

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.3436/M/2016
Assessment Year: 2008-09**

Mr. Prakash Shivji Visaria, 32, 5 th Floor, Malad Shopping Centre, Swami Vivekanand Road, Malad (W), Mumbai - 400 064 PAN: AEEPV 7772C	Vs.	ITO 15(2)(3), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Dharan V. Gandhi, A.R.
Revenue by : Shri Ram Tiwari, D.R.

Date of Hearing : 17.04.2018
Date of Pronouncement : 07.06.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 18.03.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09. The various grounds raised by the assessee are as under:-

"Ground No.1

1. **Re-opening of Assessment**

On the facts & in Circumstances of the case and in law the learned C.I.T. (Appeal) erred in confirming the re-opening of assessment without appreciating the fact that:

Assessing Officer CIT (A) proceeded on fallacious assumption that Bank deposits constituted undisclosed income and over looked fact that source of deposit need not necessarily be the deposit of the assessee.

2. Confirming Order passed u/s 144

The learned C.I.T. (Appeal) erred in confirming the order passed u/s 144 by the A.O. without appreciating the fact that the appellant attended before the A.O. and submitted the details and

3. Addition of Rs.4425020/- on account of Cash Deposit.

- a. On the facts and in circumstances of the case and in law the learned C.I.T. (Appeal) erred in confirming addition of Rs.4425020/- made on account of unexplained cash credit u/s 68 of the Act without appreciating the fact that:

The appellant has explained source of the Cash deposit.

- b. That the appellant has earned 1% commission and the same is declared as income.

The deposit and subsequent withdrawals can not be treated as income from undisclosed sources.

4. Ground No.4

Cash Credit Appearing in the Bank Pass Book.

In the facts and in circumstances of the case and in law the learned C.I.T.,kP-7r (Appeal) erred in not appreciating the fact that:

- a. Cash credit found only in Bank Pass Book and not in Cash Book maintained by assessee would be includible under section 68 as Pass Book supplied by Bank to assessee is not a book maintained by assessee. Relying on C.I.T. vs. Bhaichand H. Gandhi 141 ITR 67 (Bom.)
- b. The sum of Rs.4425020/- is not found credited in the books of appellant maintained for any previous year. Therefore the sum so credited can not be charged to Income Tax as the Income of the appellant.
- c. The passbook supplied by the Bank to its constituent is only a copy of the constituents account in the Book maintained by the Bank. it is not as if the Pass Book is maintained by the Bank as the agent of the constituent not can it be said that Pass Book is maintained by the Bank under the instruction of the constituent. Therefore the Pass Book is not maintained by the Bank as the agent of the constituent and Pass Book is not maintained by the Bank under the instructions of the constituent.

5. Grounds No. 5

Income estimated on account of other Credit Entries.

On the facts & in Circumstances of the case and in law the learned C.I.T. (Appeal) erred in confirming the estimation of the income @5% at Rs.1210068/- instead of 1% Rs.243000/- declared by the appellant without appreciating the fact that:

- a. The appellant is a real estate Broker and the net earning in real estate transaction is 1% only.
- b. The appellant has declared the income @1% which is net income without claiming the expenditure such as Telephone, Electricity, Printing and Stationery and Sub- Brokerage.

6. Ground No.6
Deduction u/s 80-C

On the facts & in Circumstances of the case and in law the learned C.I.T. (Appeal) erred in not allowing deduction u/s 80-C of the Income Tax Act, in respect of Life Insurance Policy Rs.76916/- claimed in the return of Income submitted on 14.03.2014.

Your appellant crave leave to add, amend or alter or delete any or all above Grounds of Appeal.”

2. At the outset, the Ld. Counsel submitted that ground No.1, 2, 4 & 6 are not pressed and therefore the same are dismissed as not being pressed.

3. The issue raised in ground No.3 is against the confirmation of addition by Ld. CIT(A) of Rs.44,25,020/- as made by the AO under section 68 of the Act without appreciating the fact that the assessee has explained the source of cash credit and that assessee has only earned commission @ 1% on the total transactions whereas the issue raised in ground No.5 is against upholding the estimation of income at the rate of 5% thereby confirming the addition of Rs.12,10,068/- as against 1% i.e. Rs.2,43,000/- as has been declared by the assessee.

4. The brief facts of the case are that the assessee has deposited Rs.10 lakh in cash in his saving bank account and no return was filed for A.Y. 2008-09. The assessee is engaged in the business of real estate agent and was facilitating the purchase and sale of properties. The AO after coming to know about the cash deposit, issued a notice under section 148 which was duly served upon the assessee. During the assessment proceedings the authorised representative of the assessee admitted that the assessee has deposited a sum of Rs.44,25,020/- in his saving account with Bharat Co-op Bank and the said amount was received for facilitating the purchase of land but when the deal did not materialize, the money was returned back after deducting Rs.45,000/- towards commission. The assessee claimed the advance to have been received from three persons whose complete names and addresses were not filed during the course of hearing. Thereafter a show cause notice was issued to the assessee to file the necessary evidences about these persons failing which the same would be added to the income of the assessee. However, the assessee failed to file the necessary evidences such as confirmations etc despite repeated opportunities by the AO and finally the AO added the entire cash deposit of Rs.44,25,020/- to the income of the assessee. The AO also noted during the course of assessment proceedings that there are some credit entries in the bank account of the assessee to the tune of Rs.2,42,32,133/- which the assessee was asked to explain which was replied by the assessee by submitting that

he has only earned a commission of 1% on the sale affected through him as an agent for the real estate. The AO did not accept the contention of the assessee and added a some of Rs.12,11,600/- by applying a rate of 5% on Rs.2,42,32,133/-.

5. In the appellate proceedings, the Ld. CIT(A) confirmed the addition of Rs.44,25,020/- which represented the cash deposit in the bank account of the assessee and also confirmed the addition of Rs.12,11,600/- being 5% of total cheque credits in the bank account of the assessee after taking into account the submissions and contentions as made by the assessee during the appellate proceedings.

6. Aggrieved by the order of Ld. CIT(A), the assessee is in appeal before us. The Ld. A.R. vehemently submitted before us that the assessee is engaged in the business of real estate agent and was earning only commission on the total transaction done through him. During the year the assessee received cash of Rs.44,25,020/- from three parties and the names whereof were duly filed before the authorities below and he also submitted that assessee has received only commission on the said cash deposits. The Ld. A.R. placed before the Bench the copy of bank statement which is placed in the paper book at page Nos.14 to 20 and argued that against each deposit whether by way of cash or by cheque, the assessee has issued the corresponding cheque in the next day and thereby hardly leaving any balance in the bank account of the assessee. The Ld. A.R. tried to correlate all the

entries in the bank statement of the assessee. The Ld. A.R. submitted that on 12.05.2007 there was a cash deposit of Rs.19,000/- and cheque deposit of Rs.1,10,000/- and on 12.05.2007 a cheque of Rs.2 lakhs was issued. Similarly, a cash deposit on 17.05.2007 of Rs.1 lakh and a cheque was issued on the same date of the equal amount. The Ld. A.R. argued that when the AO has considered the percentage addition on the amount for cheque credits in the bank account of the assessee but did not follow the same analogy in respect of the cash deposits whereas both the deposits by cheque as well as by cash represented the same nature of transactions in the bank account of the assessee. Therefore, the Ld. A.R. argued that the addition of total cash deposit to the income of the assessee is wrong and only a percentage should be applied.

7. So far as the confirmation of addition of Rs.12,11,600/- is concerned, the Ld. A.R. submitted that the assessee was earning only 1% commission on the total transactions which has been submitted before both the authorities below and thus to apply a rate of 5% to tax the income without any basis is wrong and not based upon any evidences. The Ld. AR submitted that there is no practice of paying 5 % commission in the real estate deals and thus the said is excessive and should be reduced to 1%.

8. The Ld. D.R., on the other hand, relied on the order of authorities below.

9. We have heard the rival submissions of both the parties and perused the material on record. Undisputably, the assessee is doing agency business in real estate and has accepted deposits from different parties in his bank account by way of cash as well as by cheques. So far as the cash deposit is concerned the assessee submitted before the AO three names from whom the assessee received the cash for property purchase which did not materialise but the AO rejected the submissions of the assessee and added the entire cash transaction of Rs.44,25,020/- to the income of the assessee whereas in respect of cheques credited in the bank account of the assessee to the tune of Rs.2,42,32,133/- the AO applied 5% on Rs.2,42,32,133/- and the Ld. CIT(A) affirmed the same. We observe that the assessee has received money in the form of cash and cheques and immediately on the same day or next following day issued the cheque in the name of the other party which support the contention of the assessee that only commission is being charged for the services rendered by the assessee and the cash added should be also assessed to tax by applying the percentage commission. Notably the AO has applied commission at the rate of 5% of the total cheque deposits which were to the tune of Rs.2,42,32,133/- whereas the added the entire cash deposits. We fail to understand as to how a different yardstick could be applied in respect of cheques credited in the bank account of the assessee whereas a different parameter is applied to the cash deposits ignoring the fact that the amount of cash and cheque deposits was

paid to the third party by way of consolidated cheque as is apparent from the bank statement of the assessee. The assessee has maintained all throughout that he is charging 1% commission for the services rendered by way of arranging properties for others. Under these circumstances we are not in agreement with the conclusion drawn by the Ld. CIT(A) as regards the confirmation of addition of Rs.44,25,020/- and are of the opinion that the same should also be subjected to tax by applying an appropriate percentage. Further, the percentage applied @ 5% on the cheques credited in the bank account of the assessee is also excessive and devoid of any basis. In our opinion the income of the assessee should be assessed by applying 2% on the gross credits in the bank account of the assessee i.e. Rs.2,86,57,153/- comprising of Rs.44,25,020/- as on account of cash and Rs.2,42,32,133/- towards cheques credited in the bank account of the assessee. The AO is directed to delete the addition of Rs.44,25,020/- and apply a percentage of 2% as stated hereinabove on the total deposit of Rs.2,86,57,153/-. The issues raised in ground No.3 & 5 are allowed partly.

10. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 07.06.2018.

**Sd/-
(Saktijit Dey)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 07.06.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.