

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. Nos. 495, 496 & 511/KOL/2013
Assessment Years: 2006-2007, 2007-2008 & 2008-2009**

***Deputy Commissioner of Income Tax,.....Appellant
Central Circle-VII, Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700 107***

-Vs.-

***M/s. Mainak Vanijya Pvt. Limited,.....Respondent
9, Mangoe Lane, Kolkata-700 001
[PAN: AAECM 3845 JJ
00***

Appearances by:

Shri A.K. Nayak, CIT (D.R.), for the Appellant

Shri Subhas Agarwal, Advocate, for the Respondent

Date of concluding the hearing : March 26, 2019

Date of pronouncing the order : April 10, 2019

O R D E R

Per Shri P.M. Jagtap, Vice-President (Kolkata Zone):-

These three appeals are preferred by the Revenue against three separate orders passed by the Id. Commissioner of Income Tax (Appeals), Central-I, Kolkata, all dated 31.12.2012 for A.Ys. 2006-07, 2007-08 and 2008-09 respectively and since the issues involved therein are common, the same have been heard together and are being disposed of by a single consolidated order.

2. The assessee in the present case is a Company. The investigation carried out by the Department of Income Tax (Investigation), Kolkata revealed that some entities were involved in providing accommodation entries to various companies based in Mumbai, which in turn had used the said funds for payments to Madhipura Mercantile Cooperative Bank at

Mumbai, which was controlled by Shri Ketan Parekh. Since the assessee-company was one of such entities, the statement of its Director Shri Itebrata Biswas was recorded under section 131 by the DDIT(Investigation), Kolkata on 09.04.2007. In the said statement given on oath, Shri Itebrata Biswas accepted that he had got cash of equivalent amount from the Mumbai based Companies belonging to Shri Ketan Parekh Group and after depositing the said cash into the Bank account of the assessee-company, cheques were issued to the said Companies. He also furnished a list of cheques so issued against cash that had been received by him. Although Shri Itebrata Biswas subsequently filed an affidavit retracting his statement, the Assessing Officer did not accept the same on the basis of the enquiries conducted by the Investigation Wing on a test-check basis, which revealed that cash was deposited in various Bank accounts in different stages. According to the Assessing Officer, this factual position substantiated the statement of Shri Itebrata Biswas, Director of the assessee-company that cash was indeed received by the assessee-company in lieu of cheques given to various companies belonging to Ketan Parekh Group. He accordingly held that accommodation entries were given by the assessee-company to various Mumbai based companies belonging to Ketan Parekh Group and since the accommodation entries so given during the previous year relevant to A.Y. 2006-07 aggregated to Rs.16,96,24,000/-, he added the commission income @ 2% amounting to Rs.33,92,480/- to the total income of the assessee in the assessment completed for A.Y. 2006-07 under section 143(3) vide an order dated 30.12.2008. In the assessment so made, he also made an addition of Rs.16,96,24,000/- in the hands of the assessee on protective basis observing that the unexplained income to that extent in the form of cash given by the Mumbai based companies was assessable on substantive basis in the hands of the said companies. The Assessing Officer also completed the assessment for A.Ys. 2007-08 and 2008-09 and in the assessment so made under section 143(3) vide orders dated 18.12.2009 and 28.12.2010, he made a similar addition on account of

commission income at the rate of 2% amounting to Rs.24,34,809/- and Rs.30,10,451/- to the total income of the assessee for A.Ys. 2007-08 and 2008-09 respectively. He also made additions of Rs.12,17,40,462/-and Rs.15,05,22,568/- similarly on protective basis in the assessment completed under section 143(3) for A.Ys. 2007-08 and 2008-09 vide orders dated 18.12.2009 and 28.12.2010 respectively for the total amount of accommodation entries provided by the assessee-company to the Mumbai based Companies belonging to Ketan Parekh Group observing that unexplained income to that extent was liable to be assessed on substantive basis in the hands of the said companies for the cash given to the assessee-company.

3. Against the orders passed by the Assessing Officer under section 143(3) for A.Ys. 2006-07, 2007-08 and 2008-09, appeals were preferred by the assessee-company before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) deleted the addition made by the Assessing Officer to the total income of the assessee for A.Y. 2006-07 on account of the alleged accommodation entries given to the Mumbai based Companies in the form of commission income at the rate of 2% as well as further addition on account of protective basis for the following reasons given in paragraph no. 8 & 9 of his impugned order:-

"8. I have perused the relevant orders and considered the material placed on record. I find that the issue regarding the discrepancy in dates related to the sworn-affidavit of the director of the appellant company as mentioned in the ITAT order has been satisfactorily explained by the appellant. Copy of sworn-affidavit and other relevant material was produced by the appellant in support of its contentions. On the other hand, no adverse material has been brought on record by the AO In course of the appellate proceedings, the AO was also supposed to ascertain about the cases where substantive additions were made corresponding to the protective addition in the present case, and also about the fate of the appeals in those cases. However, though a substantial period of nearly one year has already elapsed, nothing has been heard from the AO. The reminder issued on 19.12.2012 was also not responded by the AO. In this factual

background; given the facts of the cases and the findings of the AO in his assessment order, the decisions of the Id. CIT(A) in the case of the appellant vide his order dated 22.10.2010 in Appeal No. 360/CC-VII/CIT(A)C-I/08-09; and also, those of the Hon'ble Jurisdictional ITAT in similar cases involving identical facts and circumstances, the present appeal is now being decided on the basis of the material available on record.

9. *I find that the issues involved in the present appeal are covered by the orders of the Hon'ble jurisdictional ITAT in similar cases involving identical facts and circumstances. The additions were deleted by my learned predecessor vide his order dated 22.10.2010 in Appeal No. 360/CC-VII/CIT(A)C-I/08-09. Though the matter was restored to the file of the CIT(A) by the Hon'ble ITAT, no fresh facts or material has come up in course of the present appellate proceedings. Respectfully following the decisions of my learned predecessor in the case of the appellant as well as those of the Hon'ble jurisdictional ITAT in similar cases involving identical facts and circumstances, it is to be held that the addition made by the AO on account of unexplained income as well as on that of commission income is neither sustainable in law nor on facts. The addition of Rs.16,96,24,000/- and Rs.33,92,480/- is directed to be deleted. In result, the appeal of the appellant is allowed".*

For almost identical reasons as given in his impugned order for A.Y. 2006-07, the Id. CIT(Appels) also deleted the similar additions made by the Assessing Officer to the total income of the assessee for A.Ys. 2007-08 and 2008-09 on account of the alleged accommodation entries given to the Mumbai based Companies in the form of commission income and further addition on account of protective basis.

4. Aggrieved by the orders of the Id. CIT(Appels) giving relief to the assessee for the three years under consideration, the Revenue has preferred these appeals before the Tribunal.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The two common issues involved in these three appeals relate to the deletion by the Id. CIT(Appels) of the additions made by the Assessing Officer on account of alleged

accommodation entries given to the Mumbai based Companies on protective basis and the deletion by the Id. CIT(Appeals) of the addition made by the Assessing Officer on account of commission income allegedly received by the assessee for giving accommodation entries. It is observed that the similar issues were involved in some other cases and all these cases were adjourned in the past and also blocked for some period for getting the information about the status or outcome of the cases where the similar amounts were added on substantive basis. In spite of sufficient time given to both the parties, they have failed to furnish the said information. It is well settled that protective assessment is permissible in law and in case a doubt or ambiguity about real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to make a protective assessment. As held by the Hon'ble Supreme Court in the case of Lalji Haridas -vs.- ITO (43 ITR 387), the Officer may, when in doubt, to safeguard the interest of the revenue can assess it in more than one hand but this procedure can be permitted only at the stage of assessment. Protective assessment becomes redundant when the substantive assessment becomes final and if the substantive assessment fails, it is protective assessment which is to be treated as substantive. Keeping in view this corollary between the substantive assessment and protective assessment, an appeal against the protective assessment should ordinarily await the outcome of the substantive assessment so that the protective assessment can be in conformity with the substantive assessment. In the case of CIT -vs.- Surendra Gulab Chand Modi (140 ITR 517), the appeal arising out of the protective assessment was disposed of by the appellate authority i.e. Tribunal vacating the protective assessment without waiting for the final outcome of the proceedings arising from the substantive assessment, which matter was pending in the Hon'ble Supreme Court. The Hon'ble Gujarat High Court held that the Tribunal was not justified in proceeding with the matter and in disposing of it instead of blocking it till the disposal of the matter pending in the Hon'ble Supreme Court in order to bring it in conformity

with the view of the Hon'ble Supreme Court. The Hon'ble Gujarat High Court accordingly directed the Tribunal to keep the matter alive and pending awaiting the decision of the Hon'ble Supreme Court in the proceedings arising from the substantive assessment.

6. In the present case, the Id. CIT(Appeals) did not await the outcome of the proceedings arising from the substantive assessment and since the said information was not forthcoming even after a considerable period from the concerned assessing officer, he proceeded to dispose of the appeals arising from the protective assessments by his impugned orders and deleted the addition made on protective basis without awaiting the final outcome of the proceedings arising from the substantive assessment. Keeping in view the decision of the Hon'ble Gujarat High Court in the case of CIT -vs.- Surendra Gulab Chand Modi (supra), we hold that the Id. CIT(Appeals) was not justified in deleting the additions made by the Assessing Officer on protective basis in all the three years under consideration without awaiting for the final outcome of the proceedings arising from this substantive assessment. We, therefore, set aside the impugned orders of the Id. CIT(Appeals) on this issue and remit the matter back to him for keeping it alive and pending till the outcome of the proceedings arising from the substantive assessment.

7. As regards the issue relating to the additions made on account of commission income allegedly received by the assessee for giving accommodation entries, we find that this issue is consequential to the issue relating to the addition made on protective basis on account of accommodation entries allegedly given by the assessee-company to the Mumbai based companies. Since the said issue is remitted back by us to the Id. CIT(Appeals), we also remit the consequential issue relating to addition on account of commission income back to the Id. CIT(Appeals) for deciding the same afresh. Grounds No. 1 & 2 of the Revenue's appeals

for the three years under consideration are accordingly treated as allowed for statistical purposes.

8. The other issues raised by the Revenue in its appeal are general in nature, which do not require any adjudication.

9. In the result, the appeals of the Revenue are treated as allowed for statistical purposes.

Order pronounced in the open Court on April 10, 2019.

Sd/- (S.S. Viswanethra Ravi) Judicial Member	Sd/- (P.M. Jagtap) Vice-President (KZ)
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Kolkata, the 10th day of April, 2019

- Copies to :*
- (1) *Deputy Commissioner of Income Tax,
Central Circle-VII, Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700 107*
 - (2) *M/s. Mainak Vanijya Pvt. Limited,
9, Mangoe Lane, Kolkata-700 001*
 - (3) *Commissioner of Income Tax (Appeals), Central-1, Kolkata,*
 - (4) *Commissioner of Income Tax- ,*
 - (5) *The Departmental Representative*
 - (6) *Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.