

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 5391/Del/2016
(Assessment Year: 2008-09)

ITO, Ward-38(2), New Delhi	Vs.	Dharmender Kumar, D-16/381., Sector-7, Rohini, New Delhi PAN: AIVPK1870D
(Appellant)		(Respondent)

Revenue by :	Shri Surendra Meena, Sr. DR
Assessee by:	None
Date of Hearing	06/08/2019
Date of pronouncement	05/11/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the revenue against the order of the Id CIT(A)-13, New Delhi dated 29.07.2016 for the Assessment Year 2008-09, wherein, the addition of Rs. 33435821/- made on protective basis by the ITO- Ward-21(1), New Delhi (Id AO) is deleted. The commission income was also deleted as same is assessable in the hands of the Shri R.N. Agarwal.
2. The revenue has raised the following grounds of appeal:-
 - (i) *Whether on the facts and in the circumstances of the case and in the law, the Ld. CIT(Appeal) erred in not appreciating the facts of the case*
 - (ii) *Whether on the facts and in the circumstances of the case and in the law, the Ld. CIT(Appeal) erred in deleting the addition of Rs. 3,34,35,821/- on account of unexplained credit/cash deposits.*
 - (iii) *On the facts and circumstances of the case the Ld. CIT (A) has erred in computing the income being 0.37% on Rs.3,34,35,821/- has commission income. It is not established that the assessee is earning genuine business on which such commission is earned."*
3. The Id AO aggrieved with the order of the Id CIT(A) has preferred this appeal.
4. The brief facts of the case shows that the assessee filed his return of income on 02.02.2009 at Rs. 163510/-. The case of the assessee was reopened u/s 147 of the Act by issuing notice on 28.03.2013. The assessee requested that

original return of income filed be treated as return in response to the above notice. It was found that in Assessment Year 2010-11 that the assessee is an employee of Mr. RN Agarwal. In case of two proprietary concern of the assessee and his account is opened and such account was introduced by Mr. RN Agarwal, and also operated by him. The statement on oath was recorded of Shri RN Agarwal where he confirmed the above fact. The huge deposits amounting to Rs. 33435821/- was found to be credited in the bank account of such proprietary concern which remains unexplained. Same was also added back u/s 68 of the Act in hands of Shri R. N. Agarwal as he did not furnish any identity, creditworthiness and genuineness of such cash deposit as well as bank deposit. Therefore, same was added in the hands of the Shri RN Agarwal on substantive basis and in the hands of the assessee on protective basis. The ld AO further made an addition of commission income @0.25 per thousand as commission and out of which payable to the assessee by Mr. RN Agarwal was considered at 0.10 per paise per thousand. Thus, addition of Rs. 3343/- was made. Assessment u/s 143(3) read with section 147 of the Act was passed on 31.03.2014 determining total income of the assessee of Rs. 33602674/-.

5. The assessee aggrieved with the order preferred appeal before the ld CIT(A) who deleted the addition as per para No. 7 of his order as under:-

7. The above submissions have been carefully considered. The additional evidences have been admitted for the purposes of this appeal as they are germane to A more than reasonable opportunity has been given to the AO to examine the additional evidence and file rebuttal, if any. The appellant has pointed out that in his own case, on the same set of facts, addition of the deposits in the bank account has been deleted by the CIT(A)-32 in the A.Y. 2010-11 vide order dated 19.11.2015. It is also submitted that the substantive addition of the same amount of Rs.3,34,35,821/- was made in the case of Shri R.N. Aggarwal in the A.Y. 2008-09, but in the subsequent scrutiny assessments for A.Y. 2009-10 and 2010-11, no such addition of entire credits in the bank accounts of the appellant were made. The AO assessed the commission income by applying a rate of 0.37-0.43% on the turnover in the bank accounts in the names of M/s Pride Trade Agency and M/s Sidh Trading Company. In the appellant's own case, the assessment for the A.Y. 2009-10 has been completed u/s 147, dated 30.03.2005, accepting the returned income. In the order of the CIT(A)-32 for the A.Y. 2010-11, the addition has been restricted to commission computed at 0.37% on the total bank deposits, to

be added on protective basis. The deposits have also been directed to be adopted at the net figure, after reducing cash withdrawals which have been deposited again in the bank accounts at later dates. After carefully considering that the Department has accepted that Shri R.N. Aggarwal was the real owner of M/s Sidh Trading Co. and M/s Pride Trade Agency, and that he was actually earning 0.37% on the deposits in those bank accounts, there is no basis for the deposits to be treated as income in the hands of the appellant. The Department has, in subsequent A.Ys., admitted that the entire deposits in the two bank accounts of these concerns were not the unaccounted income of Shri R.N. Aggarwal. Hence, the addition of Rs.3,34,35,821/-, made on protective basis, is deleted.

6. The commission income was also deleted by him vide para No. 8 of his order as under:-

8. So far as the addition of commission of Rs.3,343/- is concerned, it is seen from the statement of Shri R.N. Aggarwal recorded under oath on 20.03.2014, that the alleged commission of 0.025% was shared between himself and the appellant in the ratio of 60:40, i.e. the appellant received 10 paise out of 25 paise earned on each thousand rupees transacted. The appellant has not denied this. However, it is seen that in the scrutiny assessment u/s 143(3)/ 147 for the AY 2009-10, vide orders dated 30.03.2015, the AO has assessed the entire commission income in the hands of Shri R.N. Aggarwal by applying a rate of 0.43% to the credits in the bank accounts of M/s Sidh Trading Co. and M/s Pride Trade Agency and accepted the returned income of the appellant. Neither the appellant nor Shri R.N. Aggarwal have contested this. In the AY 2010-11, the AO has again assessed the commission income only in the hands of Shri R.N. Aggarwal, and applied the rate of commission of 0.37% of the turnover. After carefully considering all the above facts, it is held that the commission earned from, the transactions in the bank accounts of M/s Sidh Trading Co. and M/s Pride Trade Agency are assessable in the hands of Shri R.N. Aggarwal. The addition of Rs.3,343/-made in the appellants case is deleted.”*

7. The ld AO aggrieved has preferred this appeal. The ld DR vehemently supported the order of the ld AO. Despite notice to the assessee none appeared before us on the appointed date. Thus, the issue is decided in absence of assessee on the merits of the case.
8. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The ld CIT(A) admitted the additional evidence where the order of assessment for Assessment Year 2009-10 and 2010-11 in case of Shri RN Agarwal was placed. In those assessment years, the total addition of bank deposit was made in hands of Shri RN Agarwal on substantive basis. The ld CIT(A) despite giving opportunity to the ld AO could

not rebut the above fact. Subsequently, for Assessment Year 2009-10 the ld AO accepted the return of income of the assessee and despite having similar facts no such addition has made. As Shri RN Agarwal confirmed that the assessee is merely an employee and as the ld AO has also made the addition on protective basis in the hands of the assessee, no infirmity is found in the order of the ld CIT(A) in deleting the above addition. Naturally, when the substantive addition is crystalised in the hands of the real owner the protective addition must be deleted. However, later on if the substantive addition is deleted for the technical reason then the addition must revive in the hands of the assessee in whose bank account the money is credited. However, at present no such fact are brought on record. Therefore, we found that the ld CIT(A) has correctly deleted the addition of Rs. 33435821/- in the hands of the assessee. Accordingly, ground No. 2 of the appeal of the ld AO is dismissed.

9. With respect to ground No. 3 where the addition of Rs. 3343/- is deleted by the ld CIT(A). We find some force in the argument the ld DR who submitted that the assessee cannot be such a gullible person who allows Mr. RN Agarwal to operate the bank account and deposit the cash of such huge sum in his proprietary concern. The assessee must be signing various cheque books, he must be signing various bills etc therefore, it cannot be said that even the assessee does not earn 0.10 paisa per thousand on the transaction. Undoubtedly assessee is one of the part of providing accommodation entries, therefore, it is highly unbelievable that he allowed Mr. R. N. Agarwal to do so may thing without receiving any consideration. Accordingly, we confirm the addition of Rs. 3343/- in the hands of the assessee. Ground No. 3 of the appeal is allowed.

10. Accordingly, appeal of the revenue is partly allowed.

Order pronounced in the open court on 05/11/2019.

-Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 05/11/2019
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi