



आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में
**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

श्री अमित शुक्ला, न्यायिक सदस्य एवं
श्री मनोज कुमार अगरवाल, लेखा सदस्य के समक्ष ।

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA No. : 2644/Mum/2015

(Assessment year: 2002-03)

ITA No.: 2645/Mum/2015

(Assessment year: 2003-04)

ITA No.:2646/Mum/2015

(Assessment year: 2004-05)

ITA No.:2649/Mum/2015

(Assessment year: 2008-09)

मोहित राकेश कुमार गुप्ता Mohit Rakesh Kumar Gupta, Prop. M.S. Astha Silk Industries Shop No.4, Ram Galli, Pankaj Market, Champa Gally Cross Lane, Mumbai -400 002 PAN: AFUPG 3014 P	Vs	ITO -14(3)(2), Earnest House, Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by		श्री विमल पुनामिया Shri Vimal Punamiya श्री नीरज पुनामिया Shri Niraj Punamiya
Respondent by		श्री सी एस शर्मा Shri C S Sharma

सुनवाई की तारीख /Date of Hearing : 29-09-2016

घोषणा की तारीख /Date of Pronouncement : 29-09-2016

आदेश
ORDER

श्री अमित शुक्ला, न्यायिक सदस्य
PER AMIT SHUKLA, J.M.:

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The aforesaid appeals have been filed by the assessee against common order dated, 22.01.2015 passed by Id. CIT(Appeals)-29, Mumbai in relation to the penalty proceedings under section 271(1)(c) for the assessment years 2002-03, 2003-04, 2004-05 and 2008-09.

2. The facts relating to levy of penalty are identical in all the years, which is mainly on account of estimation of net profit rate of commission income. The penalty levied for the various assessment years are as under:-

Assessment year	Penalty (Amt) Rs.
2002-03	6,91,449
2003-04	7,03,687
2004-05	12,20,646
2008-09	11,34,086

3. The brief facts *qua* the issue relating to levy of penalty are that, assessee is a trader in fabrics, however, at the time of survey under section 133A, it was found that, he along with his other family members through various concerns are engaged in issuing accommodation sales bills. The assessee's family consists of following persons, who were running following business concerns:-

Name	Relation	Business Concerns
Rakesh Kumar Gupta	Father	M/s Manoj Mill
Hema Gupta	Mother	M/s Shree Rama Sales & Synthetics
Mohit Gupta	Seld	M/s Aastha Silk Industries
Nilesh Gupta	Brother	M/s Dev Vani Industries
Rakesh Kumar Gupta HUF	Father HUF	M/s Sainath Textiles

The commission income from such business of providing accommodation bill was estimated by the Assessing Officer in the various assessment years in the following manner:-

Particulars	Product value	2002-03	2003-04	2004-05	2008-09
6% of sales	39642782	2378567			
4% of sales	32254181		1290166		
	59116963			2364678	
	51407550		954448		
3% of Purchases	31814964			1528930	
	50964355				1455830
Less: 5% expenses		118928	112130	194680	175606
Net Commission		2259639	2132484	3698928	336526

4. Assessee's case was that, he has only earning 1% of gross profit as a commission for issuing accommodation bills and the net profit from such commission income was around 0.42%, whereas, the Assessing Officer has estimated net profit @ 7% and thereafter giving benefit of expenditure for earning this income to the extent of 5%, the balance net profit rate of approximately 6.35% was confirmed.

5. In the first appeal, the Ld. CIT(A) confirmed the said addition and matter had travelled up to the stage of the Tribunal. The Tribunal sent back the matter to the file of the CIT(A). In the set aside proceedings, the Ld. CIT(A) after calling for the remand report again confirmed the said estimation made by the Assessing Officer.

6. Now, in the second round of appeal before the Tribunal, the net profit rate of commission has been reduced to 0.6% of the turnover and 5% of net expenditure as allowed by the Assessing Officer was retained.

7. Before us, the Ld. Counsel submitted that, now in the wake of the decision of the Hon'ble Tribunal, whereby,

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substantial relief on account of net profit rate has been given, no penalty can be levied. The effect of the Tribunal order and the computation of additional tax liability have been worked out by the Ld. Counsel in the following manner:

COMPUTATION OF ADDITIONAL TAX LIABILITY (In Rs.)				
	AY 2002-03	AY 2003-04	AY 2004-05	AY 2008-09
Appellant	90,602	143,490	173,248	228,759
Income Tax	7,120	18,098	23,650	19,752
Cess			473	593
	7,120	18,098	24,123	20,344
Hon'ble	225,964	183,849	292,691	287,767
ITAT	34,193	25,770	47,538	31,553
Income Tax		-	951	947
Cess				
	34,193	25,770	48,489	32,500
Differential	27,072	7,672	24,366	12,156

Thus, he submitted that, ultimately the quantum has been decided substantially in favour of the assessee and the difference now remains marginally less. Ultimately, the view taken by the various authorities is based on estimation and the difference between the net profit shown by the assessee and net profit as estimated from the stage of the Tribunal is very less. Thus, there cannot be a case for levy of penalty, either for concealment of income or for furnishing of inaccurate particulars. In support, he relied upon catena of decisions and also to be put forth various proposition that on such fact no penalty can be levied.

8. On the other hand, Ld. DR submitted that, the assessee has been found to be involved in providing accommodation entry and net profit rate on commission income earned on such activities have been found to be incorrect. Therefore, penalty has rightly been levied and confirmed by the CIT(A).

However, he submitted that, in the light of the Tribunal decision, the quantum of penalty can be scaled down.

9. After hearing both the parties and on perusal of the impugned order as well as the material placed on record, we find that the addition in all the years have been made after estimating the income of the assessee by way of net commission @ 6% to 7%. Now, the Tribunal in assessee's own case has reduced the net profit rate of commission @ 0.6% after observing and holding as under:

"We find that it is not case of turnover and tax thereon but regarding estimation of commission on such business of accommodation entries and tax thereon. Regarding rate of commission adopted by Assessing Officer at 6%, Ld. Authorized Representative submitted that it was very abnormal and cannot happen in case of accommodation business. Further, the rate of presumptive profit referred by the CIT(A) could not be considered in case of accommodation business. Assessee in his statement dated 13/02/2009 & 23/02/2009 stated that commission income is earned @ 1% on the sales also claimed certain expense thereon. The rate mentioned by assessee is the rate which is prevailing in this line. In this regard, Ld. Authorized Representative submitted that this issue of determination of rate of commission in case of accommodation transaction arose before the ITAT in case of Sanjay Kumar Garg vs. ACIT [2011] 12 taxmann.com 294 (Delhi) wherein Tribunal held as under:-

"49. The next issue arises for estimation of commission income. In the statement the assessee at the time of survey under section 133A had stated that he charged 25p as commission for providing accommodation entries and out of that 25p he paid 10p to others in whose name bank accounts were maintained and 5p was spent on expenses incurred in

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relation such business and hence, net commission earned was 10 paise i.e., 0.10 per cent. The Ld. CIT (A) had taken the commission at 1 per cent as against 1.75 per cent applied by the Assessing Officer for which no evidence during the course of survey was found. The Ld. CIT(A) has also noted that there was no clear standard rate of commission for accommodation activities. According to him the people who are engaged in this type of business would not charge less than 1 per cent on the bill amount as done in the case of brokerage on real estate business. He further observed that the rate of 1 per cent commission is very reasonable. Now the issue arises as to whether the commission should be estimated at the rate of .01 per cent or 1.75 per cent or 1 per cent. The Id. CIT (A) for arriving at the rate of commission earned has relied on rate of commission normally charged in case of real estate transactions. In real estate transactions the broker has to identify/ the suitable butler/ purchaser, inspection of property, visit of interested parties, negotiations of rates, registration of sale deeds etc. whereas in case of bogus entries providers no such activities are involved. Interested party gives cash to entry provider which is deposited in bank account and the entry provider issues cheque. Hence the transactions of bogus entry providers cannot be compared with the transactions of real estate business transactions. He has to ensure the nature of the property and has to satisfy both seller and purchaser. The services rendered by the brokers in real estate transactions are more than the entry providers. Hence both the transactions are not comparable. Therefore, the comparison of commission earned on a real estate transaction, which in fact takes place and commission on transaction which does not at all occur, are not comparable. In accommodation entries the transaction does not take place and, therefore, commission will be certainly lower than the commission in the case of real estate or real transactions. Moreover, neither the Ld. CIT(A) nor the Assessing Officer had given any comparable case wherein commission at the rate of 1.75 per cent as taken by the Assessing Officer or 1 per cent adopted by the Id. CIT(A) has been admitted by other assessee engaged in business of bogus provider. Therefore, in the absence of any such material on record, the statement given by the assessee on oath during the course of survey proceedings has to be given credence. The assessee has floated the bogus concerns and has controlled the accounts. During the course of survey, no material was found on the basis of which it could be said that the assessee had passed on. 1 per cent commission to the persons in whose names the bank accounts were maintained. In the absence of any evidence having brought on record, we are unable to agree with the assessee that the assessee had passed on commission of 10 paise to the persons in whose names dummy concerns were floated. However, in the business of entry

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provider certain expenditure has to be incurred which has been stated to be 5p during the course of survey. Therefore, credit of 5p out of 25p received as commission has to be allowed. Therefore, the Assessing Officer is directed to estimate commission income by applying 0.2 per cent net commission on turnover determined by the Ld. CIT (A) for both the assessment years as against 1 per cent taken by him.

6.1 We find that Tribunal in case of Sanjay Kumar Garg vs. ACIT (supra) held that rate of commission cannot be more than 1%, but in present case, assessee had already offered the same for taxation purpose but with rider of allowability of certain expense against same. Hence, the rate of 6% adopted by Assessing Officer was highly one. Hence, the commission income was to be taken @ 0.6% of sales turnover. Similar view has also been taken by the jurisdictional Mumbai Tribunal in case of Gold Star Finvest (P.) Ltd Vs. ITO [2013] 33 taxmann.com 129bal Trib.), wherein Tribunal held as under:

12. Having carefully examined the various Orders in the case of different assesseees' it has become amply clear that in these type of activities brokers are only concerned with their commission on the value of the transactions. Now the question comes what would be the reasonable percentage of the commission on the total turnover ? The assessee has also made out a case that the customers do not come directly to him and they come through a sub-broker who also charge a particular share of commission. In all the judgments what has been stated is that an average percentage of commission is between .15% to .25%. In the cases of Pairesha & Co. (supra) and Kiran & Co. (supra), the Tribunal has considered reasonableness of percentage of commission to be earned on turnover was at . 1 %. The assessee himself has offered the percentage of commission at 0.15%, which is more than the percentage of commission considered to be reasonable by the Tribunal in the cases of Pairesha & Co. (supra) and Kiran & Co. (supra), in similar type of transactions. The theory of the Assessing Officer to treat the entire deposit as "unexplained cash credits, cannot be accepted in the light of assessment orders in the case of beneficiaries and also in the light of the fact that assessee is only concern with the commission earned on providing accommodation entries. We, therefore, of the view that since the assessee itself has declared the commission on turnover at 0.15% which is more than the percentage considered to be reasonable by the Tribunal in the cases of Palresha & Co. (supra) and Kiran & Co. (supra), the same should be accepted. We, accordingly, accept the commission

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declared by the assessee and set aside the Order of the CIT (A) in this regard."

6.2 We find that ITAT in case of Sanjay Kumar Garg (supra) has applied 0.2% commission on turnover and in Gold Star Finvest (P) Ltd. (supra) approved 0.15%. So, taking all factors into consideration, we hold that percentage of commission to be earned on turnover is reasonable at 0.6%. We hold so.

6.3 Assessing Officer has allowed only ad hoc expenses @ 5% of commission income, without prejudice to merit of issue, we are not inclined to interfere in the finding of Assessing Officer on this issue".

Now, in the wake of the aforesaid Tribunal decision in the quantum proceedings, the income estimated has been scaled down substantially and the differential in tax amount is in few thousands only as reproduced above. Once it is a matter of estimation and the final income sustained after estimation of net profit is very near to the estimate of commission income shown by the assessee, then under these facts and circumstances, it cannot be held that any penalty can be levied under section 271(1)(c) either for concealment of income or for furnishing of inaccurate particulars. Once it is a case of pure estimation which has been varied by various authorities at different stages, then on such difference of opinion that to be in the matter of estimation, it cannot lead to any inference of levy of penalty. Accordingly, penalty levied by the Assessing Officer and sustained by the CIT(A) is hereby directed to be deleted in all the years. Therefore, the appeals of the assessee for all the years are allowed.

10. In the result, all the appeals of the assessee are allowed.

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Order pronounced in the open court on 29th September, 2016.

Sd/-

(मनोज कुमार अगरवाल)
 लेखा सदस्य
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-

(अमित शुक्ला)
 न्याईक सदस
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 29th September, 2016.

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT (Appeal) -29, Mumbai.
 - 4) The CIT-___Conerned, Mumbai
 - 5) विभागीय प्रतिनिधि "सी", आयकर अपीलीय अधिकरण, मुंबई/
 The D.R. "C" Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

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 Dy./Asstt. Registrar
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*चव्हान व.नि.स

*Chavan, Sr.PS