

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.2993/Mum/2017

(निर्धारण वर्ष / Assessment Years: 2011-12)

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|---|---------------------|--|
| ITO-11(1)(2) Room No.202, Aayakar Bhavan, M. K. Marg, Mumbai-400020. | बनाम/ Vs. | M/s. Realstone Exports Limited C-204, 2 nd Floor, Vishal Apartments, Taki Road, Tulij, Nallasopara (E), Thane, Maharashtra- 401209. |
|---|---------------------|--|

Cross Objection No. 162/Mum/2019

Arising out of I.T.A. No.2993/Mum/2017

(निर्धारण वर्ष / Assessment Years: 2011-12)

| | | |
|--|---------------------|---|
| M/s. Realstone Exports Limited C-204, 2 nd Floor, Vishal Apartments, Taki Road, Tulij, Nallasopara (E), Thane, Maharashtra- 401209. | बनाम/ Vs. | ITO-11(1)(2) Room No.202, Aayakar Bhavan, M. K. Marg, Mumbai-400020. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCR8504K | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

| | |
|--------------|------------------------|
| Assessee by: | None |
| Revenue by: | Shri S. H. Usmani (DR) |

सुनवाई की तारीख / Date of Hearing: 22/09/2022

घोषणा की तारीख /Date of Pronouncement: 31/10/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This appeal has been filed by the revenue and cross-objection (CO) of the assessee are against the order of the Commissioner of Income Tax (Appeals)-18, Mumbai dated 25.01.2017 for A.Y.2011-12.

2. The grounds of appeal raised by the revenue are as under: -



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1. "Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in restricting the addition made on account of unexplained cash credits u/s 68 of the Income-tax Act, 1961 to 0.15% without appreciating the fact that the assessee had failed to furnish satisfactory explanation with regard to the identity of the parties, sources thereof, and genuineness of the transactions."
2. "Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in restricting the addition to the commission income at 0.15% without considering that the material found during the course of search clearly established that the net commission charged by the assessee group of companies varied between 1.5% and 3.6%."
3. "Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) was correct in relying on the decision in the case of Gold Star Finvest Pvt. Ltd. which has not been accepted by the Department on merits for assessment year 2003-04 and is pending before the High Court for adjudication."
4. "The appellant prays that the order of the CIT (A) on the above grounds be set aside and the of the A.O. be restored."

3. The grounds of appeal preferred by assessee in its cross-objection (CO) is as under: -

"1. The CIT(A)-18, Mumbai erred in upholding the action of the Income tax Officer-8(3)(3), Mumbai (now Income tax Officer – 11(1)(2), Mumbai) in rejecting the books of account under section 145(3) of the Act.

The cross-objection contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action



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of the Assessing Officer in rejecting the books of account inasmuch as the CIT(A) has not appreciated the facts of the case in its entirety.

2. The CIT(A) erred in upholding the action of the Assessing Officer in making an addition to the tune of Rs.7,36,776/- being the commission income estimated at 0.15% of net sales of Rs.49,11,84,038/- credited to profit and loss account.

The cross-objectors contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer inasmuch as the CIT(A) has not appreciated the facts of the case in its entirety and hence, the addition sustained needs to be deleted.

Without prejudice, the appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought to have estimated the commission income at 0.10% of sales of Rs 49,11,84,038 as deposed by the Director of the Company in his statement on oath recorded on 06.01.2010 before the Assistant Commissioner of Sales Tax (Inv-1), Investigation-A, Mumbai.

3. The CIT(A) erred in upholding the action of the Assessing Officer in making an addition of Rs 6,86,466, estimating the commission earned at the rate of 1% on purchase and sale of investment transactions made during the year by treating the said transactions as accommodation entries.

The cross-objectors contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer inasmuch as the transactions are not in the nature of accommodation entries.

Without prejudice, the appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought to have



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estimated the commission income at 0.10% on share transactions made during the year.

4. The CIT(A) erred in upholding the action of the Assessing Officer in disallowing a sum of Rs 60,09,088 being the expenses debited to the profit and loss account.

The cross-objectors contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer inasmuch as the CIT(A) has not appreciated the facts of the case in its entirety.”

4. None appeared for the assessee. Ground no. 1 of revenue and ground no. 1 & 2 of CO of assessee's are dealt together. Ground no. 1 of revenue is against the action of Ld. CIT(A) giving partial relief to the assessee by restricting the addition of commission income at Rs.7,36,776/- whereas AO made an addition of Rs.1,15,91,346/-. And CO of the assessee is twofold (i) against rejection of books (ii) against action of Ld. CIT(A) restricting the addition @ 0.15% of sale whereas according to assessee it should be @ 0.10% of sales (alternate ground).

5. Brief facts, the assessee had filed the return of income on 24.09.2011 declaring total income at Rs.12,55,210/-. Later, the return of income was selected for scrutiny. The AO took note of an information received by the Sales Tax Authorities through DGIT(Inv.) from which it revealed that director of the Group companies of the assessee Shri Abhishek Morarka had given statement in the capacity of director of M/s. Utkantha Trading Company that his concerns



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namely M/s. Realstone Exports Ltd. (assessee) and other two concerns were not involved in carrying out any actual purchase or sale activity which mean that director accepted/admitted that they were providing accommodation entry to beneficiaries for commission. Therefore, the AO doubted the books maintained by the assessee. And therefore, taking note of the discrepancies/infirmities which the AO have elaborated in his assessment order, he concluded that the assessee was not maintaining proper records/books. And therefore, he invoked the provisions u/s 145(3) of the Act and rejected the assessee's books of account. Thereafter, the AO noted that assessee has shown purchases and sales of goods (fabrics) to outside parties as well as transaction with group concerns and observed as under: -

“38. In the instant case, purchase and sales transaction of goods (fabrics) shown by the assessee also include transactions with the group concerns. The breakup of the same is as under: -

| | Purchase (Rs.) | Sales (Rs.) | Total |
|------------------------------------|----------------|-------------|--------------|
| Transactions with outside entities | 6679,50,560 | 4911,84,038 | 11591,34,598 |
| Transactions with group concerns | 1875,23,157 | 1072,94,542 | 2948,17,699 |
| | 8554,73,717 | 5984,78,580 | 14539,52,297 |

6. And thereafter AO made estimation of addition as under: -

“40. The assessee has provided accommodation entries/bills in respect of its purchases and sales of Fabric and Shares. Putting it in other words, a person who requires a purchase entry/bill is provided with one, by arranging an accommodation bill/entry. Similarly, when a seller requires accommodation, the assessee accepts a purchase bill/entry, which is an accommodation bill/entry for the sale of the



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person with whom the assessee has been transacting. The assessee, thus, offers services in the form of providing accommodation bills/entries, both for purchase as well as sale and for this service rendered, charges commission. It is common knowledge that for every accommodation bill or entry, the entity seeking such benefit pays a cost to the person who provides such accommodation bill or entry, which is applicable irrespective of whether the accommodation bill / entry is in respect of purchase or sale i.e. the person getting the accommodation bill / entry incurs such cost for purchase as well as sale. For the beneficiary, the resultant gain comes with a cost. This cost is akin to commission being charged for services rendered which is in respect providing accommodation bill or entry.

41. As stated in the preceding paragraph, it is common knowledge that for providing accommodation entries, operators charge certain percentage of the quantum of transaction shown as their fees/ commission from the beneficiaries. In the facts of the case, it would be fair to estimate the net commission income @ 1% (which would also take care of the other expenses, which might have incurred to earn the commission income). Thus on an aggregate amount of bogus/accommodation entries of Rs.115,91,34,598/- shown as 'Purchases & Sales of goods' with the outside parties [Purchases of Rs.66,79,50,560/- and Sales of Rs.49,11,84,038/-] the commission income of the assessee for the A.Y. 2011-12 is determined at Rs.1,15,91,346/-.

42. Similarly with regard to the 'Purchase and Sale of Shares' of 'Pvt. Ltd.' companies viz. Rs.3,49,69,186/- and Rs.3,36,77,400/- respectively, the net commission income earned by the Assessee for providing these accommodation entries is estimated at 1% of purchase and sale transactions of shares. Accordingly, the same is computed at



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Rs.6,86,466/- [I.e. 1% of Rs.6,86,46,586/- (Rs.3,49,69,186/- and Rs.3,36,77,400/-.

43. Thus, total commission income earned by the Assessee from providing accommodation entries in respect of the 'Purchase/Sale transactions of goods and shares' is computed Rs.1,22,77,812/- [Rs.1,15,91,346/- (+) 6,86,466/].”

7. Thus, it can be seen that AO has made interalia commission income of Rs.1,15,91,346/- i.e. at 1% of on the aggregate amount of bogus/accommodation entries of Rs.115,91,34,528/- shown as purchase and sales of goods with the outside parties (purchase of Rs.66,79,50,560/- and sales of Rs.49,11,84,038/-). Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to give partial relief to the assessee by holding that 1% commission is excessive and so he directed to restrict the same to 0.15% only of the sales (meaning not on purchases). Aggrieved, by the impugned action of Ld. CIT(A), both revenue and assessee is before us by raising the aforesaid grounds.

8. After hearing the Ld. DR, we note that the AO has taken note of the information received from the sales tax/DGIT(Inv.) as well as the statement of Shri Abhishek Morarka (director of assessee's group of companies) to the sales tax department, wherein he admitted that the assessee company is also engaged as an entry operator for beneficiaries in lieu of commission (not into genuine purchase/sales of any goods/products). Based on this information and the infirmities



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pointed out elaborately (point wise) by AO at para 10 and relying on judicial precedents V Pinto & Co Vs. DCIT reported (2005) 3 SOT 634 (Bang) and the ratio of case law of Hon'ble Jurisdiction High Court in Ratanlal Omprakash Vs. CIT 132 ITR 640, the AO found fault with the accounts maintained by the assessee and held it to be incorrect and incomplete. And for the elaborate reason stated at para 33 to 35, the AO rejected the books of accounts for AY. 2011-12 which action has been confirmed by the Ld. CIT(A) cannot be faulted since we completely agree with the reasoning given by AO to have rejected the books. So no separate reasons of our own are not given (refer Hon'ble Supreme Court order in CIT Bangalore Vs. K. Y. Pilliah and Sons (1967) 63 ITR 411). Therefore, ground no. 1 of the assessee's (CO) fails.

9. However on appeal, the Ld. CIT(A) has accepted the contention of the assessee that the Net Profit (NP) cannot be estimated on both purchases as well as sale; and that it should be either on purchase or sale. Therefore, he directed the AO to estimate the net profit only on sale based on the deposition made by the assessee's director Shri Abhishek Morarka before the Sales Tax Authority. Even though, before the Ld. CIT(A), the assessee contended that the net profit on providing accommodation entry was only to the tune of Rs.0.5% of turnover, the Ld. CIT(A) on the basis of this Tribunal's decision in the case of M/s. Goldstar Finvest Pvt. Ltd. (ITA. No.887 and 2699/M/2013) has restricted the commission at 0.15% of the turn-over. So, the Ld. CIT(A) following the decision of the Tribunal in M/s.



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Goldstar Finvest Pvt. Ltd. (supra) estimated the net profit of the assessee at 0.15% on turn-over instead of 1% of both purchase and sale. Aggrieved, both the revenue as well as assessee is before us.

10. We have heard the Ld. DR and perused the records. We note that the main grievance of the revenue is against the action of the Ld. CIT(A) restricting the net profit of the assessee at 0.15% of the sales (turn-over) whereas the AO had made addition of 1% on both purchase as well as sale. Whereas, the assessee's grievance is that even though it was pleaded before Ld. CIT(A) that net profit should be only 0.10% and not 0.15% of has not been heeded to. So it has preferred Cross Objection against the impugned order to get further relief of 0.05% of turn over. We note in this regard that one of the director of the assessee (Shri Abhishek Morarka) had made statement before the Sales Tax Authority that his concerns (including the assessee) was involved in providing accommodation entry without doing any actual purchase & sale. Based on the statement provided by the Sales Tax Authority to the DGIT (Inv.), which was in turn given to the AO, the assessee's return of income for the relevant assessment year was scrutinized. The AO finding various discrepancies in the books of the assessee was pleased to reject the same u/s 145(3) of the Act and estimated the income of the assessee at 1% on both purchases as well as sales shown by the assessee. On appeal, the Ld. CIT(A) was of the opinion that the AO could not have estimated the net profit on both purchase as well as sale. He was of the view that the net profit need to



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be estimated only in respect of sales shown by the assessee. Thereafter, he was of the view that the commission earned from providing accommodation entries cannot be excessive as held by the AO to the tune of 1%. And based on Tribunal's decisions in the case of M/s. Goldstar Finvest Pvt. Ltd. (supra), he restricted the same at 0.15% of the turn-over. We note that the Ld. CIT(A) has followed the Tribunal decision in similar case wherein that assessee was also providing accommodation entry in lieu for commission income. Since the Ld. CIT(A) has followed the action of this Tribunal in the case of similar assessee's who was also providing accommodation entry, we do not find any infirmity in the action of the Ld. CIT(A) and therefore, we uphold the same.

11. Coming to the action of the Ld. CIT(A) restricting the commission at 0.15% of the sales of Rs.49,11,84,038/- rather than 1% of the total purchases as well as sale of Rs.1,15,91,34,598/- (purchases of Rs.66,79,50,560/- + sales of Rs.49,11,84,038/-) we find the action to be a plausible view and so we uphold the same. Therefore, the ground no. 1 of the revenue fails and ground no. 2 of the assessee to further restrict the commission at 0.10% is rejected.

12. Ground no. 3 of the assessee's (CO) is against the action of the Ld. CIT(A) in upholding the action of the AO in making an addition of Rs.6,86,466/- by estimating the commission earned @ 1% on purchase



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and sales of investment transaction made during the year by treating the said transaction as accommodation entry.

13. Brief facts is that the AO noted that in the relevant assessment year, the assessee company had invested in the shares of around thirty eight (38) unlisted companies. The AO notes that assessee after purchasing and selling shares to the tune of Rs.20,20,06,686/- has shown as ‘Investment’ toward ‘Share Application money/shares’. The AO noted that no income under the head capital gains was computed and offered to tax in the return of income. So he gave notice to the assessee as to why no capital gain on purchase/sale of unlisted shares had been shown in the return of income. The AO also asked the assessee details of valuation of share premium, basis of determination of purchases/sale price of these unlisted shares etc. The AO found that even though shares transactions are reflected to show that the assessee has purchased unquoted shares of Rs.3,49,69,186/- and the sale proceeds thereof amounted to Rs.3,36,77,400/-, no income or loss has been shown by assessee under the head capital gain. The AO also noted that the assessee did not furnish any evidence regarding the method adopted for the valuation of the purchases and sale price of these shares; and as such, failed to corroborate with evidence the source of these credits. The AO further noted transactions were made by the assessee are in respect of unlisted companies and that the assessee has not produced any details to show how it determined the prevailing market price of these shares which were purchased and sold



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during the year. According to AO, when the assessee has claimed that the income declared by it was on account of short term capital gains arising from the transaction of unquoted shares, then the onus was on the assessee to produce all the necessary and primary evidence to prove the genuineness of the transaction, identity of the purchaser etc. According to him, the failed to discharge the burden to establish prima facie that the transactions pertaining to the purchases and sale of the unquoted shares are genuine; and failed to bring evidence of the identity of the parties and furnished the basis of valuation of the shares including the basis for the valuation and payment of the share premium in respect of the unquoted shares of unlisted companies in the open market of trading. And therefore, the AO was of the opinion that these are sham transactions entered into solely with the intention of effecting transactions only on paper. Therefore, he relied on the decision of the Chennai Bench of the Tribunal in the case of ACIT Vs. Precot Meridian Ltd. (2010) 4 ITR 495 (Tribunal) and held that the transaction are nothing but accommodation entries provided by the assessee company to various beneficiaries in lieu of a commission. And thereafter, he estimated the commission income at 1% of Rs. 6,86,46,586/- (Rs.3,49,69,186/- + Rs.3,36,77,400/-). Aggrieved the assessee preferred an appeal before the Ld. CIT(A) wherein the Ld. CIT(A) noted that the assessee failed to prove the correctness of the transactions in the purchases and sale of shares. So he confirmed the action of AO. Before us even though the assessee has filed the CO, it has not been filed any material to take a different view other than the



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view taken by AO/Ld. CIT(A). Therefore, we uphold the action of the Ld. CIT(A) and dismiss this ground of appeal of the assessee's CO.

14. Next ground of CO of the assessee is against the action of the Ld. CIT(A) upholding the action of the AO disallowing of Rs.60,09,088/- being expenditure treated to the profit and loss account.

15. This grounds of the cross objection of the assessee is against the action of the Ld. CIT(A) disallowing expenses to the tune of Rs. Rs.60,09,088/-. The Ld. CIT(A) has dismissed this ground of appeal of the assessee because once the books of the accounts has been rejected and the AO has resorted to estimate the income, [one percent of sales & purchases] according to him, the AO has rightly not separately allowed the expenditure claimed in the P&L Account to the tune of Rs 60,09,088/-, which impugned action of the Ld. CIT(A) is in consonance with settled position of law; and on the very same reasoning, we uphold the action of AO in not separately allowing this expenditure because he rejected the books and resorted to estimation of income; and therefore Ld CIT(A) rightly confirmed the AO's action on this issue, which does not merit any interference from our side. So we uphold the impugned action of Ld. CIT(A) and therefore this ground of assessee is dismissed.



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20. In the result, the appeal of revenue as well as cross-objection of the assessee are dismissed.

Order pronounced in the open court on this 31/10/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 31/10/2022.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai