

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

**Before SH. G. S. PANNU, HON'BLE PRESIDENT
AND**

SH. C. N. PRASAD, JUDICIAL MEMBER

(Through Video Conferencing)

ITA No. 4643/Del/2016 : Asstt. Year : 2009-10

Asstt. Commissioner of Income Tax, Central Circle-6, New Delhi	Vs	Sh. Ashwani Kumar Aggarwal, 7, LGF, Shrestha Vihar, Delhi-92
(APPELLANT)		(RESPONDENT)
PAN No. AAKPA0478J		

**Revenue by : Sh. Satpal Gulati, CIT(DR)
Assessee by : Sh. P C Yadav, Adv.**

Date of Hearing: 28.12.2021	Date of Pronouncement: 08 .02.2022
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ORDER

Per C.N. PRASAD, JM :

The present appeal is filed by the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-24, New Delhi ("**CIT(A)**"), dated 24.06.2016 in relation to the assessment year ("**AY**") 2009-10.

2. The main issue relates to the addition made by the Assessing Officer ("**AO**") u/s 153A of the Income Tax Act, 1961 (the "**Act**") on account of unaccounted commission income received by the assessee from Rockland group for providing accommodation entries.

3. A search and seizure operation u/s 132 of the Act was carried out at the business premises of Rockland group of companies as well as residential premises of the Directors of the Rockland group on 6.9.2011. A search was conducted at the premises of the assessee, Sri Ashwani Aggarwal at 302, Dhaulagiri Apartments, Ghaziabad, UP on 20.10.2011. The assessee is a Chartered Accountant and was auditor of Rockland group of companies at that time.

4. Notice u/s 153A of the Act was issued to the assessee on 13.8.2013. In compliance, the assessee filed his return of income on 11.12.2013 for the AY 2009-10 declaring total income of Rs. (18,38,274/-). Assessment u/s 153A of the Act was completed on 27.03.2014 by the AO. The AO made an addition of Rs. 2,26,89,000/- to the income of the assessee on account of alleged commission @ 3% received by him for arranging accommodation entries (amounting to Rs. 75,63,00,000/- which is the total share application money received by the Rockland group). The AO relied upon the statements

of certain individuals and some documents seized during the course of the search from the premises of the Rockland group.

5. On appeal, the Ld. CIT(A) remanded the matter back to the AO seeking certain explanation/ clarifications from the AO. After considering the reply of the AO and recording his findings in detail, the Ld. CIT(A) vide his order dated 24.06.2016 decided the appeal in favor of the assessee. The Ld. CIT(A) concluded that the addition of Rs. 2,26,89,000/- made by the AO on account of alleged commission income was without any sound basis and cannot be made purely on the basis of conjectures and surmises without any circumstantial evidence to support such conclusion. The relevant paragraphs of the Ld. CIT(A)'s order are reproduced below for ease of reference:-

" 4.1.2.1 (i) *The statements of Sh. Pramod Kumar, Sh. Hariom, Smt. Rajrani Sharma has not been produced; however it has not been denied by the appellant also that these persons have mentioned his name as having contacted them for making investments in the Rockland group. However, the details as provided in the assessment order do not indicate that any commission was paid to the appellant for doing so. In any case, no evidence can be used justifiably against the assessee without offering cross-*

examination of the parties to the appellant, unless of course it is impossible to do so. The assessment order does not suggest that any such cross-examination was provided to the appellant; in fact this confirmed in the remand report as well. It has been mentioned in the remand report that the appellant to has not sought cross-examination before the completion of the assessment proceedings. But it would also be noticed that the A.O. has never confronted the appellant that he intends to use the statements of these three persons against him and therefore obviously there would be no cause for the appellant to seek cross-examination. Even when opportunity for cross-examination was provided to the A.O. during remand proceedings, it did not lead anywhere as none of these three persons could be located by the A.O. It is a settled position of law that non-providing of cross-examination of party whose statement has been used against the assessee in violation of the principle of natural justice. However this defect is not fatal and is curable [Centurion Investment and International Trading Company Pvt. Ltd. v. ITO (2010) 126 ITD 356 (ITAT, Delhi)]. However, as recounted above, even when the opportunity was provided to the department, to remedy the situation during remand proceedings, the cross-examination could not be provided to the appellant. I therefore hold that the statements of these persons cannot be used against the appellant to arrive at any adverse conclusion. If any case, even these statements do not mention that

any commission income has been paid to the appellant in respect of these accommodation entries.

(ii) Regard the seized documents, the appellant submits that these documents have not been seized from him; however he is able to correlate himself with the name "Ashwani" appearing in some of these papers, but these too do not indicate that he has received any commission. As per his understanding, these papers are in nature of summary of total remuneration and balance and he is personally not aware of these entries. The A .O. itself mentioned in the remand report that the entries in the documents indicate the name of the appellant and rate of commissioner at various places. Careful examination of these documents does show the mention of "Ashwani" at various places. However here too, no inference can reasonably be drawn from the entry against the word "Ashwani", that any commission has been paid to Ashwani. In fact at many places, only a mobile number (9899068722) has been entered against the name "Ashwani". As regards mention of the 2 to 3% commission in some of the seized documents it is seen that the appellant's name does not appear against any of these entries. To the extent that the seized documents concern the appellant, these documents can be held to be dumb documents and they do not in any way support the case of the A.O.

(iii) The statements of Sh. Anil Aggarwal, Sh. Vipul Jain and Sh. Mahavecr Jain have been provided in the remand report. It is seen from these statements that they have admitted to have facilitated providing of accommodation entries to the Rockland group for which certain commission has been received. However none of these have mentioned the name of the appellant as being party to these transactions, even when specifically asked. Therefore I am of the view that no inference can be drawn on the behalf of the revenue against the appellant from the statements.

(iv) Even the statements of Sh. Prabhat Kumar Srivastava and Sh. Anil Bhandari, both Directors of the Rockland, which indicate that the appellant has introduced some investors to the Rockland group, fall short of actually stating that commission was payable or paid to appellant for making these introductions. Rather, subsequently Sh. Prabhat Kumar Srivastava has clarified before the A.O. that no fees/commission was paid to the appellant for making these introductions. These declarations of Sh. Prabhat Kumar Srivastava and Sh. Anil Kumar Bhandari has been brought out in the assessment order, but not specifically rejected or taken note of by the A.O. In my view, the statements of the promoters too cannot be said to be evidence to conclude that commission has been paid to the appellant. In fact, their subsequent uncontroverted self-declaration specifically puts any such doubt to rest."

6. Aggrieved, the Revenue is in appeal before the Tribunal on the following grounds:-

(i) The order of Ld. CIT(A) is not correct in law and fact.

(ii) On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,26,89,000/- made by AO on account of unaccounted commission income.

(iii) On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition when the seized documents containing information about commission paid includes the name of the assessee also.

7. **Ground 1**: It is general in nature and does not need any adjudication.

8. **Ground 2 & 3**: These are related and hence are being dealt with together.

The AO made addition of Rs. 2,26,89,000/- to the income of the assessee for alleged receipt of commission for providing accommodation entries which stand deleted by the Ld. CIT (A). This has brought the Revenue before us. The Ld. DR relied on the order of the AO. He submitted that the statement of the Director of Rockland group, Mr. Prabhat Kumar Srivastava and statements of Sri Pramod Kumar, Sri Hari Om and Smt. Raj Rani Sharma

show that it was the assessee who introduced the investors to the Rockland Group. He also referred to the findings of the AO in respect of Annexure A-72, party S2, page 62 to 64 and 93 to 101 that these documents contain the name of the assessee and rate of commission at various places.

9. The Ld. AR relied upon the findings of the Ld. CIT(A). The Ld. CIT(A) considered the remand report submitted to him by the AO. He highlighted that the AO has himself mentioned in his order that in the self declaration made by Mr. Prabhat Kumar Srivastava, the Director stated that the assessee was not a party to the alleged transaction. The AO did not consider the said declaration without recording any reasons. The Ld. AR argued that the case of the assessee is beyond the scope of Section 153A of the Act as no incriminating documents were found at the premises of the assessee during the course of search.

10. We have considered the rival submissions and perused the records. It is observed that the assessee has not been provided with an opportunity to cross examine the statements of Sri Pramod Kumar, Sri Hari Om, Smt. Raj Rani Sharma. Furthermore, the AO in his remand report also admitted that the copies of their statements were not provided to the assessee. If that be so, the said statements cannot be relied upon for drawing adverse inference

against the assessee. We are therefore of the view that no addition on account of commission allegedly received by the assessee can be made. In support, reliance is placed on the judgment of the Delhi High Court in the case of PCIT vs. Anand Kumar Jain (HUF), ITA No. 23/2021 and CM APPL. 5385/2021 pronounced on 12.02.2021 wherein the Hon'ble Court held that the statement recorded in search cannot be regarded as the incriminating document for assessment under section 153A of the Act unless opportunity of cross examination of the witness is provided to the assessee.

11. We further find that the declaration made by Mr. Prabhat Kumar Srivastava, the Director in his affidavit denying payment of any fees/ commission to the assessee has neither been considered nor specifically rejected by the AO by recording any reasons. Nothing has been brought on record to disbelieve the statement of the Director, Mr. Prabhat Kumar Srivastava. In fact his statement remained uncontroverted by the AO. The Ld. CIT(A) has recorded a categorical finding that no adverse inference can reasonably be drawn from the entry against the word "Ashwani" appearing in seized documents. It has been explained by the assessee before the AO and the Ld. CIT(A) that such references relate to payment of remuneration to the assessee and not to any commission. Even where there is mention of 2 to 3% commission in seized documents, the name of the assessee does

not appear at all therein. In fact we notice that the AO in his remand report has categorically admitted that the statements of Sri Anil Agarwal, Sri Vipul Jain and Sri Mahavir Jain do not mention the name of the assessee being a party to the accommodation entries to the Rockland Group.

12. For the reasons recorded above, we are of the considered view that no adverse inference can be drawn against the assessee regarding receipt of commission by him. The addition is based on presumptions alone without any corroborative evidence brought on record in support thereof. Similar is the observation of the Hon'ble Delhi ITAT in the case of Subhash Khattar (ITA No. 902/Del/2015) which is upheld by the Hon'ble jurisdictional Delhi High Court (ITA No.60/2017). Accordingly we uphold the findings and decision of the Ld. CIT (A).

13. In the result, the appeal of the Revenue is dismissed.

Application of the Assessee under Rule 27 of the ITAT Rules

14. In this application, the assessee has raised the following grounds:

- (a) The Ld. CIT(A) has failed to appreciate that no incriminating documents were found in search and hence no addition can be

made on estimate basis when no assessment of impugned years was pending on the date of search.

- (b) Without prejudice to the above, the order of AO is void ab initio as the same has been passed u/s 153A, relying on the documents found as the premises of third party, ignoring that nothing was found in search of assessee.
- (c) The AO has erred in invoking the provisions of Section 153A instead of 153C or 147 as the assessment has been made completely on the basis of documents found in the premises of third party.

15. After hearing the representatives of the parties, we admit the application as the decision of the Delhi ITAT in the case of DCIT Vs. Jubliant Enpro Pvt. Ltd. ITA No. 560/Del/2010, dated 19.05.2014, is in support.

16. It is an admitted position that the assessee has not filed a cross appeal or cross objection against the order of the Ld. CIT(A) before the Tribunal. It is also an admitted position that the assessee raised this preliminary legal objection by way of application under Rule 27 of ITAT Rules. We are of the view that since we have already dismissed the appeal of the Revenue on merits, the application under Rule 27 does not call for

any adjudication at this stage as it would render academic. We, therefore, dismiss the application as infructuous.

Order pronounced in the Open Court on 08 /02/2022.

sd/-

sd/-

(G.S. PANNU)
PRESIDENT

(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 08 /02/2022

* _____ *

Copy forwarded to:

- Appellant
- Respondent
- CIT
- CIT(Appeals)
- DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi