

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

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 554/Del/2017 : Asstt. Year : 2012-13

Manoj Kumar Jain, R-8/11, Flat No. 700, Raj Nagar, Ghaziabad	Vs	DCIT, Central Circle, Ghaziabad
(APPELLANT)		(RESPONDENT)
PAN No. ACLPJ4982H		

Assessee by : Sh. Akhilesh Kumar, Adv.

Revenue by : Ms. Pramita M. Biswas, CIT DR

Date of Hearing: 07.12.2020

Date of Pronouncement: 14.12.2020

ORDER

Per Dr. B.R.R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-IV, Kanpur, dated 25.11.2016.

2. Following grounds have been raised by the assessee:

"1. That the authorities below have erred in law as well as on the facts of the case by completing and upholding the assessment u/s 143(3) of the Act at a total income of Rs.7,60,81,463/- as against the returned income of Rs. 1,14,400/- and the various findings & conclusions drawn are based on incorrect appreciation of facts on record and on non-existent facts, only on the basis of assumptions & hypothecations and the submissions of assessee have not been considered in right perspective thereof.

2. That the Id. CIT(A) grossly erred in confirming the protective addition of total bank credits amounting to

Rs.7,37,54,430/- without even affirming the basic fact about the fate of the assessments of beneficiaries about the same despite a specific assertion to the same in A. order, beside Id. authority further erred in treating the addition as substantive without any new fact or material.

3. That the Id. CIT(A) even failed to appreciate that the said addition though made only to protect the interest of revenue but without doubting explanation on the deposits and without finding debtors/sales etc. fake or ingenuine in as much as vat is paid on sales.

4. That the Id. CIT(A) even failed to appreciate that the protective assessment itself is against the basic tenets of law as Id. AO had not even waited for the substantive assessment in the hands of alleged beneficiaries, beside assessee is held to be earning commission on said deposits so the same could not be his income.

5. That the Id. CIT(A) erred in sustaining the assumed commission of Rs.22,12,633/-, without any iota of evidence in support of assumption in as much as a unilateral third party's uncontroverted statement is referred which is no evidence, that too @ 3% on total bank deposits which is totally illegal & unwarranted and in any case is highly excessive.

6. That the Id. CIT(A) has failed to appreciate that neither the Id. A.O. has recorded any finding in terms of s. 145(3) of the Act nor any transactions are found incorrect in audited accounts hence a passing remark of Id. AO about rejection of accounts is untenable more so when declared income Rs.1,14,400/- is accepted beside other additions.

7. That the Id. CIT(A) erred in upholding the additions of Rs. 7,59,67,063/- without discharging the heavy onus lay upon him to prove the allegations framed against the assessee.

8. That the Id. CIT(A) has erred in law by passing a non-speaking and cryptic order in total disregard of

the material and facts on the record just relying upon the order of the GIT(A), Ghaziabad in the case of appellant for A.Y.2011-12. Therefore, total addition of Rs. 7,59,67,063/- is prayed to be deleted."

3. The moot issue involves assessment of cash deposits found in the bank account of the assessee of Rs.7.37 Crs. and commission earned at the rate of 3% on the said amount of Rs.7.37 Crs. to the tune of Rs.22.12 lacs. The assessee has been alleged to be an entry operator providing bills of purchase & sales without any actual business transactions.

4. The amount of Rs.7.37 Crs. has been added on protective basis and information regarding the beneficiaries was passed on to the Assessing Officer having jurisdiction over the beneficiaries for substantive assessment. The commission of Rs.22.12 lacs has been added on substantive basis.

5. The Co-ordinate Bench of ITAT in ITA No.3561/Del/2015 vide order dated 22.05.2020 has adjudicated on both the issues. The addition being protective in nature has been deleted by the order of the Tribunal. The commission charged @3% has been brought down to 0.5%.

6. Since, the issues stands squarely covered by the earlier order of the Tribunal in the absence of any material change and the facts of the case except the amount involved, we hereby hold as under:

- a) The addition made on protective basis is directed to be deleted
- b) The commission to be charged @0.5%

7. For the sake of brevity and ready reference, the operative part of the order of the Tribunal in the case of the assessee for the earlier year is reproduced as under:

"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.23,56,61,265/- 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."

8. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 14/12/2020.

Sd/-

(H. S. Sidhu)
Judicial Member

Dated: 14/12/2020

Subodh

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR