

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2508/Kol/2018
Assessment Year: 2010-11**

Deputy Commissioner of Income-Tax, Circle-10(1), Kolkata	Vs.	Abhinandan International Private Limited. 'Shikaria Pride', 95A, Park Street, 7 th floor, Kolkata- 700016 (PAN: AACCA7962N)
(Appellant)		(Respondent)

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**C.O. No. 1/Kol/2019
In ITA No.2508/Kol/2018
Assessment Year: 2010-11**

Abhinandan International Private Limited.	Vs.	Deputy Commissioner of Income-Tax, Circle-10(1), Kolkata
(Assessee/Cross objector)		(Respondent)

Present for:

Revenue by : Shri Vijay Kumar, Addl. CIT, Sr. DR
Assessee by : Shri A. K. Tibrewal, FCA

Date of Hearing : 23.11.2022
Date of Pronouncement : 09.02.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue and cross objection by assessee are against the order of Ld. CIT(A)-4, Kolkata vide Appeal No. 42/CIT(A)-4/2017-18 dated 13.08.2018 passed against the assessment order by DCIT, Circle-10(1), Kolkata u/s. 147/143(3) of

the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 16.12.2017.

2. Grounds raised by the revenue are reproduced as under:

"1] That on the fact and circumstances of the case, the Ld. CIT(A)-4, Kolkata erred in deleting the addition of Rs. 2,99,85,863/- u/s. 68 of the Act by wrongly holding that what could be added even in case of bogus or contrived transaction is net result of purchase and sale and not the entire sales, without appreciating material facts and evidences of this case.

2] That on the facts and circumstances of the case, the Ld. CIT(A)-4, Kolkata erred in deleting addition of Rs.5,76,752/- (Rs.5,99,755 (-) Rs.23,003) u/s. 37(1) of the Act by wrongly holding that in these kind of transaction, commission is paid on profit or loss generated from bogus commodity trading and non on entire turnover when it is crystal clear that the transaction is nothing but a bogus trading."

2.1. Grounds raised by the assessee in its Cross objection are reproduced as under:

"1. That, on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) erred in concluding that the commodity transactions entered into by the assessee company were bogus in nature when the same were backed by proper documentary evidences and that the transactions were through banking channels and the same were not found to be false or fabricated.

2. That, on the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.23,003, being 2% of the Rs.11,50,152, as commission paid for arranging commodity profit on the allegation that the said commodity profit earned by the assessee company was bogus in nature."

3. Brief facts as culled out from records are that assessee filed its return of income on 07.07.2010 reporting income at nil after claiming set off of the brought forward business loss and unabsorbed depreciation. In the return filed by the assessee, it had offered income from speculative business of Rs.11,50,151/- earned out of speculation business in commodities done at National Multi Commodity Exchange (NMCE), Ahmedabad. The said return was processed u/s.

143(1) of the Act vide intimation dated 12.02.2011, which was subsequently rectified u/s. 154 of the Act with the last order passed u/s. 154 dated 20.07.2016. Subsequently, a notice u/s. 148 of the Act dated 31.03.2017 was issued on the assessee and served thereon. Assessee filed its return in response to the said notice u/s. 148 reporting total income at nil. Ld. AO observed that assessee had derived speculative income from commodities through member/broker of NMCE, Fast Track Marchants Pvt. Ltd. Ld. AO further noted that trades were executed with the counter-party clients M/s. Fairdeal Vincom Pvt. Ltd. and M/s. Anand Share Broking (P) Ltd. Assessee submitted copy of contract notes, bank statements and other relevant documents to substantiate its claim.

3.1. In the course of assessment, ld. AO issued summons u/s. 131 of the Act to Fast Track Merchants Pvt. Ltd. as well as two counter party clients. In response to this, the broker made its submission through post whereas the other two parties did not respond. Ld. AO further noted that platform of NCME is exploited unscrupulously to contrive and generate bogus profit / loss so as to enable the beneficiary for setting off annual profit in the books or setting off loss in the books to ultimately evade the due taxes. From his inquiry, Ld. AO also noted from the ROC data that Fairdeal Vincom Pvt. Ltd. had been amalgamated and Anand Share Broking Pvt. Ltd. had been struck off. Ld. AO made further inquiry by issuing a letter to NMCE for gathering information in response to which NMCE replied and gave the details of the transaction undertaken through the broker Fast Track

Merchants Pvt. Ltd. From the data supplied by NMCE in respect of the assessee, ld. AO noted that there is a difference of Rs.3,598/- in the speculative profit reported by the assessee and that given by NMCE. Ld. AO thus, concluded the assessment by noting that the contrived profit of Rs.11,53,750/- is merely a front, which also has been set off against brought forward losses. The real picture has not been explained in respect of source of investment or trading to an extent of Rs.2,88,33,975/-. He thus, made an addition of Rs.2,99,87,725/- in respect of total sale proceeds. He further estimated a commission @ 2% on the said amount and added it by disallowing u/s. 37(1) of the Act. Aggrieved, assessee went in appeal before the ld. CIT(A).

3.2. Before the Ld. CIT(A), assessee reiterated the submissions, the details in respect of the transactions under taken by the assessee is tabulated below:

Contract No.	Date	Difference being Profit/Loss Net of Brokerage & S. Tax (Rs.)	Brokerage (Rs.)	Service Tax (Rs.)
00000379/0910	21.07.2009	4,98,719.58	1,376.50	142.92
001378/0910	24.02.2010	4,98,900.61	1,450.00	149.39
001560/0910	12.03.2010	1,52,531.23	425.00	43.77
Total		11,50,151.42	3,262.50	336.08

3.3. In respect of the difference of Rs.3,598/- between the details furnished by the assessee and NMCE, it was submitted by assessee that it is owing to brokerage and service tax which was charged by the broker and was not part of the transactions of purchase and sale. The details in this respect as furnished by the assessee are tabulated below:

Contract No.	Date	Brokerage (Rs.)	Service Tax (Rs.)	Total (Rs.)
00000379/0910	21.07.2009	1,387.50	142.92	1,530.42
001378/0910	24.02.2010	1,450.00	149.39	1,599.39
001560/0910	12.03.2010	425.00	43.77	468.77
Total		3,262.50	336.08	3598.58

3.4. Assessee submitted that the amount of Rs.2,99,87,725/- which has been treated by the Ld. AO as concealed amount. in fact represented the value of sales transaction of commodities against purchase of Rs.2,88,33,775/-. Thus, the difference of sale and purchase amounting to Rs.11,50,152/- after brokerage and service tax was offered as speculation profit in the return filed by the assessee. Assessee also explained that the transaction of purchase and sale of commodities were settled on the same day and there was no delivery affected by assessee or broker in respect of such purchases and sales. Thus, the addition made by the Ld. AO is without any basis.

3.5. Considering the submissions made by the assessee, Ld. CIT(A) observed that AO has added the entire turnover of the commodities to the assessee's income. According to him, what to be added even in case of bogus or contrived transaction is, the net result of purchase and sale, and not the entire sales. Ld. CIT(A) also noted that assessee has already shown the net result of purchase and sale of commodities transaction as income in its return and thus deleted the addition of Rs.2,99,85,863/-. However, Ld. CIT(A) directed the ld. AO to compute commission on the commodity transaction by taking 2% of the net speculative income reported by the assessee as against what Ld. AO took as 2% of the total sales value. Further, Ld. CIT(A) while

disposing ground no. 10 in respect of allowing set off of brought forward loss and depreciation noted that the commodity profit has been held to be bogus. For the purpose of allowing set off of brought forward loss/depreciation, Ld. CIT(A) observed that either this profit does not exist or alternatively the Ld. AO has to allow the set off of past losses and thus, he directed the Ld. AO to allow set off of brought forward losses/depreciation. Aggrieved, the revenue is now in appeal before the Tribunal.

3.6. On the same issues the assessee has filed its Cross objection by challenging the issue relating to holding of speculative profit as bogus by Ld. CIT(A) and direction given to adopt disallowance of commission @ 2% on the impugned speculative profit.

4. Before us, Ld. Sr. DR submitted that Ld. AO had concrete evidence from the forward market commission regarding artificial trading volume and tax evasion transaction undertaken by some members and clients in NMCE, Ahmedabad for abnormal amount of loss had been booked by the said entities in the case of trading of commodities in NMCE. He strongly submitted that the loss/profit booked by the entities was not genuine and camouflaged with the help of some members and clients of NMCE. According to him, assessee has also been found to have book profit through NMCE which it has set off with brought forward depreciation/loss. He also stated that Ld. AO has made necessary enquiries and found that the two counter party clients namely, Fairdeal Vincom Pvt. Ltd. and

Anand Share Broking Pvt. Ltd. had no real existence but were paper companies which were used to act as fake counter party for generating profit/loss as desired by the beneficiary party. He thus, strongly supported the order of Ld. AO.

4.1. Per contra, Ld. Counsel for the assessee reiterated the submissions which were made before the Ld. AO and Ld. CIT(A), which are narrated above and are not repeated here for the sake brevity.

5. We have heard the rival contentions and perused the material available on record. We take note of the findings given by the Ld. CIT(A) in para 4.3 and 5 which are extracted below:

“4.3. I have perused the Submissions of the ld. AR and the Assessment Order. The AO has added the entire turnover of the commodities to the assessee's income. What could be added even in case of bogus or contrived transaction is net result of purchase and sale and not the entire sales. To give an example, if an assessee shows bogus purchase of Rs. 5 crore and bogus sale of Rs. 5.01 crore then what could be added at most is the difference i.e. Rs. 1 lakh not the entire amount Rs. 5.01 crore. This has been held by many courts of and is a trite law as of now. Therefore, addition of Rs.2,99,85,863/- cannot be sustained and the same is deleted.

The second issue is that the assessee is showing an income from this alleged bogus transaction. Since the assessee has already offered this income for taxation, therefore, the same cannot be taxed twice. In view of the above discussion addition of Rs. 2,99,85,863/ - is hereby deleted.

The third connected issue is regarding addition for commission for 2 per cent on the commodity transaction. Here also the Ld. AR pleaded that commission is normally earned on the profit or loss given and not on the entire turnover made. I agree with the contention of the Ld. AR that normally in these kind of transaction, commission is paid on profit or loss generated from bogus commodity trading and not on entire turnover. Therefore, the AO is directed to tax 2 per cent of Rs.11,50,152/- as commission income.

In view of the above discussion, Ground NO.8 and 9 are Partly Allowed.

5. Ground No. 10 is regarding not allowing set off of brought forward losses and depreciation. Since the commodity profit has been held to be bogus, therefore, either this profit does not exist or alternatively the AO has to allow set off of past losses. He cannot do both. In view of the above, the AO may allow set off of brought forward losses/ depreciation.”

5.1. From perusal of these findings, Ld. CIT(A) has come to a conclusion to sustain the addition of the net result of purchase and sale and not the entire sale and thus, deleted the addition made by the Ld. AO. However, while dealing with ground no. 10 in para 5, Ld. CIT(A) has held the commodity profit to be bogus. We note that while holding so, Ld. CIT(A) has not given his explanations, reasoning and the basis for arriving at such a conclusion. From these findings given in two paragraphs by the Ld. CIT(A) it is not discernible as to how and on what basis, Ld. CIT(A) has arrived at this conclusion. In the entire order, Ld. CIT(A) has merely extracted the observations of the Ld. AO and the submission of the assessee without dealing with them objectively and analytically. Accordingly, to meet the ends of justice and fair play, we find it proper to remit the matter back to the file of Ld. CIT(A) with a direction to pass a speaking order by considering the material placed on record and available through the enquiries made by the Ld. AO, by affording reasonable opportunity of hearing to the assessee. The assessee is also given opportunity to furnish its submissions and other details in support of its claim before the Ld. CIT(A). Accordingly, both the appeal of the revenue and the Cross objection of the assessee are allowed for statistical purposes.

6. In the result, both the appeal of the revenue and the Cross objection of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 09thFebruary, 2023.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 09th February, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A)-4, Kolkata.
 4. The Pr. CIT, , Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata