

2 ITA No.1565 TO 1569/Del./2017
ITA No.2436 TO 2440/Del./2017
ITA No.484/Del./2015
ITA No.6516/Del./2015
ITA No.6710/Del./2016

ITA No.484/Del./2015
(ASSESSMENT YEAR : 2009-10)

M/s. Bhavani Portfolio Pvt. Ltd., vs. ACIT, Central Circle,
13/34, W.E.A., Karol Bagh, Noida.
New Delhi – 110 005.
(PAN : AABCB9482B)

ITA No.6516/Del./2015
(ASSESSMENT YEAR : 2005-06)

M/s. Tejasvi Investments (P) Ltd., vs. DCIT, Central Circle-29,
13/34, W.E.A., Karol Bagh, New Delhi.
New Delhi – 110 005.
(PAN : AABCT3249G)

ITA No.6710/Del./2016
(ASSESSMENT YEAR : 2005-06)

M/s. Geefcee Finance Ltd., vs. ACIT, Central Circle,
13/34, W.E.A., Karol Bagh, Noida.
New Delhi – 110 005.
(PAN : AAACG1103H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri V.P. Gupta, Advocate
Shri Anunav Kumar, Advocate
REVENUE BY : Ms. Nidhi Srivastava, CIT DR

Date of Hearing : 15.04.2019
Date of Order : 26.04.2019

ORDER

PER BENCH :

Present cross appeals filed by the assessee as well as by the revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. The Appellant, M/s. Dwarka Impex Pvt. Ltd. (hereinafter referred to as the 'assessee') by filing the present appeals sought to set aside the impugned orders all dated 20.02.2017 passed by the Commissioner of Income-tax (Appeals)-3, New Delhi, qua the assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 on the identical grounds inter alia that :-

“1. That the CIT(A) erred in passing the order upholding the addition on account of commission to the extent of 2% without examining the facts of the case and the contentions of the appellant company.

2. That the CIT(A) erred in upholding the addition made by the AO. on account of commission to the extent of 2% without appreciating that as per the directions of Hon'ble ITAT vide its order dated 18.10.2013 the precedence available in this regard had to be considered and on that basis the rate of commission ought to have been determined at 0.25%.

3. That the CIT(A) also failed to appreciate that rate of commission at 2% could not be determined on the basis of rough notings in seized papers as the notings under reference could not be relied upon for the reason that neither same were specifically in regard to the rate of commission nor details were corroborated with other material and in any case the rates mentioned therein for a small amount could not be applied to all the cases of the group for determining the rate of commission on total amount of accommodation entries and notings under reference were also not relevant to all the assessment years.”

3. The Appellant, ITO, Ward 7 (4), New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeals sought to set aside the impugned orders all dated 20.02.2017 passed by the Commissioner of Income-tax (Appeals)-3, New Delhi, qua the assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 on the identical grounds, except the difference in addition, inter alia that :-

"1. Ld Commissioner of Income-Tax (Appeals) erred in law and on facts of the case in holding that the jurisdiction of the assessing officer while passing the fresh order pursuant to the order of the IT AT was restricted to determination of commission income as against the addition made in the original order of assessment when the ITAT has set aside the assessment to the file of the AO for fresh assessment in terms of directions contained in para 23 of its order and in accordance with law.

2. Ld Commissioner of Income-Tax (Appeals) erred in law and on facts of the case in deleting the addition made by AO u/s 68 of the IT Act amounting to Rs.1,64,01,670/-, Rs.93,51,252/-, Rs.36,00,386/-, Rs.3,01,56,000/- & Rs.50,00,000/- for assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 respectively.

3. Ld Commissioner of Income-tax (Appeals) erred in law and on facts of the case in reducing the rate of commission income from 2.25% as applied by the AO to 2.0%".

4. The Appellant, M/s. Bhavani Portfolio Pvt. Ltd. (hereinafter referred to as the 'assessee') by filing the present appeals sought to set aside the impugned order dated 13.10.2014 passed by the

Commissioner of Income-tax (Appeals), Noida, qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That the CIT(A) erred in upholding the addition made by Assessing Officer of Rs.2,27,79,793/- on account of commission income calculated @ 2.25% on total of all credit entries in the bank account, without correctly appreciating the facts of the case and also without properly appreciating and following the order and direction of Hon'ble ITAT vide its order dated 18.10.2013.

2. That the CIT(A) failed to appreciate that the appellant company is part of Tarun Goyal Group and, therefore, all inter-group entries in the bank account ought to have been excluded as per the direction of Hon'ble ITAT. Further, all the entries which had been explained by the appellant should also have been excluded and only in respect of balance entries, commission income could be considered.

3. That the CIT(A) also erred in upholding the commission income @ 2.25% disregarding the direction of Hon'ble ITAT to apply the rate considering the precedence in this regard, for which necessary evidence had also been provided before CIT(A).

4. That the CIT(A) also erred in observing in the order that the appellant had only submitted a tabular chart giving summary of credit entries alongwith affidavit of directors without adducing necessary details and relevant documentary evidences in respect of credit entries. The appellant was willing to submit documentary evidences in support of all bank entries. It was only on the suggestion of CIT(A) that same were not submitted. The CIT(A) had expressed his view that it would not be possible for him to examine the voluminous record and, therefore, same could be submitted before Assessing Officer, pursuant to his directions.”

5. The Appellant, M/s. Tejasvi Investments (P) Ltd. (hereinafter referred to as the 'assessee') by filing the present appeals sought to set aside the impugned order dated 09.10.2015 passed by the Commissioner of Income-tax (Appeals)-30, New

Delhi qua the assessment year 2005-06 on the grounds inter alia that :-

“1. That the CIT(A) erred in upholding the order of the Assessing Officer determining the commission income @ 2% on the amount representing the entries given to outside parties without correctly appreciating the facts of the case and following the directions of Hon'ble ITAT vide its order dated 18.10.2013.

2. That the CIT (A) erred in upholding the commission income @ 2% disregarding the directions of Hon'ble ITAT to apply the rate considering the precedence available in this regard, for which necessary evidence had been duly submitted before the CIT(A).

3. That the CIT(A) erred in taking a view that precedence available in the form of appellate / assessment orders in other cases could not be considered for the purpose of taking the rate of commission inspite of the fact that the Hon'ble Tribunal had directed to determine the rate of commission taking into consideration the precedence available in this regard.

4. That the CIT(A) also erred in upholding the order of Assessing Officer determining commission @ 2% on the basis of rough notings in seized papers without appreciating that the notings under reference could not be relied upon as neither same were specifically in regard to rate of commission nor details were corroborated with other material and in any case the rates mentioned therein for a small amount could not be applied in all the cases of the Group for determining the rate of commission on total amount of accommodation entries and the notings under reference were also not relevant to all the assessment years.”

6. The Appellant, M/s. Geefcee Finance Ltd. (hereinafter referred to as the 'assessee') by filing the present appeals sought to set aside the impugned order dated 15.12.2016 passed by the Commissioner of Income-tax (Appeals), Noida qua the assessment year 2005-06 on the grounds inter alia that :-

“1. That the CIT(A) erred in upholding the addition made by Assessing Officer on account of commission income calculated @ 2.25% on total of all credit entries in the bank account, without correctly appreciating the facts of the case and also without properly appreciating and following the order and direction of Hon'ble ITAT vide its order dated 18.10.2013.

2. That the CIT(A) failed to appreciate that the appellant company is part of Tarun Goyal Group and, therefore, all inter-group entries in the bank account ought to have been excluded as per the direction of Hon'ble ITA T. Further, all the entries which had been explained by the appellant should also have been excluded and only in respect of balance entries, commission income could be considered.

3. That the CIT(A) also erred in upholding the commission Income @ 2.25% disregarding the direction of Hon'ble ITAT to apply the rate considering the precedence in this regard, for which necessary evidence had also been provided before CIT(A).

4. That the CIT(A) also erred in observing in the order that the appellant had only submitted a tabular chart giving summary of credit entries alongwith affidavit of directors without adducing necessary details and relevant documentary evidences in respect of credit entries. He failed to appreciate that the appellant submitted a chart giving nature of each of the credit entries and the details so given have been duly supported by the affidavit of the Director and, accordingly, the appellant had discharged its obligation submitting of supporting documentary evidence in respect of each of the credit entries would have been quite voluminous and, accordingly, neither it was warranted to submit the same nor, CIT(A) had specifically required the appellant company to submit supporting documents in respect of each of the entries. Therefore, he could not take a view that the appellant had not discharged its burden of explaining the nature of credit entries in its books of account.”

7. Briefly stated the facts necessary for adjudication of the controversy at hand are : this is second round of litigation. During the search and seizure operation carried out at the business premises of Tarun Goyal, which is into the activities of investment

in shares at premium on exorbitant prices through their non-descript companies, certain documents, loose papers and other material were found/seized and consequently assessment was completed under section 153C of the Income-tax Act, 1961 (for short 'the Act').

8. Assessee had challenged assessment orders before the Id. CIT (A) who has confirmed the assessment orders that the rate of commission charges adopted by the AO is justified. Thereafter, assessee had challenged order passed by the Id. CIT (A) before the Tribunal who had restored the matter back to AO qua AYs 2004-05 to 2008-9 for fresh adjudication in accordance with law.

9. AO issued notice under section 143(2) and 142(1) calling upon the assessee to furnish details as under :-

(i) Furnish the copy of ITR, balance sheet, tax audit report, computation of income, all annexures and notes of accounts;

(ii) Furnish the copy of all statements of Tarun Goyal recorded on oath during the course of search and seizure operation as well as post operation period, if any.

(iii) The Hon'ble ITAT has set aside the issue to A.O. to examine the chain of transactions, they layering indulged by assessee, the calculation of peak unexplained credit etc. and to prove each credit in the books of each assessee. In this respect burden of proof lies on you to prove each and every credited and debited entry from its origin. Hence, you are requested to submit details of transactions/chain of entries (each and every credit and debit) of different parties from its origin."

11. From the detail furnished by the assessee vide reply dated 13.02.2015, AO noticed that in the assessee's bank account, amount of Rs.1,64,01,670/-, Rs.93,51,252/-, Rs.36,00,386/-, Rs.3,01,56,000/- & Rs.50,00,000/- for assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 respectively remained unverifiable/unexplained cash credit and added to the income of the assessee under section 68 of the Act and thereby made addition thereof to the income of the assessee. AO also made addition of Rs.2,08,125/-, Rs.1,56,373/-, Rs.58,500/-, Rs.2,47,500/- & Rs.56,250/- for assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 respectively on account of commission charged as per original assessment order @ 2.25% on the basis of Annexure A-12 page 13.

12. Assessee carried the matter by way of appeals before the Id. CIT (A) who has partly allowed the appeals. Feeling aggrieved, the assessee as well as Revenue have come up before the Tribunal by way of filing the present appeals.

13. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

14. Undisputedly, in the first round of appeals before the Tribunal, the only issue to be decided was relating to commission income and no issue with regard to the addition under section 68 of the Act was there. It is also not in dispute that in the first round of litigation, AO as well as Id. CIT (A) have adjudicated upon the addition made on account of commission income only as this fact is evident from assessment orders for AYs 2004-05 to 2008-09, available at pages 38 to 97 of the paper book. It is also not in dispute that the Id. CIT (A) has upheld the addition on account of commission by reducing the rate of commission from 2.25% to 2% which is under challenge by the assessee as well as by the revenue.

15. In the backdrop of the aforesaid facts and circumstances of the case, orders passed by the lower Revenue authorities in the first round as well as second round of litigation and case laws relied upon, the first question arises for determination in this case is :-

“as to whether in the second round of litigation pursuant to the remand made by the Tribunal, AO is empowered to make further addition on account of credit entries appearing in the bank statement under section 68 of the Act which was not the subject matter of the first round of litigation?”

16. Perusal of original assessment orders qua AYs 2004-05 to 2008-09, available at pages 38 to 97 of the paper book, goes to prove that the only addition made by the AO is on account of commission income @ 2.25% on accommodation entries provided by the assessee company and no addition under section 68 of the Act is there. From the copy of Form No.36 filed before the Tribunal in all the appeals for AYs 2004-05 to 2008-09 in the first round of appeal available at pages 33 to 37, it is again proved that no ground as to the addition made under section 68 of the Act has been raised by the assessee. Similarly, appeals before the Id. CIT (A) as well as the Tribunal were qua issue of commission income only. So, it is proved on record that AO in the remand proceedings has made fresh investigation and proceeded to make the addition under section 68 of the Act.

17. It is settled principle of law that on remand of the proceedings by the Tribunal to the AO, no new source of income can be introduced so as to enhance the assessment by the AO and the AO can enhance the income only qua old sources of income which was subject matter of the appeal before the Tribunal.

Reliance in this regard is placed upon the decision rendered by Hon'ble Punjab and Haryana High Court in *Kartar Singh vs. CIT – (1978) 111 ITR 184 (P&H)*.

18. Hon'ble Supreme Court in case of *Mcorp Global P. Ltd. vs. CIT – (2009) 309 ITR 434 (SC)* also decided the identical issue in favour of the assessee by returning following findings :-

“6. In the case of Hukumchand Mills Ltd. v. CIT reported in [1967] 63 ITR 232 this court has held that under section 33(4) of the Income-tax Act, 1922 (equivalent to section 254(1) of the 1961 Act), the Tribunal was not authorized to take back the benefit granted to the assessee by the Assessing Officer. The Tribunal has no power to enhance the assessment. Applying the ratio of the said judgment to the present case, we are of the view that, in this case, the Assessing Officer had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000). By reason of the impugned judgment, that benefit is sought to be taken away by the Department, which is not permissible in law. This is the infirmity in the impugned judgment of the High Court and the Tribunal.

7. There is one more aspect which needs to be mentioned. According to the impugned judgments of the High Court and the Tribunal, the transaction dated February 15, 1991, was a financial transaction and not a lease. If depreciation is to be granted for 42,000 bottles under the transaction dated February 15, 1991, then it cannot be said that 42,000 bottles came within the lease dated February 15, 1991, and the balance came within the so-called financial arrangement. In the circumstances, we hold that the benefit of depreciation given to the assessee by the Assessing Officer in respect of 42,000 bottles out of 5,46,000 bottles cannot be withdrawn by the Department and to that extent alone the assessee succeeds in this civil appeal. Lastly, as stated above, in this case the Commissioner of Income-tax (Appeals) had remitted the matter to the Assessing Officer who on remand came to the conclusion that all 5,46,000 bottles stood sold before March 31, 1991. This finding of fact has become final. It has not been challenged. Hence, the Department has erred in disallowing the depreciation of Rs. 18,04,572.”

19. Similarly, Hon'ble Gujarat High Court in case of *DCIT vs. Surat Electricity Co. Ltd. – (2011) 337 ITR 271 (Guj.)* decided the identical issue in favour of the assessee by returning following findings :-

“Thus, this Court in the above quoted decision has held that the set aside of assessment made by the appellate authority is always in accordance with the directions given by the appellate authority for making a fresh assessment. But, the most material part of the provision is the opening portion which stipulates "In an appeal against an order of assessment". In other words, the entire gamut of powers which are available to the appellate authority is governed within the four corners of the subject-matter of appeal. The subject-matter of appeal is the assessment of income which forms part of the order of assessment in light of the return of income filed by an assessee. Examining the facts of the present case in the light of the aforesaid decision, it is apparent that the AO was required to make a fresh assessment in accordance with the directions given by the CIT(A) and could not have travelled beyond the same. The impugned order of the Tribunal is, therefore, in consonance with the aforesaid decision of this High Court and does not warrant any interference.”

20. Coordinate Bench of the Tribunal in the case of *Radan Multimedia Ltd. vs. ACIT in ITA No.500/Mum/2005 dated 06.01.2016* also decided the issue in favour of the assessee by returning following findings :-

“18. Ground No 11 is in respect of request for enhancement to CIT(A) to enhance the income of the assessee by Rs. 59,70,000/- on account of shortage of binola bags. The DR submitted that CIT(A) should have enhance income on account to binola bags. The counsel submitted that this issue was never subject matter of appeal before ITAT hence CIT (A) has rightly refused to entertain the fresh issue raised by AO in remand proceedings. After hearing both the parties we are of the view that the CIT(A) is right in holding that what was not the issue before ITAT

cannot be raised by the AO in remand proceedings. The ground no 11 is dismissed.”

21. So, in view of the matter, we are of the considered view that the AO has exceeded his powers during remand proceedings, made by the Tribunal by making addition under section 68 of the Act on account of credit entries appearing in the bank statement and as such, the addition made by the AO is not sustainable, hence the Id. CIT(A) has rightly deleted the addition. Consequently, question framed is answered in the negative.

22. So far as question of applying the rate of commission at the rate of 2.25 % by the AO and reduced to 2% by the Id. CIT(A) is concerned, this issue has already been decided by the coordinate Bench of the Tribunal in the *Group cases of Tarun Goyal vide order dated 23.01.2019 passed in ITA No.6507/Del/2015 & Ors.*, thereby AO has been directed to adopt the rate of commission @ 0.50% or 50 paise and computed the profit accordingly by returning following findings :-

“14. The Id. counsel for the assessee also relied heavily on various decisions of the co-ordinate bench wherein the Tribunal has adopted rate ranging from 0.15 paise to 0.50 paise i.e 0.15% to 0.50%.

15. As mentioned elsewhere, in such illegal activities, there cannot be any precedence and the rate varies from facts of each case.

16. To put an end to the litigation and in the interest of justice and fair play, in our considered opinion, 0.50 paise or 0.50% should be taken as the reasonable rate of profit/commission in such clandestine activities. We, accordingly, direct the Assessing Officers to adopt 0.50% or 0.50 paise and compute the profit accordingly.”

23. Following the decision rendered by the coordinate Bench of the Tribunal, AO is directed to adopt the decision of Group cases of Tarun Goyal (supra) and computed the profit accordingly in these cases also.

24. So far as appeals bearing ITA Nos.484/Del./2015, 6516/Del./2015 & 6710/Del./2016 filed by the assessee are concerned, one of the issue is as to upholding the commission income @ 2.25% in case of Bhawani Portfolio Pvt. Ltd. and Geefcee Finance Ltd. and @ 2% in case of Tejasvi Investments (P) Ltd. by the Id. CIT (A). This issue is also decided in favour of the assessee by following the decision rendered by Tribunal vide order dated 23.01.2019 (supra) and the AO is directed to adopt the decision of Group cases of Tarun Goyal (supra) and computed the profit accordingly in these cases also.

25. Second issue in case of Bhawani Portfolio Pvt. Ltd. and Geefcee Finance Ltd., which are of Noida charge, is as to whether determination of commission income with reference to the entries given outside the group. It is the case of the assessee that the AO has calculated the commission income @ 2.25% on the total of all credit entries in the bank account without appreciating the fact that all the entries have been duly explained by the assessee and inter-group entries were to be excluded. Perusal of remand order dated 18.10.2013 passed by the Tribunal was required to exclude the inter-group entries in the bank account in order to calculate the commission income. So, the AO is directed to exclude all inter-group entries in the bank account as per directions of the Tribunal and then calculate the commission income @ 0.50%. Consequently, this issue in the case of Bhawani Portfolio Pvt. Ltd. and Geefcee Finance Ltd. is determined in favour of assessee for statistical purposes.

26. Resultantly, ITA Nos.1565/Del./2017, 1566/Del./2017, 1567/Del./2017, 1568/Del./2017 & 1569/Del./2017 for assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 respectively filed by the assessee, M/s. Dwarka Impex Pvt. Ltd.,

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ITA No.2436 TO 2440/Del./2017
ITA No.484/Del./2015
ITA No.6516/Del./2015
ITA No.6710/Del./2016

are allowed; ITA Nos.2436/Del./2017, 2437/Del./2017, 2438/Del./2017, 2439/Del./2017 & 2440/Del./2017 for assessment years 2004-05, 2005-06, 2006-07, 2007-08 & 2008-09 respectively filed by the Revenue are dismissed; ITA No. 6516/Del./2015 for AY 2005-06 filed by the Tejasvi Investment (P) Ltd. is allowed and ITA Nos.484/Del./2015 & 6710/Del./2016 for AYs 2009-10 & 2005-06 filed by Bhawani Portfolio Pvt. Ltd. and Geefcee Finance Ltd. respectively are allowed for statistical purposes.

Order pronounced in open court on this 26th day of April, 2019.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Dated the 26th day of April, 2019
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-3, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.