the above company chargeable to tax under section 69C of the act. Accordingly the draft assessment order was passed.

09. The assessee approached the learned Dispute Resolution Panel against the draft assessment order. The learned dispute resolution panel passed an order under section 144C (5) dated 29/12/2022 and stated that that the objections filed by the assessee against the draft order is neither signed by the assessee nor his agent as prescribed under rule 4(1) of The Income Tax (Dispute Resolution Panel) Rules, 2009. The learned DRP noted that the objections are signed by Mr. A Krishnan, advocate against the draft order cannot be considered as the person who should have filed the objection before the learned Dispute Resolution Panel. Accordingly, the learned Dispute Resolution Panel did not give any direction on merits in respect of the objection filed by the assessee as they are not maintainable in the eyes of the law. Therefore in nutshell the objection filed by the assessee was held to be not maintainable.

010. Based on this, the learned AO passed the final assessment order on 23/1/2023 under section 147 read with section 144 of The Income Tax Act determining the total income of the assessee at ₹ 168,572,010/- wherein the addition was made of ₹ 157,060,202/- under section 69 of The Act and a sum of ₹ 4,711,806 were added under section 69C of The Act as unexplained expenditure against the returned income filed by the assessee at ₹ 68 lakhs. The assessee is aggrieved with the above assessment order and is in appeal before us.
011. In nutshell, the only issue before us is that the objections have been disposed of by the learned dispute resolution panel filed by the assessee which was verified by the advocate of the assessee, holding it as not maintainable and therefore confirmed the order of the learned assessing officer.
012. The fact shows that after the draft assessment order was passed for assessment year 2014 – 15, assessee filed objections to the draft order in form number 35A (under rule 4 (1) before the learned Dispute Resolution Panel. The objections were verified by one Mr. S Krishnan, advocate, authorized representative of the appellant on 27/4/2022 by putting his signature. The learned Dispute Resolution Panel applying rule 4 of the DRP rules held that such objection should have been filed by the person who is authorized to verify the return of income of the assessee in terms of section 140(c) of The Income Tax Act. As the same person has not verified the form

number 35A of the act and therefore the learned DRP did not deal with the objections of the assessee on merit and rejected the same. Therefore the draft assessment order became final.

013. The learned authorized representative submitted that

- i Objections were filed by the assessee on 27 April 2022 verified by Mr. S Krishnan, Advocate by speed post which reached the office of the learned DRP.
- ii In response to a notice under section 142 (1) of the Act dated 26/8/2022, assessee intimated to the Id AO that the assessee has filed objection before the learned DRP by filing form number 35A. Copy of the acknowledgement dated 28/4/2022 was also submitted.
- iii On 13/10/2022 the learned income tax officer headquarter to DRP – 1, Western Zone , Mumbai issued a letter by way of a notice under section 144C (11) of The Income Tax Act to the assessee stating that the objection filed with the DRP on 28/4/2022 by the assessee is fixed for hearing on 21/10/2022. Assessee was directed to furnish the written submission. The assessee was also asked to submit soft copies of the status of the DRP for the last three years and the soft copies of details as per annexure attached. In the end of Assessee was asked form number 35A, grounds of appeal, statement of facts, submission in detail, synopsis of

the submission in brief, table containing international transaction and if the matter is covered in the case of the assessee then the soft copy of such order along with the power of attorney. Assessee was also given an option that objection filed by the assessee can also be disposed of by the DRP on the basis of the written submissions/explanations/paper books/evidence furnished and filed before the DRP.

- iv Further on 31/10/2022, Id DRP scheduled hearing through WebEx meeting which got concluded. During the course of hearing the assessee was asked to file synopsis for assessment year 2014-15 and 2015-16.
- v Assessee submitted it on 5/11/2022 by filing two worded documents giving synopsis for assessment year 2014 – 15 and 2015 – 16.
- vi On 9/11/2022 assessee submitted a note on taxability of capital gain arising to the resident of Mauritius from trading in shares of the listed Indian entities.
- vii Thereafter the learned dispute resolution panel on 29/12/2022 issued direction under section 144C (5) of the act mentioning the dates of hearing 21/10/2022 and 01/11/2022. In the directions the learned dispute resolution panel has specifically mentioned at paragraph number 3 that in response

to the various notices advocate on behalf of the assessee appeared for the online hearing from the Cisco WebEx platform and the case was discussed with him. The learned assessing officer was also given the copy of the notice of hearing but none appeared on behalf of him and neither any written request were filed. Thereafter the learned dispute resolution panel mentioned that all the objections raised by the assessee were considered and in the end the learned dispute resolution panel give a discussion and direction with respect to ground number 1 – 16 holding that the objections to the draft order in form number 35A is neither signed by the assessee and nor its agent as prescribed under Rule 4 of The Income Tax (Dispute Resolution Panel) Rules, 2009. Accordingly, LD DRP held that as the draft objections are signed by the advocate of the assessee, who is not empowered to sign the return of income either in its own capacity or as an agent, the objections filed by the assessee are not maintainable. It further held that the lapse of the assessee is not a minor procedural mistake and the authorized representative cannot be considered as an agent of the assessee. The authorized representative has limited liability to the work authorised to him and therefore the authorized representative Shri S Krishnan, learned advocate who signed form number 35A, cannot be treated as an agent of the assessee. Therefore the learned

dispute resolution panel held that no directions are required to be given in respect of the objection filed by the assessee as they are not maintainable in the eyes of law.

viii The learned authorized representative stated that

- (a) The draft order was sent to the assessee on 31/3/2022 and assessee has filed objection within 30 days on 28/4/2022. Merely because the objection in form number 35A has been signed by the advocate of the assessee, the learned dispute resolution panel could not have dismissed the objections filed on this ground only.
- (b) He extensively referred to rule 4 of The Dispute Resolution Panel Rules stated that such rule does not postulate that it should be signed in the manner and by the person who is required to verify the return of income of the assessee.
- (c) He further referred to The Income Tax Rules 1962 wherein for filing an appeal, there is a specific provision that same should be verified by the person who can file the return of income of the assessee.
- (d) He further referred to rule [5] wherein it is provided that the panel shall issue

notice to the eligible assessee and the concerned assessing officer specifying the date and place of hearing of the objections. He submitted that such notices have been issued to the assessee therefore it means that the objections stands admitted and are to be adjudicated on the merit.

(e) He further stated that when the objections have been heard extensively by the learned dispute resolution panel, asking the assessee to furnish certain details, such details furnished by the assessee, and thereby in the end merely holds that the objections are not maintainable is not correct.

(f) Even otherwise submitted that the provisions of principles of the natural justice should also show that the assessee should have been put to a notice that the objections filed by the assessee are not maintainable for some reasons.

014. In the end the learned authorized representative referred to the decision of the coordinate bench in case of ITA number 5401/M/2012 (date 16/11/2012) in case of Nomura services India private limited for assessment year 2007 – 08 wherein the learned DRP rejected the objections filed by the assessee when it was signed by

one Mr. Brijesh on behalf of assessee. In that case the signatory was authorized by the board of directors to prepare, sign and furnish and file income tax and other return etc and the document did not state the specific circumstances under which the board of director was compelled to authorize that gentleman to sign the income tax return among other documents. The learned dispute resolution panel held that form number 35A is not verified in compliance with the relevant provisions of section 140 (C) of the act and therefore, the learned DRP held that verification of form number 35A in case of that assessee was not in conformity with the provisions as mandated by section 140 (C) and hence the objections filed by the assessee were held to be invalid, objections stand dismissed in limine. The learned authorized representative submitted that the facts are identical and therefore the objections dismissed by the learned dispute resolution panel were not correct. In that case the coordinate bench directed the learned dispute resolution panel to consider the objections afresh and give necessary direction to the AO as per the provisions of the act and the rules thereon. The appeal was restored to the file of the DRP for consideration of the objections filed with it afresh. He extensively referred paragraph number 3 – 14 of that decision.

015. The learned departmental representative submitted that



- i Only assessee can verify Form number 35A before DRP. He referred to definition of assessee u/s 2 (7) and of Person u/s 2(31) of the Act.
- ii In the present case Mr. S Krishnan being an authorized representative of the appellant has verified the objections in form number 35A.
- iii He submitted that the form of verification categorically says that it is required to be filed by the assessee, Mr. Krishnan is merely is an authorized representative of the appellant and not an assessee therefore, even otherwise the objections filed before the learned dispute resolution panel are not maintainable.
- iv Rule 4 provides that objections are to be filed in person or through his agent within the specified period in form number 35A. Therefore only the assessee or his agent can file the objections. The authorized representative is not entitled to file such objections.
- v Learned dispute resolution panel has specifically considered by referring to provisions of section 163 of the income tax act that who is an agent. He submitted that the authorized representative who signed the form number 35A is not an agent.
- vi Even before the tribunal, the authority letter of Mr. Krishnan is not at all filed which even remotely

shows that he can be considered as an agent, who can file the objection before the DRP.

- vii Therefore, learned DRP is correct in dismissing the objections of the assessee.
- viii On the decision cited by the learned authorized representative, he submitted that the coordinate bench has incorrectly held that there is no prescription that the objection should be filed by the assessee in person. The coordinate bench has extended the definition of agent without any basis to include the chartered accountant or any other person. If such an incoherent view is taken, then anybody can file objection before the learned dispute resolution panel. Then the definition of assessee gets blurred. He specifically referred to section 2 (7) wherein assessee is defined. He submitted that the learned authorized representative also does not fall under that definition and therefore he was not entitled to file the objection on behalf of the assessee. He further submitted that when the LD DRP is not before tribunal, no directions can be given to LD DRP.
- ix Verification states that whatever is stated in form number 35A is 'true to the best of information and belief' of the signatory. Such averment cannot be made by an authorized representative. Therefore, there is no infirmity in the direction passed by the learned dispute resolution panel.

- x Accordingly, the order passed by the learned assessing officer against which the appeal is filed cannot be found fault with as the direction of the learned dispute resolution panel binds the learned AO and on receipt of direction, without giving any opportunity, the learned AO is duty-bound to pass an assessment order.

016. We have carefully considered the rival contentions and perused the order of the learned assessing officer which is passed pursuant to the direction of the learned dispute resolution panel. Short question before us is whether the learned dispute resolution panel is correct in dismissing the objection filed in form number 35A verified by the authorized representative holding that as the directions are not verified by the assessee or its agent, the same is required to be dismissed as not maintainable without giving any direction on the merit. Admittedly in this case form number 35A was filed against the draft assessment order passed by the learned assessing officer on 31/3/2022, verified by one Mr. Krishnan, advocate, authorized representative of assessee. The letter of authority issued to Mr. S Krishnan authorizing him to file the objection before LD DRP is not produced before us.
017. Form number 35A is a form prescribed under Income Tax (Dispute Resolution Panel) Rules, 2009 (The DRP rules). This form prescribed verification as under:-

I _____ **the assessee**, do hereby declare that what is stated above is **true to the best of my information and belief**.

018. Thus from the above verification it is clear that it is only the 'assessee' who has to sign form number 35A. Rule 4 (1) provides that the objection if any, of the eligible assessee to the draft order may be filed in person or through his agent within the specified period in form number 35A. Therefore rule 4 (1) does not talk about the verification part of form number 35A but merely talks about who shall file the form. There is a basic distinction between the person who is filing the form and the person who is making a verification of the form. As the form is required to be verified by an assessee, assessee is defined under section 2 (7) of The Income Tax Act. Rule 2 (vi) of the DRP rules clearly provides that unless the context otherwise requires the words and expressions used in the rules but not defined in defined in the act shall have the meanings respectively assigned to them in the act. Therefore as the word 'assessee' has not been defined in the DRP Rules, it would be taken from section 2 (7t) of the Income Tax Act. Section 2 (7) defines 'assessee' means a person from whom any tax or any other sum of money is payable under this act and includes certain specified category of the persons. 'Person' has been defined under section 2 (31) of the act. Looking to the various categories of the definition of the person, clear cut answer emerges that the authorized representative was not entitled to sign and verify form

number 35A. Authority based on which the learned advocate verified form number 35A was not produced before us, therefore, the assessee has failed to show that the advocate, authorized representative was any way connected and authorized to verify form number 35A. Thus, No doubt, the advocate who signed the form is neither an 'assessee' nor an agent. Therefore, we hold that verification of form number 35A made by the advocate being an authorized representative of the assessee is not proper verification and no fault can be found with the directions of the Id DRP holding that the objection are not maintainable.

019. However, despite holding that the learned authorized representative could not have verified form number 35A, we find that DRP Rules provide that as soon as the objections are filed, notice of hearing to the eligible assessee specifying the date and place of hearing of the objection shall be issued. The learned dispute resolution panel in this case has already issued a notice to the 'eligible assessee'. Subsequently the hearing of objections also took place. This is in terms of rule 5 – 7 of the DRP rules. Subsequently according to rule 9, the learned dispute resolution panel further called for the written submissions of the assessee which were also filed. The personal hearing was also granted to the assessee. Therefore at every stage assessee was given an impression that its objection is being considered on merit. We note that the objections were filed by the assessee on 29/4/2022. The learned dispute resolution

panel passed the direction on 29/12/2022. In response to the hearing before the learned dispute resolution panel, same advocate who verified objections, appeared and represented, case was discussed with him. But the LD DRP did not indicate at anytime even once that the objections are not maintainable as not verified in accordance with the DRP Rules. Perhaps had this been intimated to the assessee upfront, assessee could have taken a remedial action. But such an opportunity was never granted to the assessee. In the first letter dated 13/10/2022 issued by the learned dispute resolution panel fixing the date of hearing on 21/10/2022 has clearly referred to the application filed by the assessee. This letter was issued by the ITO headquarter to DRP-1, WZ Mumbai. Subsequently after furnishing all the details virtual hearing took place. During the course of virtual hearing, the assessee was asked to file certain synopsis, the same were also filed. The last information submitted by the assessee was on 9/11/2022 to the learned dispute resolution panel. In that time the learned dispute resolution panel did not indicate to the assessee that the objections filed are not in conformity with the rules of the DRP. After 9/11/2022, the dispute resolution panel did not make any communication with the assessee till 29/12/2022, [almost one and half month] wherein the directions were issued treating the objections filed by the assessee as not maintainable. The learned dispute resolution panel could have issued the notice to eligible assessee, even after 9/11/2022, before passing the

directions, that the objections filed by the assessee are not in conformity with the DRP rules 2009 and therefore are liable to be rejected as not maintainable. It was not done. Thus in the present case, the conduct of the learned dispute resolution panel did not indicate at any point of time that the objections filed by the assessee are not in conformity with the DRP rules. It always gave the impression to the assessee that objections are considered on merits. Had these direction been not on conformity with the DRP Rules, issuing notice, calling for the submissions, giving an opportunity of personal hearing, queries raised during the personal hearing, responses taken on record, and then in the end dismissing the objection as not maintainable, is clear-cut violation of the principles of natural justice. Whenever, the principles of natural justice are violated, the matter should be restored back at that particular stage. However, as the principles of natural justice are violated by the learned Dispute Resolution Panel which is not before us as respondent, we are not supposed to pass any instructions to them. It is the assessing officer who is before us. Therefore we would be passing directions to the learned that assessing officer and assessee.

020. The decision of the coordinate bench cited before us in ITA number 5401/M/2012 and 7230/M/2011 for assessment year 2007 – 08, set-aside the issue back to the file of the learned DRP. We have carefully perused the observations made by the bench in paragraph number 9, 12 and 13 however that are not the ratio decidendi of the

judgment. Further, in that case, when the verification was not done by assessee, the learned dispute resolution panel gave an opportunity to the assessee to explain that why the objections filed by it should not be dismissed and thereafter considering the explanation of the assessee the learned dispute resolution panel in that case held that the form number 35A not been correctly verified. That was not the case where the assessee was not at all confronted with the view of the learned dispute resolution panel that the form is not properly verified and not maintainable. That was also not the case where the hearing took place, assessee was heard on merits and later on objections were held to be invalid, without giving any opportunity to the assessee. The coordinate bench in that decision held that an agent is permitted to file the objection, there cannot be any dispute with that proposition as that is the mandate of rule 4 (1) of the DRP rules. But there is a basic distinction between 'verification' of form number 35A and filing of the objections. We also do not subscribe to the view that a chartered accountant or anybody else can verify form number 35A. We also failed to understand that how a chartered accountant or an advocate can declare that what is stated in form number 35A is true to the best of his information and belief. This is for the simple reason that a chartered accountant or any advocate cannot be privy to information about the truthfulness of facts stated in that form. Therefore certainly, according to us only assessee can verify form number 35A.

021. However in the present case, the form number 35A is verified by the advocate, which was dismissed by the learned dispute resolution panel without giving any opportunity to the eligible assessee confronting the fact that form number 35A is not properly verified, violates the principles of the natural justice. Therefore, we put the assessee back to the stage of filing of objections before the learned dispute resolution panel. Accordingly we direct the Assessee to file objections before LD DRP within 30 days from the date of receipt of this order duly verified in accordance with law. Ld DRP may decide the objection in accordance with the law.
022. Accordingly ground number B of the appeal of the assessee is allowed. All other grounds are left unadjudicated.
023. In the result ITA number 457/M/2023 for assessment year 2014 – 15 is partly allowed for statistical purposes.
024. The facts for assessment year 2015 – 16 shows that assessee challenged in ITA number 458/M/2023 assessment order passed under section 147 read with section 144C (13) dated 13/1/2023 passed by the Assistant Commissioner Of Income Tax International Taxation Circle 1 (3) (2), Mumbai also passed in pursuance of the direction of the learned dispute resolution panel dated 29/12/ 2022 wherein the learned dispute resolution panel has dismissed the objection filed by the assessee in limine as not maintainable as form number 35A was verified by the advocate.



025. As there is no change in the facts and circumstances of the case as compared to the appeal of the assessee for assessment year 2014 – 15, with similar direction as given by us while disposing of the appeal of the assessee for assessment year 2014 – 15, we allow ground number B of the appeal of the assessee. All other grounds of the appeal are left on adjudicated.
026. Accordingly appeal of the assessee for assessment year 2015 – 16 is allowed for statistical purposes.
027. In the result, both the appeals filed by the assessee are allowed on ground number B of those appeals for statistical purposes.
028. In view of our decision in both the above appeals connected stay application number 49 and 50/M/2023 filed by the assessee becomes infructuous and hence dismissed.

Order pronounced in the open court on 01.08.2023.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 01.08. 2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,



True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai