

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC": NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 9244/DEL/2019
[Assessment Year: 2011-12]

Inderbir Singh, 25, Narang Colony, New Delhi-110058 PAN- ABBPS8856J	<u>Vs</u>	Income-tax Officer, Ward-49(5), New Delhi
APPELLANT		RESPONDENT
Appellant by	Sh. G.S. Kohli, CA	
Respondent by	Sh. Sanjay Kumar, Sr. DR	
Date of hearing	23.02.2022	
Date of pronouncement	19.05.2022	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-42, New Delhi, dated 30.09.2019, pertaining to the assessment year 2011-12. The assessee has raised following grounds of appeal:

“1. That the proceedings initiated as well as assessment framed u/s 148 is illegal, unlawful and are against the natural law of justice.

2. *That the learned CIT(Appeal) had failed to appreciate the verbal and written submission given during the course of appellate proceedings in respect of proceedings initiated u/s 148 was not justified.*
 3. *That the learned CIT(Appeal) was unjustified in not following the determined rate of income established by ITAT which no doubt was followed in Asstt. year 2010-11 even by AO.*
 4. *That without prejudice to item no. 3 the learned CIT(Appeal) by following the ITAT's order directed to recomputed the income in his own manner it resultant the AO's failure to its implementation. The direction deserves to be amended for its implementation.*
 5. *That the appellant craves his right to amend, delete or add any grounds of appeal at or before the time of hearing."*
2. Facts, in brief, are that in this case the Assessing Officer noticed that no return of income was filed by the assessee. On the basis of AIR information, it was reported that there were cash deposits of Rs. 4,69,54,500/- in the bank account held by the assessee. Therefore, the case of the assessee was reopened u/s 147 of the Income-tax Act, 1961("the Act"), after obtaining necessary approval from the Competent Authority and a notice u/s 148 was issued to the assessee on 28.3.2018 vide speed post. Further a notice through e-mail was also sent to the assessee. In response to the notice, the authorized representative of the assessee appeared without requisite power of attorney. Before the Assessing Authority it was stated that assessee had filed return of income on 30.08.2012 vide acknowledgment no. 475166640300812 declaring income of Rs. 1,47,200/-.

3. Thereafter the Assessing Officer proceeded to frame the impugned assessment, whereby the Assessing Officer assessed commission income at Rs. 34,00,325/- being 1% of the total turnover, which the assessee received on account of making of drafts out of cash/credits in bank account.

4. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who, after considering the submissions, partly allowed the appeal. Thereby the learned CIT(Appeals) directed the Assessing Officer to apply 0.5% rate for determination of commission income as against 1% and thereafter allow the expenses on actual basis including bank charges. Aggrieved against this, the assessee is in appeal before this Tribunal.

5. Ground nos. 1 & 2 of the assessee's appeal are against the validity of reopening of the assessment. Learned counsel for the assessee vehemently argued that the authorities below were not justified in reopening the assessment. He contended that the action of the authorities below in this regard is contrary to the settled position of law.

6. On the contrary, learned DR opposed the submissions and supported the orders of the authorities below. Learned DR vehemently argued that the assessee himself had not disclosed the income. It was only on the basis of receipt of the

information by the Assessing Officer that the case of the assessee was reopened and the assessee filed return of income.

7. I have heard the rival submissions, perused the material on record and gone through the orders of authorities below. There is no dispute with regard to the fact that there were deposits in the bank account of the assessee. The assessee had not offered the amount of commission. Therefore, considering the facts of the present case, there is no infirmity in reopening of the assessment of the assessee. Ground nos. 1 & 2 of the assessee's appeal are dismissed.

8. Ground nos. 3 & 4 are against adopting the commission income at 0.5% and the direction to this effect issued by the learned CIT(Appeals) to the assessing authority.

9. Learned counsel for the assessee submitted that the learned CIT(Appeals) grossly erred in directing the Assessing Officer to adopt the commission income @ 0.5% in contradiction to the decision of the Tribunal in assessee's own case for the block period 1.4.1996 to 19.9.2002 in IT(SS) appeal no. 303/Del/2005, wherein the commission has been directed to be @ 0.25% and the expenses incurred in earning such income was also allowed. The learned CIT(Appeal) while deciding this issue has observed as under:

“5.13 The appellant has invited my attention to the decision of Hon'ble ITAT in its own case for the block period wherein Hon'ble ITAT mentioned

in the order that the assessee had stated during the course of search that he was charging commission at the rate of Rs.25 per Rs.10,000/-. The Hon'ble ITAT further observed that this particular statement has to be believed in the absence of any evidence to the contrary. The Tribunal also held that the expenditure will have to be allowed in computing the profit.

5.14 I find that Hon'ble ITAT relied on statement of the assessee recorded during the course of search and in the absence of any further evidence to the contrary Hon'ble Tribunal directed to estimate commission income at the rate of Rs.25 per 10 thousand. However, I find that the appellant categorically stated in response to Q. nos. 7,9,10 & 11 of the statement recorded on 29.11.2018 that the commission was charged at the rate of 0.5% out of which the bank was paid at the rate of 0.3%. Then, effectively, the income after meeting out the banking charge was to the tune of 0.2%. Accordingly, the decision of Hon'ble ITAT to apply commission income of Rs. 25 per Rs. 10000 does not hold good in view of the statement of the appellant recorded by the AO on 29.11.2018. It is important to note that Hon'ble ITAT relied on statement recorded during the search. Further, the appellant has nowhere disputed the facts stated on oath in the statement dated 29.11.2018 which was duly recorded by the AO.

5.15 Since, the appellant has stated new facts in the statement dated 29.11.2018 regarding commission charges, therefore, by applying the same principle as applied by Hon'ble tribunal, the AO is directed to apply 0.5% rate for determination of commission income against 1% and thereafter allow the expenses on actual basis including bank charges. I do not find any basis of applying 1% commission income as estimated by the AO. Hence, the ground of appeal is partly allowed.”

10. From the above finding of fact by the learned CIT(Appeals), it is clear that the basis of adopting 0.5% as the commission income was on the basis of the statement of the assessee himself. However, this statement was not brought to the notice of the Division Bench of this Tribunal. The learned counsel for the assessee could not rebut the fact that the assessee himself has stated of having received commission in cash @ 0.5% out of which 0.3% was paid as bank charges. I find

that the learned CIT(Appeal) on the basis of this statement has adopted the commission income but he has allowed the expenses on the actual basis. I am of the considered view that statement cannot be used in part. It is to be read as a whole. Therefore, considering the statement of the assessee I hereby direct the Assessing Officer to adopt 0.20% as the net commission income of the assessee.

11. In the result, assessee's appeal stands partly allowed, in the terms indicated herein before.

Order pronounced in open court on 19th May, 2022.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Dated: 19/05/2022.

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI