

**IN THE INCOME TAX APPELLATE TRIBUNAL  
JODHPUR BENCH, JODHPUR**

**BEFORE: DR. S. SEETHALAKSHMI, JM  
&  
SHRI RATHOD KAMLESH JAYANTBHAI, AM**

**ITA Nos. 100 to 104/Jodh/2019**  
**(ASSESSMENT YEARS- 2010-11 to 2012-13, 2014-15 & 2015-16)**

Shri Manoj Kumar 27, SindhI Colony, Pali.	Vs	ACIT, Central Cirlice-2, Jodhpur.
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN NO. BFHPK 1438 R</b>		

(Virtual hearing)

<b>Assessee By</b>	Shri Rajendra Jain-Adv.
<b>Revenue By</b>	Shri S.M. Joshi, JCIT-DR
<b>Date of hearing</b>	12/07/2023
<b>Date of Pronouncement</b>	03/10/2023

**ORDER**

**PER: Dr. S. Seethalakshmi, JM**

These are five appeals filed by the assessee against the orders of the Learned Commissioner of Income Tax (Appeals)-2, Udaipur [herein after “Ld.CIT(A)”] all dated 11.01.2019 for the assessment years 2010-11 to 2012-13, 2014-15 & 2015-16 respectively.

2. Since, the facts of all the cases are identical, we have heard these cases together and passing the order together. The facts and grounds are taken from

the folder of Manoj Kumar in ITA No. 100/Jodh/2019 and this case is taken as lead case.

3. The assessee has raised the following grounds of appeal:-

*“1. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in upholding validity of order passed by ld. AO.*

*2. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in upholding the validity of notice u/s 153C of the Act.*

*3. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in sustaining addition Rs.3,60,000/- as undisclosed commission income on estimation basis.*

*4. That on the facts and in the circumstances of the case, the ld. CIT(A) erred in relying the various observation made by the ld. AO as without brought out any incriminating material evidences to substantiate the finding made by him.*

*5. That on the facts and in the circumstances of the case, the ld. CIT(A) grossly erred in recording the finding that the assessee failed to correlate the income declared in the return with the unrecorded commissioner income found during the course of search proceeding.*

*6. That the petitioner may kindly be permitted to raise any additional or alternative grounds at or before the time of hearing.*

*7. The petitioner prays for justice & relief.”*

4. Brief facts of the case are that the assessee is an individual and derives business income in respect of sale of plot on commission basis. That

on 31/03/2012 the assessee has filed the return of income declaring total income of Rs. 1,57,430/- in respect of income earned from commission on sale of plots. The return filed by the assessee was accepted u/s 143(1) and no notice u/s 143(2) or 148 has been issued by the Department. That on 19/12/2015, a search u/s 132A of the act was carried out at the premises of Mr. Farooq at metro plaza, at the time of search the authorized officer has seized certain documents relating to sale of plots through power of attorney and also on commission basis and on the basis of above seized documents, the authorized officer issued summon u/s 131(1A) to Mr. Farooq and recorded his statement in which he has explained that he and his six friends including Manoj kumar (assessee) are working as association in the name and style of "Marudhar Buildcon" in which they do land development work and sale of plots on commission basis. On the basis of above seized documents, statement of Mr. Farooq and information found as a result of search in the case of Mohd Farooq, the ld. AO has issued notice u/s 153C on 16/10/2017 to the assessee for filing of return of income. That in response to notice u/s 153C of the Act, the original return filed by the assessee should be treated as return u/s 153C of the Act. That during the assessment proceedings the assessee has submitted that what so ever income earned in respect of sale of plots on commission basis was duly disclosed in the return of income and as

such same may kindly be accepted. That on 24/12/2017 the ld AO passed the order u/s 153C r.w.s. 144, assessed the total income of Rs. 5,17,430/- and made the addition of Rs. 3,60,000/- as undisclosed income in respect of commission without considering return filed u/s 139 of the Act.

5. Aggrieved, from the said order of assessment, the assessee has filed an appeal before the ld. CIT(A). The ld. CIT(A) after hearing the contention of the assessee, dismissed the appeal of the assessee by giving following findings on the issue:-

“8.3 In view of the facts as noted above, I find that the commission income has not in fact been declared in the returns of income filed u/s 139(1) and the action of the A.O in assessing the undisclosed commission income over and above the income declared in the returns of income filed u/s 139(1), is hereby upheld. Further, as the assessee **did not furnish any details before the A.O or in appeal, to explain, with reference to the seized documents containing details of transactions entered into by the assessee, how commission income was accounted for in his declared income, the manner in which the A.O has estimated the commission income pertaining to particular assessment years** (aggregating Rs. 20,00,000/-) is also upheld.

8.4 In view of the above discussion, the assessment of total income by the A.O. in the years under appeal, as given in the table below, is upheld.-

Asst. year	Returned Income	Addition on account of Commission Income	Income Assessed.
2010-11	1,57,430/-	3,60,000/-	5,17,430/-
2011-12	1,58,960/-	3,80,000/-	5,38,960/-

2012-13	2,66,190/-	3,40,000/-	6,06,190/-
2014-15	3,86,960/-	80,000/-	4,66,960/-
2015-16	5,04,330/-	1,00,000/-	6,04,330/-

8.5 In the result third to sixth grounds, in all appeals are dismissed.

9. Ground 7 of appeal as under-

“That on the facts and in the circumstances of the case, the Ld. AO grossly erred in charging interest u/s 234A, 234B and 234C of the Act.

9.1 The charge of interest under the above sections is mandatory. Therefore, the ground of appeal is dismissed.

In the result, all five appeals are dismissed.”

6. Feeling dissatisfied from the order of the ld. CIT(A) the assessee preferred the present appeal. The ld. AR for the assessee has filed a detailed submissions before us which is reproduced hereinbelow:-

“FACTS OF THE CASE

- 1] The assessee is an individual and derives business income in respect of sale of plot on commission basis.
- 2] That on 31/03/2012 the assessee has filed the return of income declaring total income of Rs. 1,57,430/- in respect of income earned from commission on sale of plots. The return filed by the assessee was accepted u/s 143(1) and no notice u/s 143(2) or 148 has been issued by the Department.
- 3] That on 19/12/2015, a search u/s 132A of the act was carried out at the premises of Mr. Farooq at metro plaza, at the time of search the authorized officer has seized certain documents relating to sale of plots through power of attorney and also commission basis and on the basis of above seized documents, the authorized

officer issued summon u/s 131(1A) to Mr. Farooq and recorded his statement in which he has explained that he and his six friends including Manoj kumar (assessee) are working as association in the name and style of "Marudhar Buildcon" in which they do land development work and sale of plots on commission basis.

- 4] On the basis of above seized documents, statement of Mr. Farooq and information found as a result of search in the case of Mohd Farooq the ld AO has issued notice u/s 153C on 16/10/2017 to the assessee for filing of return of income.
- 5] That in response to notice u/s 153C of the Act, the original return filed by the assessee should be treated as return u/s 153C of the Act.
- 6] That during the assessment proceedings the assessee has submitted that what so ever income earned in respect of sale of plots on commission basis was duly disclosed in the return of income and as such same may kindly be accepted.
- 7] That on 24/12/2017 the ld AO passed the order u/s 153C r.w.s. 144, assessed the total income of Rs. 5,17,430/- and made the addition of Rs. 3,60,000/- as undisclosed income in respect of commission without considering return filed u/s 139 of the Act.

Having discussed the facts of the case, I would like to submit on each ground of appeal raised in the memo of appeal: -

- 1] As regards grounds of appeal No. 1 & 2 relating to validity of order passed by the ld AO.
  - a] From the assessment order your honour will find that the ld AO had issued notice u/s 153C on 16/10/2017 and subsequently has issued notice u/s 142(1) to the assessee. The assessee has submitted that due to change of the person who have filed the return of income, the return of income in response to notice u/s 153C and also reply in response to show cause notice issued by your good self has not been submitted within time. It is further explained that the original

return filed by the assessee is placed on record. The Id AO within a very short period and without providing reasonable opportunity to the assessee and passed the assessment order on 24/12/2017 same may kindly be quashed.

- b]** That the assessee has also submitted the proceedings initiated u/s 153C without proper satisfaction as per provisions of section 153C has been recorded by the Id AO while issuing notice u/s 153C in the case of searched person. Therefore proceedings initiated by the Id AO may kindly be quashed.

In light of above the order passed by the Id AO and consequentially the notice issued u/s 153C may kindly be quashed.

- 2]** As regards grounds of appeal No. 3 to 6 relating to addition on account of unexplained/ undisclosed commission income.

- a]** That while making such addition the Id AO made observation reads as under:-

*"Mr. Farooq, main person with whom assessee was associated along with Shri Madan Lal, Mr. Iqbal, Shri Manoj Tiwari, Mr. Harun and Shri Jagdish Singh in property development business, vide his reply dated 24/11/2017, submitted that during the period 2010 to 2014, he alongwith other co-partners jointly developed the colonies and sold the plots on commission basis. For the said purpose they obtained power of attorney from the land owners and sold the plots. The sale consideration on sale of plots were received by them (Mohd. Farooq and his six co-partners) from the buyers and the same was transferred to land owners through bank or cash after deducting commission per plot and expenditure incurred for development of land. It was further stated that income earned in respect of such business activities was not disclosed in the return of income. Mohd. Farooq has stated that his share from the business activity was 45% and remaining 55% share was in respect of the following persons-*

- a. Madan Lal 20%*
- b. Iqbal Khan 10%*
- c. Manoj Kumar 10%*
- d. Mansha Ram 5%*
- e. Mohd. Harun 5%*
- f. Jagdish Singh 5%*

*Perusal of computation of income submitted alongwith acknowledgement of ITR filed (though not verified till date) by Mohd. Farooq shows that he has shown the following commission income in various assessment years: -*

<i>A.Y.</i>	<i>Gross Total Income as per ITR</i>	<i>Commission Income</i>	<i>Ratio of Commission income to the total commission income declared</i>
<i>2010-11</i>	<i>717780/-</i>	<i>433874/-</i>	<i>18%</i>
<i>2011-12</i>	<i>1125170/-</i>	<i>443270/-</i>	<i>19%</i>
<i>2012-13</i>	<i>569002/-</i>	<i>406472/-</i>	<i>17%</i>
<i>2013-14</i>	<i>1237550/-</i>	<i>874350/-</i>	<i>37%</i>
<i>2014-15</i>	<i>401520/-</i>	<i>103000/-</i>	<i>4%</i>
<i>2015-16</i>	<i>440000/-</i>	<i>106000/-</i>	<i>5%</i>
		<i>2366966/-</i>	<i>100%</i>

*It is pertinent to mention that in his statement dated 23/05/2016 given before the investigation Wing of Income Tax Department, Mohd. Farooq had surrendered Rs. 2 Crore as undisclosed commission income earned by him and his six associates from the land development business. During the assessment, Mohd. Farooq has accepted 45% share from such business, therefore, his share was computed at Rs. 90,00,000/- as per assessee's own statement dated 23/05/2016 referred above. Therefore, commission income of Rs. 23,66,966/- only declared by Mohd. Farooq was not accepted. After due consideration, addition of the undeclared commission income of Rs. 66,33,034/- was added to the total income of Mohd. Farooq in the ratio of commission income declared in his ITR filed u/s 153A for various assessment years i.e. 2010-11 to 2015-16. Since, commission income declared for A.Y. 2010-11 was shown at 18% of the total commission income declared by the assessee for A.Y. 2010-11 to 2015-16, 18% of undeclared commission income of Rs. 66,33,034/- i.e. Rs. 11,93,946/- was added to the total income of Mohd. Farooq as his undeclared commission income as per his own statement given before the department.*

*18% of the balance commission income of Rs. 1,10,00,000/- (Rs. 2,00,00,000/- - Rs. 90,00,000/-), i.e. Rs. 19,80,000/- was also added on protective basis in the hands of the Mohd. Farooq.*

*3.2.1. Assessee had 10% share of commission income from land development business conducted alongwith Mohd. Farooq and other co-partners. therefore, his share of commission income amounting to Rs. 2 crore surrendered by Mohd. Farooq and duly accepted by assessee comes to Rs. 20,00,000/- percentage of commission income earned for the current assessment year is 18% as declared by Mohd. Farooq in his return of income. Thus, commission income of the assessee comes to Rs. 3,60,000/- is added to his total income of*

*the assessee as his undeclared commission income earned from land development business conducted alongwith Mohd Farooq and other associates.*

- b]** From the above, the Id AO had worked out the commission income of the assessee over the period i.e. 2010-11 to 2015-16 as per ratio of income shown by Mohd. Farooq in above referred table. The share of the assessee was 10% and accordingly over the period i.e. 2010-11 to 2015-16 the total commission income worked out of Rs. 20,00,000/- (2,00,00,000/- x 10%) by the Id AO and the Id AO has bifurcated such commission income for A.Y. 2010-11 to 2015-16 is as under: -

Asst. Year	Commission Income	Remarks
2010-11	360000.00	18% of share of assessee i.e. 20,00,000/-
2011-12	380000.00	19% of share of assessee i.e. 20,00,000/-
2012-13	340000.00	17% of share of assessee i.e. 20,00,000/-
2013-14	740000.00	37% of share of assessee i.e. 20,00,000/-
2014-15	80000.00	4% of share of assessee i.e. 20,00,000/-
2015-16	100000.00	5% of share of assessee i.e. 20,00,000/-
Total Commission income estimated by Id AO	20,00,000.00	

- c]** From the assessment order your honour will be observed that the Id AO made such arithmetical calculation and estimation of income from commission only assumption and presumption without brought on record any positive material or information found as a result of search in third party on the basis of which notice u/s 153C was issued. Further the Id AO holding that the assessee had earned commission of Rs 20,00,000/- over the period and bifurcated such commission income year wise on the basis of income decaled by the searched person is totally baseless and also arbitrary.

- d]** That the ld AO had estimated commission income without considering the commission income so declared by the assessee in the return of income for the above period and as such the ld AO charged the tax on same income which was already taxed & disclosed by the assessee in his return of income. When the assessee has already offered the commission income for taxation and onus has been discharged by it then the same income cannot be taxed again. Reliance is also placed on the decision of Hon'ble Supreme Court in the case of CIT vs Durga Prasad More (1969) 72ITR807 (SC) in which it was held "If the amount represented the income of the assessee of the previous year, it was liable to be included in the total income and an enquiry whether for the purpose of bringing the amount to tax it was from a business activity or from some other source was not relevant". The commission income disclosed by the assessee are as under: -

Asst. Year	Commission Income declared in return filed u/s 139	
	Commission Income	Date
2010-11	157426.00	31-03-2012
2011-12	158960.00	29-03-2013
2012-13	266190.00	31-07-2013
2013-14	440541.00	24-01-2014
2014-15	454577.00	29-03-2015
2015-16	600225.00	19-11-2015
	2077919.00	

- e]** It is relevant to further mentioned here that the assessee had earned the commission income from the sale of plot in respect of colony developed by the Mohd Farooq which was duly disclosed while filing the return of income u/s 139 of the Act and without due consideration of the reasonable explanation submitted by the assessee which was supported from the documentary evidences, the addition so made by the ld AO is totally baseless and also arbitrarily.
- f]** Further the ld AO had not brought on record any incrementing material found as a result of search in the case of Mohd Farooque which shows the assessee

had earned any undisclosed or unrecorded income and the addition was made only on the basis of presumption and guesswork without any corroborating evidence found as a result of search in third party as discussed above, the decision dated 28.8.2015 of the Hon'ble Delhi High Court passed in the case CIT (Central)-III vs. Kabul Chawla in ITA No. 707, 709, 713/Del/2014 wherein the Hon'ble High Court has held that if the additions are made, but not based on any incriminating material found during search operation, then these additions are not sustainable in the eyes of law.

In light of above the addition made by the ld AO may kindly be deleted.”

7. Per contra, the ld. DR relied upon the orders of the ld. CIT(A).

8. We have heard the both parties and perused the materials available on record. We note that on 31.03.2012 the assessee has filed the return of income declaring total income of Rs. 1,57,430/- in respect of income earned from commission on sale of plots. The return filed by the assessee was accepted u/s 143(1) and no notice u/s 143(2) or 148 has been issued by the Department. Further, we observed that a search u/s 132A of the act was carried out at the premises of Mr. Farooq at metro plaza, at the time of search the authorized officer has seized certain documents relating to sale of plots through power of attorney and also commission basis and on the basis of above seized documents, the authorized officer issued summon u/s 131(1A) to Mr. Farooq and recorded his statement in which he has explained that he

and his six friends including Manoj kumar (assessee) are working as association in the name and style of "Marudhar Buildcon" in which they do land development work and sale of plots on commission basis.

9. We observed that the ld. AO has issued notice u/s 153C of the Act on 16.10.2017 to the assessee for filing of return of income on the basis of search documents, statement of Mr. Farooq and information found as a result of search in the case of Mohd Farooq. In response to the notice u/s 153C of the Act, the original return filed by the assessee should be treated as return u/s 153C of the Act. Further, we observed that during the assessment proceedings the assessee has submitted that what so ever income earned in respect of sale of plots on commission basis was duly disclosed in the return of income and which was accepted by Assessing Officer. On 24.12.2017 the ld. AO passed the order u/s 153C r.w.s. 144, assessed the total income of Rs. 5,17,430/- and made the addition of Rs. 3,60,000/- as undisclosed income in respect of commission without considering return filed u/s 139 of the Act.

10. During the appellate proceedings, the ld. AR for the assessee has filed written submissions which has been considered by the ld. CIT(A) in page 2 of its order and the findings are that the assessee was a member of an AOP

consisting of seven persons, engaged in selling and purchasing land on commission basis. The assessee had 10% share in the AOP. Shri Farooq, the main member of the AOP, stated on oath that the AOP had earned profit of Rs. 2,00,00,000/- over the assessment years 2010-11 to 2015-16. The assessee signed and agreed with the statement of Sh. Farooq. The assessee has not disputed that he has earned income of Rs. 20,00,000/- from selling and purchasing land on commission basis, over the A.YS 2010-11 to 2015-16 but what is contended is that the commission income of Rs.20,00,000/- was already declared in the returns of income filed u/s 139, and no further addition to income, as declared in the returns of income filed u/s 139, was called for. However, inspite of repeated queries by the A.O, the assessee failed to correlate the income declared in the returns with the seized documents containing details of transactions entered into by the assessee. On this issue, we note that the Id. CIT(A) noted that the assessee did not furnish any details before the A.O or in appeal, to explain, with reference to the seized documents containing details of transactions entered into by the assessee, how commission income was accounted for in his declared income, the manner in which the A.O has estimated the commission income pertaining to particular assessment years. Thus, even before us the assessee did not substantiate as to facts that the

commission income already declared the same as based on the seized material found. Thus, we are aware that the assessee raised various grounds challenging the validity of the assessment on legal grounds as well as on merits. Since, the Revenue also could not justify the addition clearly demonstrating before us that the addition is based on seized documents and how the commission income is added over and above commission income already disclosed by the assessee. The Bench is also aware about the recent decision of the Hon'ble Apex Court resting the controversy at set that on search related assessment addition on the completed assessment be sole based on the seized material can be made. While on dictating these orders the Bench also taken into consideration the instructions issued by the board in compliance to the decision of the Hon'ble Apex Court in the case of Abhishar Buildwell Private Limited on 23.08.2023. Thus, as clearly noted by the Id. CIT(A) in the order that the assessee needs to justify whether the commission income earned is from the same document found in the course of search and on the other hand, the Revenue is directed to supply the documents based upon which the addition is made. Thus, we do not want to fuss on the merits of the dispute in the light of these facts we feel in the interest of justice to set aside the

issue before the ld. A.O. so as to decide the issue after considering the facts as discussed hereinabove. Based on these observations the appeal of the assessee in ITA No. 100/Jodh/2019 is allowed for statistical purpose.

11. The Bench feels that the fact in the case in ITA No. 101 to 104/Jodh/2019 is exactly the similar to the fact ITA No. 100/Jodh/2019 and therefore, it is not imperative to repeat the fact in ITA No. 101 to 104/Jodh/2019. The decision taken by us in ITA No. 100/Jodh/2019 shall apply mutatis mutandis to ITA No. 101 to 104/Jodh/2019.

In the result, the appeals of the assessee are allowed for statistical purposes.

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 by placing the details on the notice board.

Sd/-

(RATHOD KAMLESH JAYANTBHAI)  
ACCOUNTANT MEMBER

Sd/-

(DR. S. SEETHALAKSHMI)  
JUDICIAL MEMBER

Dated : 03/10/2023

*\*Santosh*

Copy to:

1. The Appellant
2. The Respondent
3. The CIT

4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar  
Jodhpur Bench