

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

**ITA No.6812/M/2019
Assessment Year: 2009-10**

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| Shri Kamal Kishore Rathi, 115B, Shalimar Miracle, Opp. ICICI Bank, SV Road, Goregaon (West), Mumbai – 400 062 PAN: AAGPR1508N | Vs. | DCIT, CC4(3), 1921, Air India Bldg., Nariman Point, Mumbai - 400021 |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri Vijay Shah, A.R.
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 14 . 03 . 2023
Date of Pronouncement : 28 . 03 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Shri Kamal Kishore Rathi (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 25.09.2019 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2009-10 on the grounds inter-alia that :-

“1. Based on facts and circumstances of the case and further as explanation offered the order passed by learned CIT (A) is bad in law and against the principles of natural justice.

2. The order passed by learned CIT (A) is based on surmises and unnatural assumptions.

3. *Based on the facts and circumstances of the case and further as per the explanation offered the learned CIT(A) erred in disallowing the payment of commission amounting to Rs. 10,00,000/- to Mr. Alliance Intermediaries & Network P. Ltd. for use of their account.*

4. *The learned CIT(A) grossly erred in confirming the order of AO towards addition of commission paid to M/s. Alliance Intermediaries & Network Pvt. Ltd. amounting to Rs. 10,00,000/-*

5. *The learned CIT (A) ought to have given due consideration to the fact that the said amount was paid to M/s. Alliance Intermediaries & Network Pvt. Ltd. by account payee cheques issued from the Account of the appellant.*

6. *The learned CIT(A) ought to have given due consideration to the fact that an affidavit duly signed by Shri Jayesh Sampath, one of the director of M/s. Alliance Intermediaries & Network Pvt. Ltd., admitting the receipt of said commission amount, and should have allowed as deductible expense.*

7. *The learned CIT(A) ought to have given due consideration to confirmation statement filed by the appellant at the time of assessment proceedings.*

8. *Your appellant humbly submit that the amount paid to M/s. Alliance Intermediaries & Network Pvt. Ltd. was never received back by the appellant either directly or indirectly. Hence the amount paid as commission to M/s. Alliance Intermediaries & Network Pvt. Ltd. amounting to Rs. 10,00,000/- should be allowed (Rahul Kharia Vs. ITO (2308/Kol/2016) CIT Vs. Printer House P. Ltd. (188 ITR 70)*

9. *Your Appellant craves leave to add, alter or amend any or all the grounds of appeal on or before the time of hearing.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee filed the return of income declaring total income of Rs.2,58,670/- and subsequently survey action was carried out on the assessee on 26.08.2010. During the survey proceedings the assessee declared additional income of Rs.5,00,000/- for the year under consideration. Then a reopening under section 143(3) & 147 of the Income Tax Act, 1961 (for short ‘the Act’) was initiated and in response thereto the assessee has filed revised return on 26.03.2011 declaring income of

Rs.4,43,700/-. The Assessing Officer (AO) noticed that the original return was not filed within time and the revised return was held as nonest and invalid. The AO thereafter framed the assessment on 20.03.2014 at the income of Rs.7,58,670/-.

3. The assessee challenged the assessment order before the Ld. CIT(A) which was dismissed. Thereafter the assessee filed the appeal before the Tribunal which has restored the matter back to the AO to make fresh assessment after allowing opportunity to the assessee to cross examine Shri Mukesh Choksi vide order dated 14.06.2017.

4. Thereafter in accordance with the directions issued by the Tribunal the AO passed the order dated 03.10.2018 under section 143(3) read with section 147 and 254 of the Act by assessing the total income at Rs.7,58,670/-.

5. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. We have perused the order passed by the Ld. CIT(A) who has given part relief by returning following findings:

“6.2 The submissions and contentions of the assessee have been duly considered it is observed that in accordance with the directions of the Hon'ble ITAT, the AO allowed opportunity to the assessee to cross-examine Shri Mukesh Choksi In the cross- examination, Shri Mukesh Choksi reiterated that a signed cheque book was given to the assessee and the assessee was allowed to operate the said bank account by charging commission @0.15%. It is noted that the assessee did not bother to cross examine Shri Mukesh Choksi about the genuineness of the said sub-brokerage payment of Rs. 10,00,000/- to one of his concerns. In view of the reconfirmation of Shri Mukesh Choksi in course of the cross-examination about the dubious nature of the transactions carried out through the said bank account by charging commission @ 0.15%, the action of the AO of concluding that the assessee's claim of sub-brokerage payment of Rs. 10,00,000/- is bogus, cannot be faulted. Moreover, the contention of the assessee that Shri Jayesh Sampath, one of the another Directors of the said concern of Shri Mukesh Choksi, had filed an affidavit accepting having received the said sub-brokerage payment, is not very relevant since it is an open secret that Shri Mukesh Choksi was the mastermind and all the others only worked under his control. As regards, the assessee's claim of expenses on account of salary & wages of Rs. 9,00,000/- and the deductions u/s Chapter VI-A of Rs. 92,924/-, it is observed that the AO has not at all examined the various evidences in respect of this claim which were submitted before the Hon'ble ITAT and also before him in the 2nd round of proceedings and therefore cannot be considered to be bogus. Moreover, since the additional receipts on account of survey action have already been considered by the assessee in the revised return of income, the action of the AO of making a separate addition of Rs. 5,00,000/- also cannot be sustained since it will lead to double addition.

6.3 While adjudicating Ground No. 1, it has been held that the said revised return showing an income of Rs. 4,43,700/- is to be treated as a valid return filed in response to notice u/s 148. Moreover, as discussed above, the AO's conclusion that assessee's claim of sub-brokerage expenses of Rs. 10,00,000/- related to Mukesh Choksi made in the said revised return, has been found to be correct. Therefore, the assessee's income is determined at Rs. 14,43,700/- Rs. 4,43,700/- Rs. 10,00,000/-] as against Rs. 7,58,670/- determined by the AO. Accordingly, Ground Nos. 2 to 4 of the appeal are partly allowed.”

8. Now the assessee by filing present appeal challenged the addition of Rs.10,00,000/- made by the Ld. CIT(A) on the ground that this addition being not part of the assessment order has been

made without issuing any notice of enhancement to the assessee and that the assessee has paid the amount of Rs.10,00,000/- to M/s. Alliance Intermediaries & Network Pvt. Ltd. on account of commission through banking channel and that one of the directors of M/s. Alliance Intermediaries & Network Pvt. Ltd. has admitted the receipt of said commission amount which is liable to be allowed as deductible expenses.

9. Undisputedly in the first round of litigation the assessee has not claimed deduction of Rs.10,00,000/- claimed to have been paid as brokerage to M/s. Alliance Intermediaries & Network Pvt. Ltd. It is also not in dispute that in the revised return the assessee has claimed this amount of Rs.10,00,000/- having been paid to M/s. Alliance Intermediaries & Network Pvt. Ltd. which has not been considered by the AO in the order dated 03.10.2018 passed under section 143(3) read with section 147 & 254 of the Act while giving appeal effect to the Tribunal order dated 14.06.2017. It is also not in dispute that the Ld. CIT(A) has considered the amount of Rs.10,00,000/- claimed by the assessee in its revised return and made addition thereof which amounts to enhancement, without giving any notice to the assessee.

10. In the backdrop of the aforesaid facts and circumstances of the case the sole question arises for determination in this case is “as to whether the claim of the assessee to the tune of Rs.10,00,000/- made in the revised return has rightly been considered by the Ld. CIT(A) without having any findings on it returned by the AO”.

11. The AO has summararily dismissed the claim of the assessee qua the amount of Rs.10,00,000/- claimed as deduction having been

paid to M/s. Alliance Intermediaries & Network Pvt. Ltd. as brokerage on the ground that the revised return is nonest and invalid. In these circumstances issue raised vide revised return has never been examined by the AO. However, we are of the considered view that when the case was remanded by the Tribunal to the AO to decide afresh the AO was required to consider the revised return qua all the claims made by the assessee on merits. The Ld. CIT(A) in para 6.3 has categorically mentioned that the revised return showing an income of Rs.4,43,700/- is to be treated as a valid return filed in response to notice under section 148 of the Act. So the Ld. CIT(A) has considered the claim of the assessee qua deduction of Rs.10,00,000/- on the basis of revised return but without issuance of any notice to the assessee which otherwise amounts to enhancement.

12. We are of the considered view that when factual aspect qua claim of Rs.10,00,000/- made by the assessee has not been examined by the AO the Ld. CIT(A) without issuing notice to the assessee or without calling any remand report from the AO could not have decided the same. The Ld. A.Rs for the parties to the appeal have unanimously contended that in such circumstances to decide the issue once for all the issue should be remitted back to the AO to decide the claim of the assessee afresh after providing opportunity of being heard by considering the revised return as a valid one. However, rest of the addition made by the AO and confirmed by the Ld. CIT(A) are not to be disturbed.

13. In view of what has been discussed above, impugned order passed by the Ld. CIT(A) is hereby set aside to the extent of

addition of Rs.10,00,000/- claimed as deduction by the assessee and case is remitted back to the AO to decide afresh to that extent in view of the findings returned hereinabove.

14. Resultantly, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 28.03.2023.

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 28.03.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.