

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. R.K. PANDA, ACCOUNTANT MEMBER**

ITA No.3561/Del/2015
Assessment Year: 2011-12

Manoj Kumar Jain C/o. O.P. Sapra & Associates C-763, New Friends Colony New Delhi-110025 PAN no.ACLPJ4982H (APPELLANT)	Vs.	DCIT Central Circle Income Tax Office, 3 rd Floor, CGO Complex -1, Hapur Road, Ghaziabad (RESPONDENT)
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Appellant by	Sh. Kapil Goel, Advocate
Respondent by	Ms. Pratima M. Biswas

Date of hearing:	16/03/2020
Date of Pronouncement:	22/05/2020

ORDER

PER R.K PANDA, AM:

This appeal filed by the assessee is directed against the order dated 31.03.2015 of the CIT(A), Ghaziabad relating to A.Y. 2011-12.

2. Facts of the case, in brief, are that a search u/s. 132 of the IT Act was conducted in the case Sh. Pankaj Sharma and Ajay Sharma, during which certain incriminating documents were found. A survey u/s. 133A of the IT Act was carried out on

11.10.2010 at the office of the assessee who is the proprietor of M/s. Rishab Trading Company. It was gathered by the search party and survey team that Sh.Pankaj Sharma and Ajay Sharma alongwith the assessee Sh. Manoj Kumar Jain, Sanjay Thakur, Pushkar Tyagi, Amit Bansal and Vishnu Bhagwan were carrying on the business of providing accommodation entries to several business houses by getting the amount transferred from their accounts by RTGS and / or cheque and later on (immediately thereafter, preferably on the same day) withdrawing the entire amount and as stated by them in their statements, returning them to the parties who had got sums transferred into accounts of these persons (i.e. the entry providers Shri Pankaj Sharma, Ajay Sharman and Others). The AO extracted the names of different persons/ firms who had given the accommodation entries and the name of the beneficiaries and thereafter issued summons to some of the parties on test check basis who had been provided accommodation entries. On being confronted by the AO it was claimed by the assessee that he was getting commission of 0.01% which amounts to Rs.10,000/- per Rs. 1 crore of accommodation entry. On the basis of the search operation and post search enquiries and survey u/s. 133 A in the premises of Rishav Trading Company and details of bank account of Sh. Manoj Kumar Jain in the name of his proprietorship firm M/s. Rishav Trading Company, the AO concluded that the assessee was involved in the business of entry providing. He, therefore, issued notice u/s. 153 C for the A.Y. 2005-06 to 2010-11 on 18.09.2012 and notice u/s. 142 (1) for A.Y. 2011-12 on

18.09.2012. The assessee objected to the issue of notice u/s. 153 C of the IT Act on the ground that only survey u/s.133 A was conducted on 12.10.2010 in the assessee's case and objected to the validity of notice u/s. 153C. The AO held that the case of the assessee has been selected u/s.153 C because a search was conducted in the case of A.K. Traders on 11.10.2010 in the bank premises of HDFC bank, Ambedkar Road, Ghaziabad and thereafter survey was conducted in the case of the assessee.

3. Relying on the order in the case of various other persons of the same group who have provided entries the AO adopted the profit rate of 3% on the amount of Rs.23,56,61,255/- being accommodation entry provided which comes to Rs.70,69,838/-. Similarly in absence of any explanation regarding the source of deposits in the bank account, the AO treated the entire amount that were deposited in the bank account as unexplained deposits and added the same to the total income of the assessee on protective basis on the ground that the addition is required to be made in order to protect the interest of the revenue. Thus, the AO made the addition of Rs.70,69,838/- as business income being the amount received by the assessee as commission and Rs.23,56,61,255/- as unexplained cash deposit in the bank account.

4. Before CIT(A) the assessee challenged the validity of issuance of notice u/s. 153 C as well as the addition on merit. However, the Ld. CIT(A) decided both the issues against the assessee.

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

1. That the impugned assessment order dated 31/03/2013 as passed by the Ld. Dy, CIT, Central Circle, Ghaziabad (in short "AO") on total income of Rs.28,20,19,514/- u/s 143(3) of I.T. Act is arbitrary, unjust and illegal inter alia because:

a) No valid notice u/s 143(2) of I.T. Act was issued and served on the Appellant within the stipulated time.

b) The impugned assessment order as passed by the AO is barred by limitation and the Ld. CIT(A) had erred on facts and under the law in holding that the same was within the stipulated time without giving valid reason and/or without disproving the evidence produced by the Appellant in support this contention. The impugned assessment order deserves to be cancelled/annulled.

2. That the impugned assessment order also deserves to be cancelled/annulled because the AO had failed to observe principles of natural justice by not giving proper and adequate opportunity of being heard before completing the impugned assessment order.

3. That the authorities below had failed to appreciate that the Appellant was an / actual trader duly registered with the Trade Tax Authorities and had verified the transactions from record of the Appellant and therefore, the impugned assessment order as passed on the same lines as has been done in other Assesseees Shri Pankaj Sharma, Shri Ajay Sharma and others. From this angle also, the impugned assessment order being illegal, deserves to be cancelled/annulled.

4. That without prejudice to the above grounds, the authorities below had no justification to make an addition of JRSZ3J56/L265/- representing bank credits on protective basis in the absence of such 'additions having been made in the hands of others on substantive basis and without giving proper and adequate opportunity of being heard coupled with the fact that the facts stated and the submissions made had not been considered properly. Therefore, the addition deserves to be deleted.

5. That without prejudice to Ground No 4 above, there was no justification to apply net profit rate of 3% on the bank credits aggregating at Rs.23,56,61,265/- thereby making an addition of Rs.70,69^B38A-without disproving the transaction recorded in the account books of the Appellant and therefore, this addition also being illegal, deserves to be deleted.

6. That the Ld. CIT(A) had erred on facts and under the law in sustaining addition of Rs.26,54,591/- for alleged unaccounted purchases. At any rate, without prejudice, the addition as made is very excessive.

7. That various observations made by the Ld. CIT(A) while upholding various additions or part thereof as made by the AO are either incorrect or untenable. The Ld. CIT(A) had not given due weight to the submissions supported by the documentary evidence as made/ filed before him by the Appellant. Consequently, the additions sustained by the Ld. CIT(A) deserves to be deleted.

6. The assessee has also raised the following additional grounds of appeal :-

“That assessment framed u/s 143(3) for the period under consideration (AY 2011-12) which falls in Six years block prescribed u/s 153C, is invalid, void-ab-initio and lacks jurisdiction as it should have been framed u/s 153C, accordingly the orders passed by AO and First Appellate Authority deserves to be quashed. ”

“That assessment framed u/s 143(3) for the period under consideration is ultra vires to section 153C, in as much as the no document is referred in satisfaction note, much less incriminating document, much less belonging to assessee herein, much less seized during search action u/s 132 much less for the subject period, so as to give rise to any undisclosed income and therefore satisfaction note is completely inchoate and non starter and therefore orders passed by AO and First Appellate Authority deserves to be quashed.”

7. Referring to the decision of Hon’ble Supreme Court in the case of NTPC Limited vs. CIT reported in 229 ITR 383 and various other decisions the Ld. Counsel for the assessee submitted that the additional ground is purely legal in nature and no fresh facts are required to be investigated and, therefore, the same should be admitted for adjudication.

7.1 After hearing both the sides and considering the fact that the additional grounds raised by the assessee are purely legal in nature and no fresh facts are required to be investigated, the same are admitted for adjudication.

8. The Ld. Counsel for the assessee at the outset submitted that the assessment for the impugned assessment year have been completed u/s.143(3) whereas the same should have been completed u/s.153C since the satisfaction note was prepared by the AO on 18.09.2012 and the impugned assessment year i.e. A.Y. 2011-12 falls within the period of six years. Since the AO in the instant case has not passed the order u/s. 153 C as no notice u/s. 153C was issued, therefore, the order passed by the AO u/s. 143 (3) is not legally valid. For the above proposition he relied on the following decisions placed in the paper book :-

1. *Recent Apex court decision in Singhad Technical Society (order dated 29.08.2017) 397 ITR 344*

2. *Hon'ble Delhi high Court decision in case of Fast Booking (I) Pvt. Ltd., order dated 02.09.2015 (ITA No.334/2015) (378 ITR 693)*

3. *Hon'ble Delhish high Court decision in the case of Silver Line, order dated 04.11.2015 (ITA Nol.578/2015) (383 ITR 455)*

4. *Hon'ble Punjab and Haryana High Court decision in case of M/s. VMT Spinning Co. Ltd., order dated 16.09.2016 (ITA No.445/2015) (389 ITR 326)*

5. *Hon'ble Gujarat high Court in case of Jolly Fantasy World Ltd. 373 ITR 530*

6. *Hon'ble Delhi ITAT in case of Pavitra Realcon Pvt; Ltd. ITA No.3185/Del./2015 (A.Y. 2011-12) (refer para 15 to 22)*

7. *Hon'ble Delhi ITAT in case of Satkar Roadlines Pvt. Ltd.*

ITA No.3305/Del/2014 Assessment year 2009-10 Date of pronouncement 27.04.2016

8. *Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Shree Jasjeet Singh in ITA No.337/2015*

9. The Ld. DR on the other hand strongly objected to the arguments advanced by the Ld. Counsel for the assessee. She submitted that during the assessment proceedings the assessee had objected to issue of notice u/s. 153C of the IT Act whereas now he is arguing that the assessment should have been completed u/s.153C of the IT Act. This shows that the assessee is willfully trying to mislead the Tribunal regarding the stand taken by it during assessment proceedings where it objected to issue of notice u/s.153 C and now arguing that the assessment should have been completed u/s. 153C. Referring to the order sheet entries, copies of which are filed by the assessee himself, she submitted that the AO has completed the assessment u/s. 153C. She accordingly submitted that the additional ground raised by the Ld. Counsel for the assessee should be dismissed.

10. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find at various places in the order sheet entries, copies of which were produced by the

assessee, it is mentioned that notice u/s. 153 C has been issued and the assessment is completed u/s. 153 C of the IT Act. The order sheet entries dated 22.03.2013 and 31.03.2013 translated in English by the assessee himself placed at page 17 of the paper book read as under :-

22.03.2013

Submission of the AR is placed on record. AR has objected to notice u/s. 153 as only survey u/s.133A was conducted in the case and requested to drop proceedings. Satisfaction for taking the case u/s. 153 C has been recorded earlier.

-sd-

31.03.2013

Assessment is completed u/s. 153 C of the IT Act, 1961. Issue D/N, Challan etc. Initiate penalty proceedings u/s. 271 (1) (c) for concealment, 271 AAA, 271 B & 273 of the Income Tax Act, 1961.

11. Since the AO has issued the notice u/s. 153 C and the assessment has been completed u/s. 153C of the IT Act, therefore, we do not find and substance in the additional grounds raised by the assessee. Accordingly the above grounds are dismissed.

12. So far as the other grounds are concerned the Ld. Counsel for the assessee did not press grounds of appeal No.1,2,3,7,8 and 9 for which the Ld. DR has no objection. Accordingly the above grounds are dismissed as not pressed.

13. So far as the ground No.4 and 5 are concerned these relate to the order of the CIT(A) in confirming the addition of Rs.23,56,61,265/- made by the AO on protective basis and the addition of Rs.70,69,838/- being commission @ 3% on the bank credit of Rs.23,56,61,265/-.

14. So far as the commission @ 3% is concerned the Ld. Counsel for the assessee relying on a series of decisions placed in the paper book submitted that in the case of entry operators such commission has been estimated @ .15% to .5%. Referring to the decision of the Delhi Bench of the Tribunal in the case of Sh. Sanjay Vs. ACIT made vide ITA No.162 to 168/Del/2010 order dated 30.04.2013 he submitted that the Tribunal while adjudicating the penalty appeal has mentioned that vide order dated 12.11.2008 the commission @ 0.5% on the value of bogus accommodation entries was added in the hands of the assessee. Referring to the decision of the Mumbai Bench of the Tribunal in the case of Ramesh Kumar Vs. ACIT vide ITA No.3512/Mum/2013 to 3513/Mum/2013 order dated 22.04.2015 he submitted that the Tribunal in the said decision has held that commission rate of 0.25% is reasonable. Referring to the decision of the Mumbai Bench of the Tribunal in the case

of Gold Star Finvest Vs. DCIT vide ITA No.74/Mum/2015 order dated 29.12.2016 he submitted that the Tribunal in the said decision has directed the AO to take commission @ .15% and allow the expenses to the tune of 50% of the said commission and bring the amount to tax. Referring to the decision of the Mumbai Bench of the Tribunal in the case of Talent Infoway Ltd. Vs. DCIT vide ITA No.6384/Mum/2012 and batch of other appeals vide order dated 24.01.2017 he submitted that the Tribunal in the said decision has held that the net profit rate on each commission should be taken @ 0.15 % and the expenditure claimed should be allowed to the extent of 59 %. He accordingly submitted that the rate of commission @ 3% adopted by the AO and upheld by the CIT(A) being on the higher side should be reduced to 0.15%.

15. So far as the addition of Rs.23,56,61265/- is concerned he submitted that the same has been added on protective basis without any addition on substantive basis. Referring to the decision of the Delhi Bench of the Tribunal in the case of ITO Vs. Anuj Kumar vide ITA No.07/Del/2012 order dated 05.06.2018 for A.Y.2008-09, he submitted that the Tribunal in the said order has held that if no substantive addition has been made in any other hand there is no room for addition to be made on protective basis. Referring to the decision of the Delhi Bench of the Tribunal in the case of ITO Vs. Fussi Financial Services Private Limited vide ITA No.4227/Del/2014 order dated 05.06.2017 for the A.Y. 2005-06 he submitted that the Tribunal in the said decision has held that there may be substantive assessment without any protective

assessment, however, there cannot be any protective assessment without there being a substantive assessment. He also relied on the decision of the Mumbai Bench of the Tribunal in the case of MP Ramchandara Vs. DCIT reported in 32 SOT 592 and Suresh K. Jajoo Vs. ACIT reported in 39 SOT 514 and various other decisions and submitted that since no substantive addition has been made in the hand of any other person, therefore, there cannot be any protective addition in the hands of the assessee.

16. The Ld. DR on the other hand heavily relied on the order of the Ld. CIT(A) so far as the addition of Rs.23,56,61,265/- is concerned she submitted that the assessee was unable to give the full details regarding the source of such deposits and name of the persons who had given the money and, therefore, the AO was fully justified in making the addition on protective basis which has been rightly upheld by the CIT(A). So far as the adoption of rate of 3% commission is concerned, she submitted that the same is reasonable and therefore, the same should be upheld. She accordingly submitted that the order of the CIT(A) on these two additions should be upheld.

17. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO on the basis of the deposits in the bank statement of the assessee for the year under consideration noted that an amount of Rs.23,56,61,265/-

has been given to various persons as accommodation entry and since the assessee could not explain the source of such deposits in the bank account made addition of Rs.23,56,61,265/- as unexplained deposits of the assessee on protective basis. He further made addition of Rs.70,69,838/- being commission @ 3% of such deposits as income of the assessee.

18. So far as the adoption of rate 3% commission is concerned, we find there is no such basis in the order as to how the AO has arrived at the commission rate of 3% on such accommodation entries. The coordinate Benches of the Tribunal under identical circumstances are adopting the rate of commission varying from @ 0.15% to 0.5%. Considering the totality of the facts of the case we direct the AO to adopt the profit rate of 0.5% as commission on such accommodation entry of Rs.23,56,61,255/-. Accordingly the order of the CIT(A) is modified and the AO is directed to restrict the addition to Rs.11,78,306/- being commission @0.5% of Rs.23,56,61,265/- as against Rs.70,69,838/- adopted by him and upheld by the CIT(A).

18.1 Now, coming to the addition of Rs.23,56,61,265/- on protective basis we find from the order of the AO as well as the CIT(A) that there is no such addition on substantive basis in any other hand. The AO has made the addition on protective basis without making any addition on substantive basis in any other hand. It has been held in various decisions that if no substantive addition has been made in any other hand, then there cannot be

any protective addition. The Delhi Bench of the Tribunal in the case of Sh. Anuj Kumar (supra) and in the case of Fussi Financial Services Private Limited (supra) has held that when AO has not made any addition on substantive basis there cannot be any protective addition. It has been held that there may be substantive assessment without there being a protective assessment. However, there cannot be any protective assessment or addition without any substantive assessment or addition. Since in the instant case the AO has not made any substantive assessment or addition in any other hand, therefore, the protective addition made in the hands of the assessee being not in accordance with law has to be deleted. We accordingly set aside the order of the CIT(A) and direct the AO to delete the addition of Rs.23,56,61,265/- made by him on protective basis without making any addition on substantive basis.

19. In ground No. 6 the assessee has challenged the order of the CIT(A) in sustaining the addition of Rs.26,54,591/- for alleged unaccounted purchases.

20. Facts of the case, in brief, are that during the course of survey at the office premises of the assessee, a document marked annexure A-1 containing 80 pages was impounded which contained details of sales of Rs.6,97,54,767/- during the months of July to October 2010 pertaining to 38 parties. The AO treated these transactions as unaccounted sales and applied the GP rate of 1.42% which is the rate disclosed for the A.Y. 2010-11. The AO

thereafter extrapolated the sales and applying GP @ 1.42 % on the turnover of Rs.64,70,28,619/-estimated the GP at Rs.90,44,509/-. He also computed the unaccounted capital involved in the unexplained turnover @ 2,11,99,403/- on the basis of total capital Rs.5177590/-.

20.1 In appeal the Ld. CIT(A) sustained an amount of Rs.26,54,591/- and deleted the balance addition by observing as under :-

“To address the issue it would be appropriate to examine the statement of Sh. Akhlak Ahmaad recorded during the course of survey. In his statement Sh. Akhlak Ahmad has deposed that –

i) He is an employee of Bharat Steel Rolling Mill, Meerut Road Muzaffarnagar earning a salary of Rs. 10000/- per month looking after sales.

ii) Bharat Steel Rolling Mill was owned by Sh. Banty and Sh. Ramavtar of Muzaffarnagar also works on his behalf. On the date of survey, he had come to meet Sh. Ram Avtar in the office of Sh. Manoj Jain.

iii) He had come to meet Sh. Ram Avtar to have tea

iv) In questions 7 to 13, Sh. Akhlak Ahmad was asked and replied as under :-

It is relevant to see that the said Annexure-A1 impounded during the survey also has 80 pages containing details of sales. It is also noteworthy that in these documents as per the assessment order there are entries of Rishabh Trading Company, Ghaziabad amounting to Rs.2654591/- at Sr.No.36 in the table given in the assessment order.

Besides, also noteworthy .is the statement of Sh. Ajay employee of Rishabh Trading Company Prop. Sh. Manoj Jain at the survey premises. The question no. 24 and answer thereof is being reproduced below:-

In light of above facts, the contentions of the appellant that transaction in these papers do not belong to him have merit and the assessing officer has offered no comments on the assessee's objection at the assessment stage or the remand report. In facts and circumstances of the case, the above statements being on record and not controverted, I am of the view that the sales contained in these pages do not pertain to the assessee in entirety. Were these sales of the assessee, name of his concern would not appear in the list of sales of the assessee. Therefore, addition of G.P. with respect to the sales and the extrapolation thereof is not sustainable. However, it is true that the purchase of Rs. 2654591/- pertaining to the assessee are recorded in these documents. The employee of the assessee, Sh. Ajay Saini has denied any connection with this account. This leads to the inference that these represent unaccounted purchase of the assessee even though the assessee has denied any relation with these documents. Such denial is contrary to the documentary evidence. Therefore, these represent unaccounted purchases of the assessee. Therefore, addition of Rs. 2654591/- is sustained and balance addition on account of unaccounted sales is deleted. Ground no.8 is partly allowed.

In view of above, addition on account of initial capital contested in ground of appeal no. 11 is deleted as it is held that this is not turnover of the appellant.

13. In the result, the appeal is partly allowed for statistical purposes.

21. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

22. We have heard the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case, on the basis of documents seized marked as Annexure-A-1 containing 80 pages which were impounded during the course of survey noted that the said note sheet contains unexplained purchase of Rs.26,54,591/- and accordingly made addition of the same which has been upheld by the CIT(A). The addition made by the AO on account of business income from outside books of account and unexplained initial investment has been deleted by the CIT(A) and the revenue is not in appeal before us and, therefore, we are not concerned with the same.

22.1 So far as the addition of Rs.26,54,591/- on account of unaccounted purchases is concerned in our opinion only the profit element in such unaccounted purchase should be made especially when there is no unaccounted stock found during the survey on account of such unaccounted purchases. In our opinion profit rate @10% on such unaccounted purchase will be reasonable and will meet the ends of justice. We, therefore, set aside the order of the CIT(A) on this issue and direct the AO to restrict the addition to Rs.2,65,459/- as against Rs.2654591

made by the AO and sustained by the CIT(A). The grounds raised by the assessee are accordingly partly allowed.

23. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22.05.2020.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:-22.05.2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	16.03.2020
Date on which the typed draft is placed before the dictating Member	17.03.2020
Date on which the approved draft comes to the Sr.PS/PS	22.05.2020
Date on which the fair order is placed before the Dictating Member for Pronouncement	22.05.2020
Date on which the fair order comes back to the Sr. PS/ PS	22.05.2020
Date on which the final order is uploaded on the website of ITAT	22.05.2020
Date on which the file goes to the Bench Clerk	22.05.2020
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

