

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

**BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER &
SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA No.2658/Del/2013

[Assessment Year : 1995-96]

Shri Sanjeev Kumar, C/o-Shri Hari Goel, UP-26, Pitam Pura, New Delhi-110088. PAN-AEKPG4102M	vs	ACIT, Circle-37(1), New Delhi.
APPELLANT		RESPONDENT

ITA No.3740/Del/2013

[Assessment Year : 1995-96]

DCIT, Circle-37(1), New Delhi.	vs	Shri Sanjeev Kumar, C/o-Shri Hari Goel, UP-26, Pitam Pura, New Delhi-110088. PAN-AEKPK3363A
APPELLANT		RESPONDENT
Appellant by	Shri Salil Agarwal, Sr.Adv. & Shri Shailesh Gupta, CA	
Respondent by	Shri H.K.Choudhary, CIT DR	
Date of Hearing	04.01.2023	
Date of Pronouncement	13.01.2023	

ORDER

PER KUL BHARAT, JM :

These cross appeals filed by the assessee and the Revenue for the assessment year 1995-96 directed against the order of Ld. CIT(A)-XXVIII, New Delhi, both dated 18.03.2013. Since similar grounds have been raised, both cross appeals of the assessee and the Revenue were taken up for hearing together and are being decided by way of this consolidated order for the sake of convenience and brevity.

ITA No.2658/Del/2013 [Assessment Year : 1995-96]

2. First, we take up the assessee's appeal in ITA No. 2658/Del/2013 for the Assessment Year 1995-96. The assessee has raised following grounds of appeal:-

1. *"That the learned Commissioner of Income Tax (Appeals) XXVIII, New Delhi has grossly erred both in law and on facts in upholding the assumption of jurisdiction by the AO to frame the impugned assessment despite the fact that both the initiation of proceedings u/s 147 of the Act and assessment framed u/s 143(3) of the Act dated 31.3.1998 were illegal, invalid on account of the following reasons:*
 - i) *That notice u/s 148 dated 19.09.1997 was served on the chartered accountant of the assessee and not on the assessee;*
 - ii) *That no reasons were recorded prior to the issue of notice u/s 148 of the Act;*
 - iii) *That no notice u/s 143(2) of the Act was issued prior to the framing of assessment u/s 143(3) of the Act dated 31.03.1998;*
- 1.1. *That the conclusion of the learned Commissioner of Income Tax (Appeals) that aforesaid ground raised are too late in the day as original order of assessment has been upheld by Tribunal and order of Tribunal has acquired finality overlooks the following judicial pronouncements relied upon by the appellant:*
 - a) *113 ITR 22 (Guj) P.V. Doshi vs. CIT*
 - b) *194 ITR 548 (Born) Inventors Industrial Corpn. Vs. CIT*
 - c) *281 ITR 366 (All) Abdul Majid vs. CIT*
 - d) *21 SOT 440 (Kol) Pearless Ge. Fin. & Inv. Co. Ltd. vs. ACIT*
 - e) *127 ITD 160TM (Chennai) Hemal Knitting Industries vs. JCIT*
 - f) *ITA No. 2638/2005 (Kar) dated 5.4.2010 CIT v Mis PaiVaibhav Hotels (P) Ltd*

2. *That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in upholding the addition of Rs. 4,51,930/- representing 5% of the assessed income of the wife of the appellant without appreciating that no income of the wife could be held to be in the case of appellant.*
- 2.1. *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that there was no evidence on record to establish that wife of the appellant was benamidar of the appellant and mere fact that wife was allegedly unable to explain her transactions of her business M/s Akriti Investments, the same could not be a ground to assume that such income is, income of the appellant.*
- 3 *That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on fact in applying the rate of 5% to determine the income of the assessee from commission by failing to appreciate the decision of the Hon'ble Tribunal wherein commission income was restricted from .35% to .60% and as such commission rate so applied is excessive.*
4. *That the learned Commissioner of Income Tax(Appeals) has also erred both in law and on facts in upholding the disallowance of Rs.77,607/- out of expenditure incurred claimed by the appellant on surmises, conjecture and suspicion.*
5. *That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in upholding the addition of Rs.10,000/- out of deposits in the bank account which was fully explained from sale of shares.*
6. *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in confirming the levy of interest u/s 234A of Rs. 7,88,126/-, 234B of Rs.5,40,116/- and 234C of Rs.288/- which are not leviable at all on the facts of the appellant.*

It is therefore prayed that, assessment framed by kindly be quashed and further additions disputed in the appeal alongwith interest levied may

kindly be deleted and in any case be held to be excessive and appeal of the appellant be allowed.”

3. Facts giving rise to the present appeal are that this is second round of litigation. In the earlier round, the matter travelled upto Tribunal and the Tribunal was pleased to restore the issue back to the Assessing Officer (“AO”) for re-consideration. However, the AO yet again assessed the income at Rs.1,41,36,186/- vide order 24.12.2009 u/s 144 of the Income Tax Act, 1961 (“the Act”).

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who vide impugned order dated 18.03.2013 partly allowed the appeal of the assessee. Thereby, on merit of the addition, Ld.CIT(A) granted substantial relief to the assessee. However, Ld.CIT(A) rejected the grounds related to validity of re-opening of the assessment.

5. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

6. Apropos to **Ground Nos.1 & 1.1**, Ld. Counsel for the assessee vehemently argued that Ld.CIT(A) was not justified in rejecting the grounds, related to issue of notice u/s 148 of the Act. He contended that before the authorities below, the assessee had taken specific ground that it had not received any notice and the notice u/s 148 of the Act was served upon its Chartered Accountant and not upon the assessee. He relied upon various case laws to buttress the contention that the impugned assessment was framed without authority of law.

7. Ld. CIT DR opposed these submissions and submitted that as per the records, the assessment was framed under the normal provision i.e. section

143(3) of the Act. Therefore, the objection regarding jurisdiction is misconceived and is not supported by the evidences.

8. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. We find that the original assessment was framed u/s 143(3) of the Act when a pointed query regarding objection that no notice u/s 148 of the Act was served upon the assessee, was raised by him. Ld. Counsel for the assessee could not point out to any evidence regarding the assessment being framed u/s 147 of the Act except the contents of the Remand Report filed before Ld.CIT(A). In our considered view, the material placed before us, does not support the claim that the assessment was re-opened under the provision of section 147 of the Act. Even there is no such fact is recorded by the AO in the body of the assessment order. Moreover, the Revenue has also not placed any such material before us. Therefore, Ground Nos. 1 & 1.1 raised by the assessee are dismissed since they are not backed by any material evidence.

9. **Ground Nos.2, 2.1 & 3** raised by the assessee are against the upholding of addition of Rs.4,51,930/- representing 5% of the assessed income of the wife of the assessee without appreciating that no income of the wife could be added in the hands of the assessee.

10. On the contrary, Ld. CIT DR supported the assessment order.

11. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities

below. We find that Ld.CIT(A) after considering the submissions, decided the issue by observing as under:-

12.1. *“The AO has noted that the seized diary Annexure A-I shows payment of Rs. 77,25,200/- to M/s Akirti Investments during the period 18.03.1994 to 13.03.1995 from various parties. It is a fact established that the above said amount was received by M/s Akirti Investments and was deposited from time to time in the bank account no. 100029 at Allahabad Bank, Daryaganj belonging to M/s Akirti Investments. He has also noted that Smt. Rekha Gupta, Proprietor of M/s Akirti Investments and Sh. SKC, assessee who is managing the group, however, were not able to 'explain the source of cash deposits in this bank account during their statement recorded u/s 131. He however confirmed in his statement dated 8.8.1995.*

"this diary is mostly in the hand writing of Mr. Rakesh Kumar, my Asstt. And in this diary transactions of all companies managed and controlled by us have been mentioned."

12.2 *The AO has made the said addition by observing that wife of the appellant Mrs. Rekha Gupta is a mere graduate without having any proper background in the account/finance/share transactions. She is basically a house wife and, knew nothing about the business as his evident from her statements. The statement of Smt. Rekha Gupta recorded' u/s 131 on 11.12.1995 is not only very only interesting but revealed too. Extracts are reproduced below:-*

“I do not know that, account No. of Akirti Investments when opened I cannot tell and what types of transactions are made in it, I do not know anything.”

16. *When asked about loans given on her behalf of her companies of which she is a Director and what rate of interest and against what security she stated again.*

"I do not know"

12.3. He thus held in para 23 as under:

"23. In addition to the income assessed in the hand of Sh. Sanjeev Kumar, the income in the name of assessee's wife, Smt. Rekha Gupta, in view of her ascertainment about now knowing any thing about the business and evidences of Mr. Sanjeev Kumar Chaudhary controlling the entire business, has assessed in the hands of Mr. Sanjeev Kumar Chaudhary on substantive basis"

12.4. In the written submission appellant stated that addition has been made by relying upon the appraisal report and order of assessment in the case of Mrs. Rekha Gupta which have not been confronted. It was also submitted that mere fact that wife was allegedly unable to explain her transaction of her business M/s Akriti Investments, the same could not be a ground to assume and conclude that alleged income of the wife is income of the appellant as has been held in the case of ACIT vs. Peter Thorose reported in 111 ITD page 360 (Third Member) (Guwahati), It was further submitted that there is no evidence to establish benamidar of ownership viz-a-viz the appellant. It was submitted that owner means legal ownership. 'No material has been led and in absence of any such material having been led and placed on record, the assessee cannot be presumed to be owner of the firm M/s Akriti Investments and, therefore, the addition made by the Assessing Officer is wholly unsustainable. Reliance was placed on the following cases to contend that despite the fact investment was made in the name of the wife or the other member of assessee's group yet addition was held not tenable. It was also held that, ignorance cannot be a ground to make addition in the hands of the appellant:

- a) 67 TTJ 602 (Chd) Satpal Singh v ACIT
- b) 67 TTJ 411 (Chd) Rameshwar Lal Ahuja v ACIT
- c) 67 TTJ 471 (Chd) Pioneer Publicity Corporation v ACIT
- d) 66 TTJ 508 (All) Smt. Usha Tripathi v ACIT
- e) 37 ITD 96 [Jpr] Manohar Lal v ITO

- f) 69 ITD 336 (Mum) Jaya S Shetty v ACIT
- g) 72 ITD 155 (Mum) Smt Raja Rani Gupta v ACIT
- h) 70 TTJ 801 (Ahd) ITO v Manilal S Dave

12.5. *I have considered the grounds raised in appeal and the submission of the AR. The argument that income of Mrs. Rekha Gupta is not income of appellant is not tenable, keeping in view the statement of Mrs. Rekha Gupta and, appellant. However as I have held above that assessee is engaged in the business of giving hawala loans I hold that Mrs. Rekha Gupta wife of the appellant was only another entity of the appellant. I thus direct that 5% commission be also applied on the amount assessed as income. Hence out of an addition of Rs. 90,38,572/- addition of Rs. 4,51,930/- is confirmed and appellant gets relief of Rs. 85,86,642/ - and ground is partly allowed.”*

12. The only grievance of the assessee is the rate of commission applied by the authority below. The AO had infact made addition of the entire sum of Rs.90,38,672/- on the substantive basis in the hands of the assessee and the protective basis in the hands of the wife of the assessee. So far the decision of Ld.CIT(A) for applying 5% of the total addition as income of the assessee is backed by binding precedents. The Ld.CIT DR could not controvert the finding of Ld.CIT(A) by bringing any other binding precedents to our notice. Therefore, the decision of Ld.CIT(A) for estimating commission income cannot be faulted. However, under the identical facts, the Co-ordinate Bench of the Tribunal in various decisions, has taken the rate of earning of commission varying from 0.55% to 1.25%. Therefore, looking to the facts of the present case, it would sub-serve the interest of justice if the rate of earning of commission is adopted at the rate prevalent in the same line of business. Therefore, the addition is restricted to 1.25 % of the total amount [Rs.90,38,572/-] which is restricted to

Rs.1,00,000/- . Thus, Ground Nos.2, 2.1 & 3 raised by the assessee are partly allowed.

13. Apropos to **Ground No.4** raised by the assessee is against the upholding of disallowance of Rs.77,607/- out of expenditure incurred claimed by the assessee on surmises, conjecture and suspicion.

14. Ld. Counsel for the assessee submitted that Ld.CIT(A) was justified in granting part relief as the expenditure was incurred for business purposes. The entire expenditure should have been allowed by Ld.CIT(A).

15. Ld.CIT DR opposed these submissions and supported the assessment order.

16. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. We find that Ld.CIT(A) has given a finding on fact by observing as under:-

5.2. *“I have considered the grounds raised in appeal and the submission of the AR. The AO disallowed sum of Rs. 1,55,215/- being 40% of expenditure claimed of Rs.3,88,037/- on the ground that such expenditure is shared by other companies of the assessee. This aspect has not been denied by the appellant. No details as to number of the companies or operations of the companies are emerging from either the order of assessment or other material on record. In light of the above it is necessary to estimate the disallowance and keeping in view the fact that genuineness of the expenditure has not been disputed,] considered it reasonable to sustain disallowance of 20% of the expenditure claimed by the appellant. Accordingly) I hold, out of disallowance of Rs. 1,55,215.20 appellant gets relief of Rs. 77,607/- and balance Rs. 77,607/- is sustained. The ground is partly allowed.”*

16.1. The finding on fact recorded by the assessee could not be controverted by Ld.CIT(A) the same is hereby, affirmed. Thus, Ground No.4 raised by the assessee is dismissed.

17. **Ground No.5** raised by the assessee is against the sustaining of addition of Rs.10,000/- out of deposits in the bank account.

18. Ld. Counsel for the assessee submitted that Ld.CIT(A) was not justified in sustaining the addition. The assessee does not wish to press Ground No.5 due to smallness of the amount of addition. However, he submitted that looking to the smallness of the amount of addition, Ground No.5 raised by the assessee is dismissed as not pressed.

19. **Ground No.6** raised by the assessee in respect of levy of interest Rs.7,88,126/- u/s 234A of the Act, Rs.5,40,116/- u/s 2344B of the Act and Rs.288/- u/s 234C of the Act. The levy of interest is consequential in nature, we hold accordingly.

20. In the result, the appeal of the assessee is partly allowed.

ITA No.3740/Del/2013 [Assessment Year : 1995-96]

21. Now, we take up the Revenue's appeal in ITA No. 3740/Del/2013 for the Assessment Year 1995-96. The Revenue has raised following grounds of appeal:-

1. *"In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in restricting the addition made by the AO on account of cash deposits to only 5% of the total deposits even though the assessee has not provided plausible explanations with the necessary documentary evidences.*

2. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in restricting the addition made by the AO on account of disallowance of expenses to 20% instead of 40% made by the AO.*
3. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in restricting the addition made by the AO on account of 'sundry creditors' and 'other creditors' to only 5% of such creditors even though assessee failed to provide plausible explanation with necessary documentary evidence.*
4. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in deleting the addition made by AO on account of unexplained cash.*
5. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in deleting the addition made by AO on account of fixed assets as the assessee has not produced bills in respect of addition to fixed assets.*
6. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in restricting the addition made by AO on account of undisclosed deposits of Rs.2 lacs to only 5% of the total deposits event though the assessee had not provided plausible explanation with respect to the same with necessary documentary evidences.*
7. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in deleting the addition made by AO on account commission, interest earned and unexplained loan without appreciating the fact that the assessee failed to give explanation with necessary documentary evidences.*
8. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in restricting the addition made by AO on account of income of his wife of Rs.90,38,372/- on substantive basis to only 5% of the said amount.*
9. *In the facts and circumstances of the case, the Ld. CIT(A) grossly erred in deleting the interest u/s 220(2) of the IT Act, 1961.*

10. *The appellant craves to add, amend or modify the grounds of appeal at any time.*

It is prayed that the order of CIT(A) is contrary to the facts on record and the settled position of law; and the order of the A.O. deserves to be restored.”

22. Apropos to **Ground Nos. 1, 3, 4, 5, 6, 7 & 8** raised by the Revenue, Ld.CIT DR submitted that Ld.CIT(A) grossly erred in fact and in law in treating the transactions as the business transaction and computing the commission @ 5% on such transactions. Further, he reiterated the submissions as made in ITA No.2658/Del/2013 for the Assessment Year 1995-96 in the case of the assessee.

23. Ld. Counsel for the assessee opposed these submissions and submitted that identical issue has been decided in favour of the assessee by various judicial pronouncements. The AO was not justified to make addition of entire amount.

24. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The facts are identical as were in assessee's appeal in **ITA No.2658/Del/2013** [Assessment Year 1995-96]. We find that in assessee's appeal, we affirmed the decision of Ld.CIT(A) treating the cash deposited in the bank accounts as the business income and computing the commission income out of such deposits. The Revenue has not brought to our notice any other binding precedents. We therefore, do not see any reason to take a different view. Therefore, respectfully following the same, Ground Nos. 1, 3, 4, 5, 6, 7 & 8 raised by the Revenue are dismissed.

25. **Ground No.2** raised by the Revenue is against the restricting of disallowance to the extent of 20%.

26. Facts are identical as in the assessee's appeal in **ITA No.2658/Del/2013** [Assessment Year 1995-96]. The Ld. Representatives of the parties have adopted the same arguments as were in ITA No.2658/Del/2013 [Assessment Year 1995-96]. Since we have upheld the decision of Ld.CIT(A) and there is no change into the facts of the case. Therefore, taking a consistent view, Ground No.2 raised by the Revenue is dismissed.

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

28. In the final result, appeal of the assessee in **ITA No. 2658/Del/2013** [Assessment Year 1995-96] is partly allowed and appeal of the Revenue in **ITA No.3740/Del/2013** [Assessment year 1995-96] is dismissed.

Order pronounced in the open Court on 13th January, 2023.

Sd/-
(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

** Amit Kumar **

Copy forwarded to:

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

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ITAT, NEW DELHI