

**IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI G.D. AGRAWAL, PRESIDENT
AND SHRI MAHAVIR SINGH, JUDICIAL MEMBER**

**I.T.A. No.225/Nag/2012
Assessment Year : 2008-09**

Assistant Commissioner of Income Tax, Circle-8, Nagpur.	Vs.	Shri Roshanlal Ramdeo Jaiswal, Manohar Chowk, Gondia. PAN : ABNPJ5222D.
(Appellant)		(Respondent)

**I.T.A. No.313/Nag/2012
Assessment Year : 2008-09**

Shri Roshanlal Ramdeo Jaiswal, Manohar Chowk, Gondia. PAN : ABNPJ5222D.	Vs.	Assistant Commissioner of Income Tax, Circle-8, Nagpur.
(Appellant)		(Respondent)

**Cross Objection No.12/Nag/2012
(In ITA No.225/Nag/2012)
Assessment Year : 2008-09**

Shri Roshanlal Ramdeo Jaiswal, Manohar Chowk, Gondia. PAN : ABNPJ5222D.	Vs.	Assistant Commissioner of Income Tax, Circle-8, Nagpur.
(Appellant)		(Respondent)

Revenue by : Shri Gitesh Kumar, Senior DR.
Assessee by : Shri M.K.M. Agrawal, CA.

Date of hearing : 05.03.2018
Date of pronouncement : 05.03.2018

ORDER

PER BENCH :

The appeals by the Revenue and the assessee and the cross-objection of the assessee for assessment year 2008-09 are directed against the order of the CIT-II, Nagpur dated 12th March, 2012.

2. The first common issue in the appeal of the Revenue and the cross-objection of the assessee is as regards to the order of the CIT(A) restricting the addition of ₹13,88,604/- instead of addition made by the Assessing Officer at ₹41,17,986/- by adopting the peak credit on monthly basis method.

For this, Revenue has raised following grounds :-

“1. On the facts and in the circumstances of the case CIT(A) has erred in deleting the addition of Rs.41,17,986/- made by AO on account of negative cash balance.

2. On the facts and in the circumstances of the case, CIT(A) has erred in restricting the addition of Rs.41,17,986/- to Rs.13,88,604/- by adopting the method of peak credit on monthly basis.

3. On the facts and in the circumstances of the case, CIT(A) has erred in violating the provisions u/r. 46(A) of the Income Tax Rules in not remanding the matter to the AO while accepting to take additional information during the appellate proceedings.”

The assessee has raised following ground in the cross-objection:-

“01. The appellant has stated that CIT(A) has erred in deleting the addition of Rs.4117986.00 made by A.O. on account of negative cash balance. The appellant has further stated that on the facts and in the circumstances of the case, CIT(A) erred in restricting the addition of Rs.4117986.00 to Rs.1388604.00 by adopting the method of peak credit on monthly basis.

The CIT(A) has rightly deleted the addition of Rs.4117986.00 on due verification and due consideration of the facts and circumstances of the case, however the addition of Rs.1388604.00 on the method of monthly peak is not correct and it should have been on the basis of peak level of negative cash balance on daily basis. As submitted the maximum peak level of negative cash balance on daily basis is Rs.95442.82.”

3. Briefly stated, facts are that the assessee derives income from wholesale trading of country liquor, petrol pump (IOC), BSNL franchisee and retail country liquor shops. The assessee is a part of business concern called as 'Jaiswal Group' of Gondia. A survey under Section 133A of the Income-tax Act, 1961 (hereinafter 'the Act') was conducted in this group of cases on 14th December, 2007. In respect to this addition, the Assessing Officer noted that a peculiar feature of the sale account of the assessee shows that it is in the habit of recording sales in cash at ₹20,000/- per day or less. Since the assessee has not produced the books of account, the sale entries could not be identified. The assessee was asked to identify such transactions but he did not accept the existence of such modus operandi. The Assessing Officer, therefore, cross tallied these entries with the account of the assessee and wherever the retailer has shown the payment on the day credited by the assessee or a day earlier, the credit was treated as explained. However, when the payment is shown by a retailer at a later date, the credit was treated as not explained and accordingly, such negative balance representing only 17 retailers comes to ₹41,17,968/-. The Assessing Officer, after going through the documents and books found at the time of survey which recorded cash transactions, made addition of this negative peak at ₹41,17,968/-. Aggrieved, assessee preferred appeal before CIT(A). The CIT(A) partially accepted the claim of the assessee and estimated the negative peak on monthly basis and thereby sustained the addition of ₹13,88,604/-. The Revenue is in appeal against the deletion of addition and assessee is in cross-objection against sustenance of addition.

4. After hearing rival contentions and going through the facts and circumstances of the case, we are of the view that this issue needs reconsideration at the level of the Assessing Officer for the reason that the assessment is to be made on the basis of negative cash balances by adopting the method of peak credit but peak credit has to be taken on daily basis and not on monthly basis as taken by the CIT(A). Before

us, learned counsel for the assessee stated that entire details have been filed in respect to peak credit on daily basis even which were filed before the Assessing Officer and the CIT(A). We are of the view that we have no mechanism to verify each and every entry to ascertain the position of negative cash balance on the basis of peak credit on daily basis. Hence, we set aside this issue and remand the matter to the file of the Assessing Officer for fresh consideration in terms of the above. This issue of Revenue's appeal and that of the cross-objection of the assessee is allowed for statistical purposes.

5. The next common issue in this appeal of the Revenue and the cross-objection of the assessee is as regards to the order of the CIT(A) in restricting the addition of ₹1,78,009/- instead of addition made by the Assessing Officer at ₹6,67,480/- on account of disallowance of discount on commission received from BSNL to retailers.

For this, Revenue has raised following ground No.4 :-

“On the facts and in the circumstances of the case CIT(A) erred in restricting the addition of Rs.6,67,480/- made by AO on account of disallowance of discount to Rs.1,78,009/- holding that assessee has passed on at least 80% of commission received from BSNL to retailers.”

The assessee has raised following ground No.3 :-

“03. The appellant has state that “On the facts and in the circumstances of the case CIT(A) erred in restricting the addition of Rs.667480.00 made by A.O. on account of disallowance of discount to Rs.178009.00 holding that assessee has passed on at least 80% of commission received from BSNL to retailers.

The addition of Rs.667480.00 by disallowing the discount to retailers was based on wrong computation which was duly highlighted during assessment proceeding and also before the CIT(A). However CIT(A) has on due verification of records and

documents and the method adopted by A.O. has reduced the disallowance to Rs.178009.00 and the act is fully justified. However an appeal has been preferred by us on 13.7.2012 that this amount should be considered as part of our surrender amount."

6. Brief facts relating to this issue are that the assessee deals with BSNL Sim Cards/Recharge Vouchers and other products in this business. The assessee claimed that it has received only net amount i.e., the difference in the rate of discount obtained from BSNL on purchase and discount offered to customers. The assessee produced books of account which indicate that full sale bills are drawn first and discount is accounted later on. The Assessing Officer noticed from the accounts that total sales made to retailers are at ₹10,93,37,664/- that includes cash sales and credit sales on which discount of ₹66,74,809/- was claimed. According to the Assessing Officer, it translates sale to 6.10%. According to him, on purchases of ₹11.63 crores, assessee claimed commission of ₹81.21 lakhs which translates to 6.98%. According to the Assessing Officer, the margin shown by the assessee is very thin and accordingly, he applied 10% of discount on whole range of transactions by observing in paragraph 12.21 as under :-

"12.21 I, therefore, have no option but to conclude that the discount given is inflated to reduce his income. I, therefore, disallow 10% of the discount amount as not proved i.e. 10% of Rs.66,74,809/- which comes to Rs.6,67,481/-. Even after this adjustment the discount allowed comes to 5.49% as against 6.98% received by the assessee which translate into decent margin on 1.49%."

Aggrieved, assessee preferred appeal before the CIT(A).

7. The CIT(A) restricted the addition at ₹1,78,009/- by observing in paragraph 8.3 & 8.4 as under :-

"8.3 Appellant has claimed that A.O. has wrongly calculated the figures for discount and has claimed that these are various types of produce in which

appellant has given different percentage of discount as indicated in above submissions and had also claimed that 80% of discount received by appellant is to be passed on to the retailers by the appellant as per agreement with BSNL. Appellant has shown that various product give different commission like 6.5%, 7% and for this he has filed copy of two demand note of BSNL addressed to appellant.

8.4 In this year, appellant has got commission of Rs.81.21 lakhs and if appellant has given 80% of this to retailers the total discount given to retailers should be Rs.64.96 lakhs. However, appellant seems to have claimed more and, however, the claim of appellant of discount is restricted to 80% of Rs.81.21 lakhs claimed by the appellant and balance claimed by the appellant to the extent of 66.74809 – 64.96800 = 1.78009 is disallowed i.e. addition made by A.O. is restricted to this amount of Rs.1,78,009/-.”

Aggrieved by the order of CIT(A), both came before the Tribunal.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the Assessing Officer, without any basis, disallowed commission straightaway at the rate of 10%. The assessee has furnished the detailed break-up of discount allowed and commission on sim cards and recharge coupons which is around 5% and 6.40%. From the figures submitted by the assessee regarding details of discount, it is clear that around 5% commission was given by the assessee but Assessing Officer has wrongly worked out the percentage as 6.10%. We find that even the CIT(A) has restricted the discount at 80%, which, in our view, is not the right procedure. In view of above facts and details submitted by the assessee, we are of the view that nothing is to be disallowed because the working given by the assessee regarding commission at 5% on recharge coupons is within the perfect limits. Accordingly, we delete the addition completely and allow this issue of the cross-objection of the assessee. This issue of Revenue's appeal is dismissed.

9. The next common issue in this appeal of Revenue and cross-objection of the assessee is as regards to application of provisions of Section 40A(3) of the Act in respect to purchase of sim cards, recharge coupons in contravention of provisions of Section 40A(3) of the Act.

For this, Revenue has raised following ground Nos.5 & 6 :-

"5. On the facts and in the circumstances of the case CIT(A) erred in holding that there existed a relationship of Principal & Agent between BSNL & the assessee and that provisions of sec. 40A(3) are not attracted.

6. On the facts and in the circumstances of the case CIT(A) erred in deleting the addition of Rs.1,47,02,811/- made by AO u/s 40A(3) of the I.T. Act, 1961."

The assessee has raised ground Nos.4 & 5 in its cross-objection on this issue :-

"04. The appellant has stated that "On the facts and in the circumstances of the case CIT(A) erred in holding that there existed a relationship of Principal and Agent between BSNL and the assessee and that provisions of Sec.40A(3) are not attracted."

The above contention of the appellant is not correct. We are franchisee of BSNL and we have been appointed by BSNL as their authorized franchisee with a view to do marketing and distribution of its BSNL Telecom Service under its brand names for which the BSNL has been licensed to provide BSNL service. There is a definitely a relation of principal and agent in view of modus operandi of the business. The CIT(A) has rightly hold the relationship of principal and agent between BSNL and assessee. It is also supported by the verdicts of Honourable High Court of Kerala in case of Vodafone Essar Cellular Ltd., Vs. Asstt.CIT dt. 17.8.10 and Honourable ITAT Cochin Bench in the case of S.Rahumathulla Vs. ACIT dt. 20.4.10.

05. The appellant has stated that "On the facts and in the circumstances of the case CIT(A) erred in

deleting the addition of Rs.14702811.00 made by A.O. u/s 40A(3) of the I.T. Act, 1961."

The contention of the appellant is not correct. The CIT(A) has justifiably deleted the addition of Rs.14702811.00 as there is no sale/purchase in between franchisor and franchisee. The action of CIT(A) is supported by the above verdicts referred in Sl.No.4 above."

10. Briefly stated, facts are that the Assessing Officer disallowed the purchase of sim cards and recharge coupons payments made in contravention of Section 40A(3) amounting to ₹1,48,02,811/-. Aggrieved, assessee preferred appeal before the CIT(A). The CIT(A), following the decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. Vs. ACIT in ITA No.1742 of 2009 and others dated 17th August, 2010, observed that there is no sale and purchase in the case of the assessee and hence, the provisions of Section 40A(3) of the Act do not apply. For this, he observed in paragraph 9.3 as under :-

"9.3 However, appellant has claimed that there is relationship of principal and agents and between appellant and BSNL and hence appellant can give cash collected on behalf of principal and section u/s 40A(3) is not attracted. Appellant has placed reliance on the judgment of Kerala High Court in case of Vodafone Essar Cellular Ltd. Vs. Asstt.CIT in ITA No.1742, 1759, 1761 to 1764, 1773 & 1780 of 2009 dt. 17.08.2010 and ITAT, Cochin Bench 127 ITD 440 (2011). I find that relationship of principal/agent is there and appellant is getting only commission out of it. Hence, there is no sale purchase and section 40A(3) is not attracted. Hence, addition on this account is deleted."

Aggrieved, both assessee and Revenue came in appeal before the Tribunal.

11. We have heard rival contentions and gone through the facts and circumstances of the case. We find that this issue is covered by the

decision of Hon'ble Kerala High Court in the case of Vodafone Essar Cellular Ltd. (supra). Respectfully following the said decision of Hon'ble Kerala High Court, we dismiss ground Nos.5 & 6 of the Revenue's appeal. Ground Nos.4 & 5 of the assessee's cross-objection on this issue are allowed.

12. The cross-objection of the assessee is only supportive. Since we have already dismissed ground Nos.5 & 6 of the Revenue's appeal and the ground Nos.4 & 5 raised by the assessee in its cross-objection are allowed, the cross objection has become academic and hence, dismissed .

13. The only issue in the appeal of the assessee in ITA No.313/Nag/2012 is against the order of the CIT(A) in not allowing credit for income surrendered during the course of survey amounting to ₹5 lakhs.

14. We have heard rival contentions and gone through the facts and circumstances of the case. At the time of hearing, the learned counsel for the assessee was asked by the Bench what is the discrepancy in the surrender made by assessee, which was declared in the return of income. And further, whether the assessee has retracted the surrender? He could not answer. He only made submission that the surrender of ₹5 lakhs should be given credit against other income. When a further query was put to him that against which additions setoff can be allowed, he stated that disallowance of interest and addition of negative cash balance should be adjusted against the same. We are of the view that these additions have no relationship with the surrender of income because disallowance of interest does not generate any cash availability and similarly, negative cash balance also does not generate any cash which can be set off against the surrender of ₹5 lakhs. Accordingly, we have gone through the findings of the CIT(A) which are reproduced in paragraph 5.3 and read as under :-

“5.3 As appellant has himself credited unaccounted income in books of account after surrendering it during survey, A.O. should have given credit of such disclosure to appellant vis-a-vis undisclosed income determined by A.O. for the current assessment year. But appellant has already taken cash and deposited it in its books and all the additions made by A.O. in this order are on issues not related to survey viz., stock difference or any specific defect to be given set off amongst this suomoto crediting of cash of five lakhs. Hence, I do not find any reasons to telescope the addition made by A.O. to the extent of Rs.5 lakhs surrendered by the appellant and immediately credited in cash book that is separate undisclosed income offered by the appellant not related to issues raised by A.O. in assessment. Hence, this ground is dismissed.”

15. We find no infirmity in the finding of the CIT(A) and, hence, the same is confirmed.

16. In the result, the appeal of the Revenue and the assessee and the cross-objection of the assessee are disposed of in terms indicated above.

Decision pronounced in the open Court on 05.03.2018.

Sd/-
(G.D. AGRAWAL)
PRESIDENT

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Dated : 05.03.2018
VK.

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. Concerned CIT
4. The CIT(A)
5. D.R.

Assistant Registrar