

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

**BEFORE SHRI C. N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.7774/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2011-12)

Assistant Commissioner of Income Tax-11(3)(1), Room No. 427, Aayakar Bhavan, M K Marg, Mumbai-400 020	बनाम/ v.	Trail Blazer Tours (India) Private Limited 170, B Wing, Jeena House O M Sagar, Sahar, Andheri East, Mumbai-400 099
स्थायी लेखा सं./PAN : AACCT6365J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by	Shri Vishwas Jadhav, DR
Assessee by :	Ms. Aarti Sathe

सुनवाई की तारीख / **Date of Hearing** : 04-08-2016

घोषणा की तारीख / **Date of Pronouncement** : 07-10-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 7774/Mum/2014, is directed against the appellate order dated 22nd October 2014 passed by learned Commissioner of Income Tax (Appeals)- 18, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2011-12, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 20th February 2014 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. Whether on the facts and in the circumstances of the case and in law, was the Ld. CIT(A) justified in deleting the addition of Rs.17,91,690/- made on account of non-deduction of tax(u/sec. 194I) on rent paid on the basis of additional evidences submitted by the assessee during the assessment proceedings nor remand proceedings and hence should not have been admitted as per Rule 46A of the I T Rules 1962.”

2.”Whether on the facts and in the circumstances of the case and in law , was the Ld. CIT(A) justified in deleting the addition made on account of non-reconciliation of entries in 26AS without appreciating that the additional evidence submitted by the assessee during the appellate proceedings were neither filed during assessment proceedings nor remand proceedings and hence should not have been admitted as per Rule 46A of the I T Rules 1962.”

3. “Whether on the facts and in the circumstances of the case and in law, was the Ld. CIT(A) justified in not appreciating the ratio laid down by the ”

4. “The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the A.O. be restored.”

3. The brief facts of the case are that the assessee is engaged in the business of providing services relating to tours and travel. It was observed by the AO during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act that the assessee has made short deduction of tax deducted at source on rent to the tune of Rs.1,79,169/- as under:

S.No.	Name of the Party	Total Rent paid during the year(In Rs.)	TDS to be deducted @10% (In Rs.)	TDS actually deducted (In Rs.)	Difference (In Rs.)

1	Orion Projects	26,44,152	2,64,415	2,39,724	24,691
2.	Nitras Exports Private Limited	14,44,930	1,44,493	18,177	1,26,316
3.	Crystal Complex Private Limited	26,30,258	2,63,026	2,38,464	24,562
4.	Seema C. Jain	2,88,000	28,800	25,200	3,600
	TOTAL		7,00,734	5,21,565	1,79,169

The assessee did not furnished any explanation as to why tax has not been deducted as per rates prescribed in the Act. Thus, the AO added corresponding expenditure of Rs.17,91,690/- to the income of the assessee vide assessment order dated 20-02-2014 passed by the AO u/s. 143(3) of the Act.

4. Aggrieved by the assessment order dated 20.02.2014 passed by the AO u/s. 143(3) of the Act , the assessee filed first appeal with learned CIT(A) and contended that the AO calculated TDS on service tax component included in the rent and the details were furnished before the learned CIT(A). Further, it was submitted that w.r.t. Nitras Exports Private Limited, the party has given low deduction of tax at source certificate authorizing to deduct tax at source @2% instead of 10%. The assessee relied on CBDT circular no 4 dated 28-04-2008 wherein the CBDT clarified that the service tax amount should be excluded while calculating TDS on rent as the service tax is collected to be paid to Government. In Remand Report also the AO submitted that there is short deduction of TDS on rental payments. The learned CIT(A) allowed the appeal of the assessee on this ground relying on CBDT circular no 4 dated 28-04-2008 that Tax is not to be deducted at source under Section 194I of the Act on service tax component and shall be deducted on rental component only vide appellate order dated 22-10-2014 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 22-10-2014 passed by the learned CIT(A) , the Revenue is in appeal before the Tribunal wherein learned DR contended that additional evidences were filed by the assessee before the learned CIT(A) which were not filed before the AO in assessment proceedings nor in remand proceedings and hence learned CIT(A) erred in admitting additional evidences without forwarding the same to the AO in violation of Rule 46A of Income Tax Rules, 1962, while the learned AR relied on the orders of learned CIT(A) and submitted that the tax cannot be deducted at source u/s 194I of the Act on service tax component while it can be only deducted at rent component as per CBDT circular no 4 dated 28-04-2008. Further the learned counsel submitted that with respect to Nitras Exports Private Limited , the said party has submitted lower deduction TDS certificate issued by the Revenue to deduct TDS@ 2%instead of 10%. On being asked to produce the said certificate of lower deduction of TDS furnished by Nitras Exports Private Limited, the learned counsel for the assessee stated that the same shall be produced with copy to learned DR. It is the say of learned counsel for the assessee that the powers of the learned CIT(A) is co-terminus with powers of the AO.

6. We have heard the rival contentions and perused the material on record. We have observed that the assessee has paid rentals on which tax was deducted at source as per chart produced in preceding para's. The assessee did not deducted tax at source u/s 194I of the Act on service tax component as per CBDT circular no 4 dated 28-04-2008 for which we are in agreement with the contentions of the learned counsel for the assessee which has also been upheld by the learned CIT(A). The Revenue is aggrieved in the instant appeal that the additional evidences being admitted by the learned CIT(A) in violation of Rule 46A of the Income Tax Rules, 1962 as the same were not forwarded by the learned CIT(A) to the AO for verification and hence these additional evidences were not evaluated by the learned AO in the assessment

proceedings nor in the remand proceedings. Thus, for limited purposes of verification of the claim of the assessee that the service tax component was separately charged from the rent paid by the assessee and the assessee duly deducted tax at source on rent paid u/s 194I of the Act and it is only on service tax component, no tax was deducted at source u/s 194I of the Act, we are remanding the matter back to the file of the AO for limited verification as stipulated by us as above. Secondly, with respect to rent paid to Nitras Exports Private Limited, the assessee deducted TDS @2% instead of 10% as mandated u/s 194I of the Act. The assessee did not produce the lower deduction of tax at source certificate issued by the Revenue authorizing deduction of TDS @2% instead of 10% u/s. 194I of the Act before the Tribunal as stated during the course of hearing before the Bench by learned counsel for the assessee and hence we are remanding the matter back to the AO whereby the assessee shall produce the said certificate of lower deduction of tax at source before the AO for necessary verifications and examination. With the above stated directions, the ground no 1 is disposed off. We order accordingly.

7. The next effective ground raised by the Revenue is with respect to deletion by the learned CIT(A) of addition made by the AO with respect to difference in the income as reported in 26AS vis-a-vis with income as reported in the return of income filed with Revenue by admitting additional evidences without complying with the requirements of Rule 46A of Income Tax Rules, 1962 where in the said additional evidences were not filed before the AO during the assessment proceedings as well during the remand proceedings.

It was observed by the AO that there is a mismatch of the income reported in AS 26 vis-à-vis income as recorded in books of accounts. The assessee did not give reconciliation details to reconcile the two figures of the receipts based on AS26 and books of accounts maintained by the assessee. Thus, the AO made

an addition of Rs.1,74,09,425/- based on difference between the receipts declared in the Profit and Loss Account vis-à-vis receipts appearing in 26AS database as under :-

a) **Interest Income u/s. 194A :**

S.No.	Name of the Party	Income as Per 26AS	Income as per P & L account	Differance
1.	ICICI Bank Limited	Rs.7,533/-	Nil	Rs.7,533/-
2.	Kotak Mahindra Bank Limited	Rs.89,265/-	Nil	Rs.89,265/-
	TOTAL	Rs.96,798/-	Nil	Rs.89,265/-

b) **Commission Income u/s. 194H:**

S.No.	Income as per 26AS	Income as per P & L account	Difference
1.	Rs.4,99,45,153/-	Rs.3,26,44,993/-	Rs.1,73,00,160/-

c) **Rent Income u/s 194I:**

S.No.	Name of the Party	Income as Per 26AS	Income as per P & L account	Differance
1.	TATA AIG General Insurance	Rs.20,000/-	Nil	Rs.20,000/-
	TOTAL	Rs.20,000/-	Nil	Rs.20,000/-

Thus, the AO made an addition of Rs.1,74,09,425/- based on difference between the receipts declared in the Profit and Loss Account vis-à-vis receipts appearing in 26AS database vide assessment order dated 20-02-2014 passed by the AO u/s 143(3) of the Act.

8. Aggrieved by the assessment order dated 20-02-2014 passed by the AO u/s 143(3) of the Act, the assessee filed first appeal with the learned CIT(A) and contended that if one goes through the schedule 13 annexed to and forming part of the accounts, it is clearly stated that :-

Business Auxiliary Services	Rs. 30,17,339/-
Commission Income(Net)	Rs.3,26,44,993/-
Interest/Banks	Rs. 2,63,281/-

As per books of accounts details of commission are as follows:

Commission Received	Rs.4,63,48,908.11
Less: Discount Allowed	Rs.(1,36,03,915.10)

Net Commission Income Credited to P & L A/c	Rs.3,26,44,993.01

Hence, as per books of accounts gross income is bifurcated as follows:

Gross Income	Rs.4,62,48,180.35
Business Auxiliary	Rs. 30,00,000.00

Tour Income	Rs.5,01,52,113.17
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It was submitted by the assessee before learned CIT(A) that income as per form 26AS is Rs. 4,99,45,153.00 while income as per Income and Expenditure account is Rs 5,01,52,113.17. It was also submitted that the interest income of Rs.2,63,281/- was clearly reflected in the Schedule 14 in

which tax deducted at source was an amount of Rs.96,798/- which is reflected in Form No. 26AS it was submitted by the assessee before learned CIT(A) that income shown in books of accounts is more than income shown in form no. 26AS. It was submitted that in schedule 13 other services income of Rs.1,41,12,922/- includes Tata AIG General Insurance Co. Ltd commission of Rs.20,000.00 . It was submitted that the income as disclosed in Profit and Loss Account as per schedule 13 under the heading income from services , sub-heading commission income(net) Rs.3,26,44,993/- which is the outcome of Gross Amount of Commission received of Rs. 4,62,48,908/- less discount given Rs.1,36,03,915/- .It was submitted that net commission is disclosed in Profit and Loss account which is normal accounting practice followed by the assessee year after year and certified by the auditors. Thus, it was submitted that the net amount disclosed as per Profit and Loss account tallies with income as per form no 26AS.

The learned CIT(A) observed that the AO asked the assessee to reconcile the Income between as declared in books of accounts and as reflected in form no 26AS but the assessee reconciled only the TDS figures as indicated in form no 26AS with TDS as reflected in books of accounts. The learned CIT(A) observed that the assessee has submitted that the difference is on account of accounting for net commission in books of accounts due to adjustment of discount given of Rs.1,36,03,915/- from the gross commission of Rs.4,62,48,908/- , to reflect net commission income of Rs.3,26,44,993/- in the books of accounts while the Form No 26AS reflected gross commission income, which was submitted to be normal accounting practice followed by the firm in the earlier years. The net amount of commission amounts were certified by the auditors as disclosed in the Profit and Loss Account. It was also observed by the learned CIT(A) that the assessee submitted that there was no rental income from TATA AIG General Insurance Co. Ltd but the said income was from professional sources and credited to Tour Income. It was

observed by the learned CIT(A) that there was no discrepancy as pointed by the AO. The learned CIT(A) called for remand report from the AO whereby the AO submitted that the assessee only reconciled the TDS amount and did not reconcile the difference in the receipts as reflected in the Profit and Loss account with Form No AS 26 and it was submitted by the AO that difference to the tune of Rs.1,74,09,425/- was thus added by the AO to the total income of the assessee .

The learned CIT(A) deleted the additions made by the AO and allowed the appeal of the assessee on this ground as the assessee has shown total receipt of Rs.5,01,52,113/- in the books of accounts against entries of Rs.4,99,45,153/- shown in form no 26AS which means that the assessee has itself shown receipts more than given in the form no 26AS and it was mainly due to the method of accounting whereby net commission after deducting discount from gross commission is reflected in Profit and Loss Account while Form no 26AS reflected gross commission, which led to reconciliation of commission income after adjusting discount of Rs.1,36,03,915/- allowed. Thus, as per books gross commission income as per books came to Rs.4,62,48,180/- (before adjusting discount), business auxiliary income of Rs. 30,17,339/- and tour income of Rs.9,03,932/- totaling to Rs.5,01,52,113/- against income as declared in form no AS26 of Rs.4,99,45,153/-. Thus, the income as per profit and loss account (before adjusting discount on commission) was higher than income as perform no 26AS and hence addition to the income of Rs.1,74,09,425/- was deleted by learned CIT(A) vide appellate orders dated 22.10.2014.

9. Aggrieved by the appellate order dated 22-10-2014 passed by learned CIT(A) , the Revenue is in appeal before the Tribunal and it is the say of the learned DR that the learned CIT(A) has admitted additional evidences filed by the assessee in appellate proceedings without sending the same to the AO for

his comments as mandated under Rule 46A of Income Tax Rules, 1962 and hence the order of learned CIT(A) is not sustainable in law. It was submitted by learned DR that despite several reminders , the assessee did not come forward to give details before the AO to reconcile the difference between the amount reflected as commission income in Profit and Loss Account as per books of accounts vis-à-vis the amount of income as reflected in AS 26. The learned DR submitted that the matter be remanded to the AO for necessary verifications and examination. The learned counsel for the assessee relied upon the orders of the learned CIT(A). The learned counsel for the assessee drew our attentions to the paper book filed and submitted that reply was given whereby details of TDS as per form 26AS and bifurcation of TDS was furnished before the AO vide reply dated 14-02-2014(pb/page58). It was submitted that on 10-3-2014 i.e. after passing of an assessment order dated 20-02-2014 by the AO u/s. 143(3) of the Act , an rectification application was moved with the AO u/s 154 of the Act on 12-03-2014 which is placed at paper book / page59-61,66-75 . The replies submitted before learned CIT(A) in appellate proceedings is also placed in paper book page 62-65. The remand report sent by the AO is placed in paper book 76-78. The replies submitted by the assessee before learned CIT(A) in response to the remand report of the AO is placed in paper book page 79-81.

We have gone through all the relevant documents as mentioned above and placed in paper book and the submissions of both the rival parties including orders of the authorities below. The assessee did not filed complete details of gross commission income and discount allowed separately before the AO in assessment proceedings while only net figures of commission income were placed before the AO which were reflected in the books of accounts as net commission income earned by the assessee while the form no 26AS reflected the gross commission income and hence mismatch of Rs.1,36,03,915/- being discount allowed by the assessee out of commission income. This claim of

discount of Rs.1,36,03,915/- was never verified and examined by the AO during the assessment proceedings as only the net commission income figures were there before the AO as were reflected in Profit and Loss account of the assessee as per books of accounts , and the gross commission income figures were there before the AO during assessment proceedings as were reflected in AS 26 , which difference of Rs.1,36,03,915/- was thereby added to the income of the assessee by the AO as simplicitor difference in the income as per books of accounts vis-à-vis income as reflected in form no AS 26 , without examining and verifying the claim of deduction claimed by the assessee of discount allowed of Rs.1,36,03,915/- out of gross commission income as the said facts of having allowed discount out of gross commission were never before the AO. The assessee raised this issue in proceedings u/s 154 of the Act filed on 12-03-2014 anterior to framing of impugned assessment order dated 20-02-2014 u/s 143(3) of the Act, which disclosure of details in proceedings u/s 154 of the Act is irrelevant to the appellate proceedings arising from the assessment order u/s 143(3) of the Act. The assessee submitted replies before the learned CIT(A) in appellate proceedings whereby it explained the difference between the gross commission income and net commission income and that being discount allowed by the assessee of Rs.136,03,915/- out of gross commission income. It is the say of the learned DR that additional evidences submitted by the assessee were never forwarded by the learned CIT(A) to the AO which is in violation of Rule 46A of the Income Tax Rules , 1962 and the assessee did not submit details to reconcile the difference of receipts in books of account vis-à-vis with receipts as reflected in form no 26AS. We are of considered view that the interest of justice will be best served if the issue is set aside and restored to the file of the AO for de-novo adjudication of the matter on merits with respect to the addition of Rs.1,74,09,425 made by the AO on account of difference in the receipts as reported in books of accounts vis-à-vis receipts as reported in Form No 26AS inter-alia, including the examination and verification of the claim of discount

given by the assessee of Rs.1,36,03,915/- out of gross commission income. Needless to say proper and sufficient opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. The assessee will be allowed by the AO to produce all necessary and relevant evidences and explanations to support its contentions . The assessee is directed to co-operate with Revenue in set aside proceedings. We order accordingly.

10. In the result, appeal filed by the assessee in ITA No. 7774/Mum/2014 for the assessment year 2011-12 is allowed as indicated above.

Order pronounced in the open court on 07th October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 07-10-2016 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 07-10-2016

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व.नि.स./ व.क., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai