

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2866 & 2867 & 2870/Del/2015
(Assessment Year: 2007-08, 2008-09 & 2011-12)

Purshottam Lal Gupta, B-271, Nehru Ground, Faridabad PAN: AALPG3424H	Vs.	DCIT, Circle-II, Faridabad
(Appellant)		(Respondent)

Assessee by :	Shri KC Singhal, Adv Shri Amit Gupta, Adv
Revenue by:	Smt Sulekha Verma, CIT DR
Date of Hearing	16/07/2019
Date of pronouncement	14/10/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the three appeals filed by the assessee against the order of the learned Principal Commissioner of Income Tax (OSD), Gurgaon dated 12/2/2015 for assessment year 2007 - 08, 2008 - 09 and 2011 - 12. All these three appeals are emanating from single search and are on the same issue; therefore, they are heard together and disposed of by this common order.
2. Before looking at the grounds of appeal of the assessee, the facts culled out from the assessment order for assessment year 2007 - 08 shows that assessee is an individual and allegedly earning income from business. Search u/s 132 of the income tax act was carried out at the residence of the assessee on 28/1/2011. Statement of the assessee was recorded u/s 132 (4) of The Income Tax Act wherein he stated that the books of accounts of his proprietary concern Metal Trading Co are impounded by The Additional Commissioner Of Central Excise (Anti Evasion), Faridabad. On enquiry, it was found that there was a further search carried out at the residential as well as office premises of Asian colour coated Ispat Ltd group of cases on 28/1/2011 and the assessment of the assessee is centralized with that

group. The seized documents in the search of said group were received on 11/11/2011. On enquiry from the central excise office, orders of The Custom and Central Excise Settlement Commission in case of Sebros Auto industries Ltd, SD Auto engineering Ltd were sent. According to those orders, it was found that assessee was one of the applicants among others who had filed an application before the Central Excise settlement commission. Based on the order of the Central Excise settlement commission, the learned assessing officer noted that in the above settlement petition the assessee and his employees and 10 other firms and persons have filed such petition. As per the petition, it is submitted by them before settlement commission that they are engaged in issuing fake and vatable invoices to various manufacturers who have also filed a settlement application. Based on these information searches were also conducted by the central excise commissioner on 22/12/2010. Consequently, various incriminating records and documents indicating fraudulent transactions of sale of vatable invoices and various diaries and loose papers containing handwritten details of transactions were recovered from the residential premises of the assessee's employee. Further, it was apparent that assessee was indulging in trading of vatable invoices procured from various manufacturers registered dealers, which were not accompanied by the goods mentioned in the invoices. Further statement of assessee was also recorded on 18/3/2013 where the assessee admitted to have acted as a guarantor and was confirmed by him. From the above statement, it was clear that he has not admitted only before the central excise Department but also before the income tax Department that he stood as a facilitator/ guarantor of cash transaction against issue of cheque between manufacturers and suppliers. Further in the order of the Customs and Central Excise settlement commission dated 2/11/2012 and 21/11/2012, The commission has given a categorical finding that assessee has earned commission in the range of 0.5 – 3% in view of facilitating smooth functioning of cash transactions between the benefactors and suppliers. Thereafter the learned assessing officer based on the statement of the assessee dated 18/3/2013 proceeded to quantify the commission income earned by the assessee. For the purpose of quantification of commission income on the fake invoices issued by the

assessee, the learned assessing officer computed the commission income based on the statement and the notice issued by the central excise Department at the rate of 3% for the relevant assessment year. For this assessment year the learned assessing officer noted that assessee has issued fake invoices to five parties amounting to INR 4 1408424/- and commission income thereon was determined at INR 1 242252/-.

3. Further it was seen that the order u/s 143 (3) of the income tax act was passed by the assessing officer on 23/12/2009 the assessing officer has made certain additions during the course of assessment against which the assessee preferred appeal before the learned CIT – A who deleted the above addition as per order dated 26/3/2010. The revenue preferred an appeal before the coordinate bench who passed an order on 26/8/2011 restoring back the issue of the addition on account of the low gross profit of INR 4 081638/- to the file of the learned CIT – A. Therefore, to keep the issue alive the learned assessing officer made the same addition to the total income of the assessee. Thus the assessment order u/s 153A (1) (B) of the income tax act, 1961 was passed on 23/2013 by the deputy Commissioner of income tax, central circle – I, Faridabad determining total income of the assessee at INR 1 3844560/- against the returned income of assessee of INR 8 520670/-.
4. As agreed by the order of the learned AO, assessee preferred appeal before the learned CIT – A who confirmed the addition on account of commission income as per his order for assessment year 2011 – 12 wherein he reduced the rate of commission from 3% to 2%. With respect to the addition of the gross profit of INR 4 081638/- for the reason that as the coordinate benches set aside the whole issue back to the file of the learned CIT – A for its own determination, the above addition was deleted.
5. Facts for assessment year 2008 – 09 are also similar to the facts stated for assessment year 2007 – 08. For assessment year 2008 – 09 as per order dated 28/3/2013 passed by the learned assessing officer the amount of commission was quantified on account of fake invoices issued to 5 parties amounting to rupees 114408789/- and the commission income thereon was determined at INR 3 432264/-. In that particular year it was also found that there is a further addition of INR 1 305754/- which was on account of

interest. The addition was made by the learned assessing officer for the reason that above disallowance was confirmed by the coordinate bench and against which the assessee has filed appeal before the honourable High Court. Accordingly total income of the assessee was assessed at rupees 11400660/- against the returned income of rupees 6662640/-.

6. Aggrieved with the order of the learned assessing officer assessee preferred an appeal before the learned CIT – A who confirmed the commission income as per his order dated 12/2/2015 reducing the rate of commission determined by the learned assessing officer at the rate of 3% to 2%. Therefore, assessee is aggrieved with that order has preferred this appeal for assessment year 2008 – 09 also.
7. Similar facts also exist for assessment year 2011 – 12 wherein as per order dated 28/3/2013 passed u/s 153B (1) (B) of the income tax act 1961 wherein the learned assessing officer has made the addition of INR 1 1327582/- to the returned income of INR 3 0236290/- determining the total income of rupees for 1563870/-. For this year the learned assessing officer noted that assessee has issued fake invoices 26 parties amounting to INR 3 77586073/- and the commission income determined thereon is INR 1 1327582/-.
8. Aggrieved with the order of the learned assessing officer assessee preferred an appeal before the learned CIT – A who passed an order on 12/2/2015 wherein instead of the commission income adopted at the rate of 3% by the learned assessing officer he reduced it to the 2% for the year under appeal. Therefore aggrieved with the order of the learned CIT – A, assessee has preferred this appeal before us.
9. Therefore, there are 3 appeals ending before us on the identical issue of the addition confirmed by the learned CIT – A on account of commission income earned by the assessee on fake invoices issued to various parties for assessment year 2007 – 08, 2008 – 09 and 2011 – 12. The respective grounds of appeal raised for these years are tabulated hereafter.
10. The assessee has raised the following grounds of appeal in ITA No. 2866/Del/2015 for the Assessment Year 2007-08:-

“1. *That on the facts and circumstances of the case as well as in law, the addition on account of alleged commission made by AO and to the extent sustained by the Principal CIT(OSD) is illegal in as much as no*

incriminating material was found in the course of search u/s 132 of the Act.

2. *Without prejudice to the above, the factual findings in respect of alleged commission, rate of commission and the value on which the alleged commission had been computed are not based on any independent enquiry with reference to any material but contrary to facts on record which is also apparent from the fact that assessment is made on ad-hoc basis.*
3. *Without prejudice to the above, the addition sustained is too excessive being contrary to facts. Both the authorities have failed to appreciate the facts correctly.*
4. *The appellant craves to add, or amend the grounds of appeal, if required and necessary.”*

11. The assessee has raised the following grounds of appeal in ITA No. 2867/Del/2015 for the Assessment Year 2008-09:-

- “1. *That on the facts and circumstances of the case as well as in law, the addition on account of alleged commission made by AO and to the extent sustained by the Principal CIT(OSD) is illegal in as much as no incriminating material was found in the course of search u/s 132 of the Act.*
2. *Without prejudice to the above, the factual findings in respect of alleged commission, rate of commission and the value on which the alleged commission had been computed are not based on any independent enquiry with reference to any material but contrary to facts on record which is also apparent from the fact that assessment is made on ad-hoc basis.*
3. *Without prejudice to the above, the addition sustained is too excessive being contrary to facts. Both the authorities have failed to appreciate the facts correctly.*
4. *The appellant craves to add, or amend the grounds of appeal, if required and necessary.”*

12. The assessee has raised the following grounds of appeal in ITA No. 2870/Del/2015 for the Assessment Year 2011-12:-

- “1. *That on the facts and circumstances of the case as well as in law, the initiation of proceedings under the special provisions of sections 153A r/w section 153A(l)(b) of the I T Act is without jurisdiction.*
2. *Without prejudice to the above, even assuming that the assessment was made under the normal process of law i.e. section 143(3) then the assessment is also null & void since the mandatory notice u/s 143(2) was served beyond the statutory period. Even the issue of notice u/s 142 directing the appellant to file the return was illegal.*
3. *Without prejudice to the above, the factual findings in respect of alleged commission, rate of commission and the value on which the alleged commission had been computed are not based on any*

independent enquiry with reference to any material but contrary to facts on record which is also apparent from the fact that assessment is made on ad-hoc basis.

4. *Without prejudice to the above, the addition sustained is too excessive being contrary to facts. Both the authorities have failed to appreciate the facts correctly.*
 5. *The appellant craves to add, or amend the grounds of appeal, if required and necessary.”*
13. The learned authorised representative submitted that appellant is carrying on the business of trading in metals and further but during all these years and was regularly filing the income tax returns. Search u/s 132 of the income tax act 1961 was carried out at the premises of the appellant on 28/1/2011. However no incriminating material was found in the course of search which is also apparent from the fact that addition made by the AO are based only on the basis of the material collected by him from excise and customs department during the course of assessment proceedings. He extensively referred to paragraph number 3 of the assessment orders. He further submitted that assessment proceedings commenced under section 153A of the income tax act by issue of notice dated 24/1/2012. He further submitted that on the basis of the material collected from excise and customs department, it was found by the learned assessing officer that assessee was involved in arranging the invoices to various parties against the charging of the commission wearing between 0.5% and 3% of the value of the invoices. Accordingly, the additions were made in the hands of the assessee for all these assessment years. He thus submitted that assessment year 2007 – 08 and 2008 – 09 were concluded assessment on the date of search i.e. 28/1/2011. He submitted that in both these years the addition could only be made based on the incriminating material found during the course of the search. He further stated that as there is no incriminating material found during the course of search the assessment and the consequent addition made in these 2 years deserves to be deleted. For this proposition, he referred to the decision of the honourable Delhi High Court in case of CIT vs. Kabul Chawla 380 ITR 573 (Del) and Principal Commissioner of Income Tax vs Meeta Gutgutia 395 ITR 526 (Del).
14. For assessment year 2011 – 12 is submitted that assessee has been found charging of commission wearing between 0.5% – 3% of the value of the

invoices. The learned CIT – A has estimated the commission income at the rate of 2%, which is very high and is not sustainable. He submitted that the rate of the commission could not exceed 0.5% if at all required to be added in the hands of the assessee.

15. The learned departmental representative submitted a detailed paper book and referred to the letter dated 24/4/2019 of the assessing officer. See extensively read the above submission made by the learned assessing officer wherein it is submitted that assessee has accepted during the course of proceedings before the central excise authorities that assessee is issuing fake invoices and earning commission income thereon. With respect to the argument of the learned authorised representative that these are the concluded assessment so far as a by 2007 – 08 and 2008 – 09 were concerned that the searches were concerned that on the residential premises of the assessee on 28/1/2011 and therefore the assessment orders were passed u/s 153A of the income tax act. She further referred to the copy of the statement recorded and the punch, and submitted that assessee has committed and confessed in a statement u/s 132 of the income tax act about issue of the fake invoices and earning commission there from. Therefore, she submitted that there is any incriminating material available with the revenue for making the above addition for this proposition C relied upon the decision of the honourable Delhi High Court in case of Dayawanti vs CIT 390 ITR 496 (Delhi) wherein it has been held that even the statement is an incriminating material based on which the addition can be made.
16. We have carefully considered the rival contention and perused the orders of the lower authorities. Before us the assessment year 2007 – 08 and 2008 – 09 are concluded assessment is at the time of the date of search. Whereas assessment year 2011 – 12 is pending. Therefore, our findings for these two sets of assessment years would be different.
17. For the assessment year 2007 – 08 and 2008 – 09 on the reading of the assessment orders as well as based on the information contained in the paper book of the learned departmental representative, we do not find that addition has been made by the learned assessing officer on account of any incriminating documents found during the course of search at the residence

of the assessee. The addition has only been made by the learned assessing officer based on the proceedings before the central excise Department and settlement commission under provisions of the Central Excise act. Admittedly, the assessee has confessed in the statement about earning of the commission on issue of the fake invoices. However merely based on the statements such addition cannot be made. Merely a statement unless accompanied by or supported by the incriminating material the addition cannot be made. Even in case of the issue before the honourable Delhi High Court in 390 ITR 496 over and above statement there were Various materials, documents, agreements, invoices and statements in form of accounts and calculations were seized, however, in the present case there were no such material so far as it relates to assessment year 2007 – 2008 and 2008-2009. Even in the pension are produced before us no material was shown to us, which related to these two assessment years. In view of this, respectfully following the decision of the honourable Delhi High Court in CIT vs Kabul Chawla (supra), we hold that in absence of any incriminating material found during the course of search pertaining to these two assessment years, no addition can be made in the hands of the assessee. In view of this, we direct the learned assessing officer to delete the addition for these 2 years on account of commission income earned by the assessee on issuing the fake taxable invoices. In the result ground number 1 of the appeal for assessment year 2007 – 08 and 2008 – 09 are allowed.

18. In view of the reason that we have already allowed ground number 1 of the appeal of the assessee for both these years ground number 2 and 3 of these appeals do not survive.
19. Accordingly, appeals for assessment year 2007 – 08 and 2008 – 09 filed by the assessee are allowed.
20. Coming to the assessment year 2011 – 12 we do not find any merit in the appeal of the assessee because the addition has been made on the basis of the fake invoices issued by the assessee to various parties. The assessee has not denied that he has not issued fake invoices to these parties. Only issue is how much commission is earned by the assessee. The learned assessing officer computed the commission income at the rate of 3% based on the statement made by the assessee that he earns commission at the

rate of 0.5% – 3% of the taxable invoices value. The learned CIT – A confirmed the addition at the rate of 2%. For reaching at the above conclusion the learned CIT – A page number 28 has given a reason that the basis for adopting 3% at the rate of commission has not however been elusive dated in the impugned order and on the other hand the assessee has not furnished necessary primary facts to enable proper determination of the actual rate of commission. The suppliers of the fake invoices will also be entitled for some commission but as the entire business has been undertaken under the patronage of the assessee, the learned CIT – A adopted the commission at the rate of 2% as unaccounted income of the assessee. We have not been given any reason to further reduce the above rate of commission by the learned authorised representative. The revenue is not in appeal before us against quantum of addition of the 1% rate of commission deleted by the learned CIT – A. In view of this we do not find any infirmity in the order of the learned CIT – A in confirming the addition of the commission income at the rate of 2% in the hands of the assessee for issuing fake taxable invoices to various parties. In view of this ground number 1 – 4 of the appeal of the assessee for assessment year 2011 – 12 are dismissed.

21. In the result, appeal of the assessee for assessment year 2011 – 12 is dismissed.

Order pronounced in the open court on 14/10/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 14/10/2019
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi