

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "H" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 2143/Mum/2022 (A.Y. 2009-10)

Hussein Abbas Arsiwala 701, 17 Bandra Super Star, Perry Road Bandra West Mumbai-400 050. PAN : ABQPA2738L (Appellant)	Vs.	The CIT(A)-32 Mumbai. (Respondent)
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Assessee by	Mr. Rushabh Mehta
Department by	Shri Prakash Kishinchandani
Date of Hearing	27.07.2023
Date of Pronouncement	17.10.2023

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 17.6.2022 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and it relates to A.Y. 2009-10. The grounds of appeal urged by the assessee give rise to the following issues :-

- a) Disallowance of entire business promotion expenses
- b) Disallowance of entire profession fees expenses
- c) Disallowance of entire commission expenses
- d) Partial disallowance of 10% from out of various other expenses
- e) Addition of Rs. 2.50 crore towards commission income

2. Facts relating to the case are stated in brief. The assessee is a commission agent. The Assessing Officer noticed during the course of assessment proceedings relating to A.Y. 2012-13 that the assessee has not filed return of income for earlier years, even though he was having taxable income. Accordingly, he reopened the assessment relating to the year under consideration by issuing notice under section 148 of the Act on

27.4.2015. In response to the same the assessee filed the return of income on 13.10.2015 declaring a total income of Rs.1.02 crores. The Assessing Officer noticed from the profit and loss account filed by the assessee that he has claimed business promotion expenses of Rs. 2,42,750/-, professional fees expenses of Rs. 6,87,814/- and commission expenses of Rs. 54,55,501/-. Since the assessee did not furnish any details in respect of the above said expenses, the Assessing Officer disallowed them fully. With regard to commission expenses, the AO also observed that the assessee might have failed to deduct tax at source from it. In respect of the remaining expenses the Assessing Officer disallowed 10% of those expenses for want of proper bills and vouchers.

3. The Assessing Officer also noticed that the assessee has taken loan of Rs. 1.25 crores from M/s. Magnum Home Makers Pvt. Limited during the year under consideration. The assessee had taken loan from the above said concern in the earlier years also and accordingly the Opening balance of loan as on 1.4.2008 was shown at Rs. 2.00 crores. After including the loan of Rs.1.25 crores taken during the year under consideration, the assessee showed Closing balance as on 31.3.2009 at Rs. 3.25 crores. The assessee furnished a confirmation letter from M/s. Magnum Home Makers Pvt. Limited and it confirmed the loan of Rs.1.25 crores paid during the year under consideration. During the course of assessment proceedings relating to AY 2008-09, the AO had noticed that there was opening balance of Rs.50.00 lakhs in the account of Magnum Home Makers P Ltd and further the assessee had taken loan of Rs.1.50 crores during that year making the closing balance as Rs.2.00 crores as on 31.3.2008. However, M/s Magnum Home Makers P Ltd did not confirm the above said Rs.2.00 crores. Accordingly, the Assessing Officer presumed that the assessee has repaid the amount of Rs. 2 crores and accordingly proposed to assess the same as income of the assessee.

4. The assessee submitted that M/s. Magnum Home Makers Pvt. Limited had actually given advance to him. It was submitted that, for the

reasons best known to them, they have transferred a sum of Rs. 2.50 crores as brokerage payment out of the advance given to the assessee. The assessee submitted that it was not aware of the above said treatment given by the above said company. It was submitted that these details came to the knowledge of the assessee only during the course of reassessment proceedings, when the assessing officer called for information from it. It was also submitted that the TDS deduction was reflected only in the e-TDS statement on 3.8.2018, i.e., the said party has reported the TDS deduction very belatedly. It was submitted that the assessee was neither informed nor aware of the above said entry passed by M/s. Magnum Home Makers Pvt. Limited. Accordingly, it was submitted that the assessee has continued to show the amount received from the above said company as advance/loan only. However, the assessee agreed to offer the same and accordingly prayed for deduction of TDS amount of Rs.28,32,500/- deducted from Rs.2.50 crores referred above. The Assessing Officer did not accept the above said explanations of the assessee and accordingly assessed Rs. 2.50 crores as income of the assessee. The Assessing Officer did not however allow the TDS credit.

5. In the appellate proceedings, the learned CIT(A) confirmed the disallowance of various expenses made by the Assessing Officer. With regard to the adhoc disallowance of 10% of the expenses, the learned CIT(A) directed the Assessing Officer to verify the explanation given by the assessee and decide the same afresh. The learned CIT(A) also confirmed the addition of Rs. 2.50 crores made by the Assessing Officer. Aggrieved by the order passed by the learned CIT(A) the assessee has filed this appeal before the Tribunal.

6. We heard rival contentions and perused the record. We noticed earlier that the assessee is a commission agent and he has maintained books of accounts. Accordingly, he has filed Profit and Loss account along with the return of income. We noticed earlier that the return of income was filed by the assessee for AY 2009-10 on 13.10.2015 in response to the

notice issued u/s 148 of the Act, i.e., almost after expiry of more than six years from the end of the year under consideration.

7. During the course of assessment proceedings, the AO asked the assessee to furnish details and evidences for incurring of business promotion expenses, professional fees payment and commission expenses paid. Since the assessee could not furnish the details, the AO has disallowed entire amount of expenses claimed under the above said three heads. We noticed earlier that the assessment has been reopened after expiry of six years from the end of the financial year and due to passage of time, it is quite natural that it might be difficult for the assessee to furnish the relevant details in a perfect manner as sought by the AO. Hence, in our view, the AO should have been considerate in examining the expenses claimed in the profit and loss account. It is not the case of the AO that the assessee did not incur these expenses at all and no evidence was brought on record to show that they were bogus claims. Also, it is inconceivable that the assessee could not have incurred expenses at all towards business promotion, professional fees and commission payments. Under these set of facts, we are of the view that it was justifiable for the AO to disallow a portion of expenses to take care of deficiencies, instead of disallowing entire amount of expenses. The AO has also observed that the assessee might have not deducted TDS from commission payments. Admittedly it is only an apprehension and it cannot be a ground to disallow the expenses. We noticed earlier that the AO has disallowed 10% of most of the expenses for want of details, where as he has disallowed 100% of claim in respect of above said three expenses. As observed by us earlier, we are of the view that, in the facts and circumstances of the case, the disallowance of entire claim of above said three expenses was not justified. Accordingly, we are of the view that it would be justified if part of expenses is disallowed to take care of deficiencies and revenue leakages. Accordingly, we are of the view that the disallowance should be restricted to 25% of the expenses claimed under the head business promotion expenses, professional fees payment and commission expenses paid and

the same would meet the ends of justice. Accordingly, we set aside the order passed by Ld CIT(A) on these three issues and direct the AO to restrict the disallowance to 25% of the claim as discussed above.

8. With regard to disallowance of 10% in respect of remaining expenses, we notice that the Ld CIT(A) has already restored the matter to the file of AO with the direction to re-examine the same in the light of details furnished by the assessee in a letter. Accordingly, we are of the view that the decision rendered on this issue by Ld CIT(A) does not call for any interference.

9. The last issue urged by the assessee relates to the addition of Rs.2.50 crores made by the AO. The Ld A.R submitted that the assessee has received only advance amounts from M/s Magnum Home makers P Ltd as mentioned earlier. The assessee had received a sum of Rs.3.25 crores from the above said company over the years. He submitted that the assessee was neither informed nor aware of the fact that the above said company has transferred a sum of Rs.2.50 crores from advance account to its expenditure account. He submitted that the assessee has deducted TDS and these facts came to the knowledge of the assessee only during the course of reassessment proceedings.

10. He submitted that the commission income becomes payable to the assessee on the basis of sales procured/services rendered by the assessee for M/s Magnum Home Makers P Ltd. He submitted that the above said company did not link the expenses claimed by it with the sales/services while transferring the amount of Rs.2.50 crores to commission expenses account. Further, it did not furnish any such details to the assessee. He submitted that the assessee had erroneously agreed to offer the above said amount as his income before the AO, without realizing these accounting aspects. He submitted that to tax any receipt, it has to be first shown that the income has accrued to the assessee, i.e., unless it is shown that the income has accrued to the assessee by linking the payment with the

sales/services rendered by the assessee, it cannot be considered as income of the assessee, merely because the payer has booked the payment as expenditure. He submitted that the payer has accounted for the commission expenses to suit his convenience and it cannot be presumed that the said action of the payer would give rise to income in the hands of the assessee. Income will arise in the hands of the assessee in accordance with the method of accounting employed by the assessee. Accordingly, he submitted that merely because the above said person has converted a part of advance amount as expenditure, the same will not give rise to any taxable event in the hands of the assessee. He further submitted that majority of amount pertained to earlier years and not to the year under consideration.

10. We heard Ld D.R and perused the record. We notice that there is not dispute with regard to the receipt of money by the assessee from M/s Magnum Home Makers P Ltd. The Ledger Account furnished by M/s Magnum Home Maker P Ltd for the year under consideration is given below:-

MAGNUM HOME MAKER PVT LTD

Sundry Creditors Ledger For the Period of April-2008 to March-2009

<u>Date</u>	<u>Particulars</u>	<u>Debit</u>	<u>Credit</u>
<u>Balance</u>			
01-04-2008	To Balance b/d	2,00,00,000	
16.04.2008	“ Union Bank	21,67,500	
16.04.2008	“ TDS	28,32,500	
31.03.2009	By Journal Voucher		2,50,00,000
NIL			
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		2,50,00,000	2,50,00,000
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The above said ledger account describes the payment made on 16.4.2008 amounting to Rs.21,67,500/- as ‘facilitators brokerage’. The above said company has also furnished ledger account of the earlier two years and

the details of payment of the opening balance of Rs.2.00 crores in the earlier years are as given below:-

02-12-2006	Property purchased at Vasai	25,00,000
12-12-2006	Purchase of Property at Vasai	25,00,000

	As on 31.3.2007	50,00,000
09-05-2007	Property at Nallasopara	1,50,00,000

	As on 31.3.2008	2,00,00,000
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We notice that the above said amount of Rs.2,00,00,000/- was paid prior to 09-05-2007. It is the submission of the assessee that these payments do not pertain to AY 2009-10 and it pertained to earlier years. The assessee also contended that the above said company has transferred the above said payment along with a sum of Rs.21,67,500/- and TDS amount of Rs.28,32,500/- as brokerage during the financial year relevant to the assessment year 2009-10.

11. The income is taxable in the hands of any assessee as per the accounting system followed by him. For example, if the payer follows mercantile system of accounting and the receiver follows cash system of accounting, then the payer will account for expenses, when it accrues to him, while the receiver will declare the said payment as its income, when he actually receives it. It does mean that, merely because a payer has claimed some payment as expenditure in a particular year, it would not automatically to be considered as income in the hands of the receiver in the very same year. We noticed that the payer M/s Magnum Homes have paid the sum of Rs.2.00 crores prior to May, 2007, i.e., much earlier to the year under consideration. It is the claim of the assessee that the above said payments represents income of earlier years and not related to AY 2009-10. It is the contention of the assessee that the amount of Rs.2.00 crores cannot be considered to be income of the assessee in AY 2009-10 merely because M/s Magnum Homes has claimed the same as its

expenditure in AY 2009-10. As noted earlier, the accounting treatment given by the payer cannot be imported into the hands of the receiver. There is merit in the above said contention of the assessee. Further, we noticed that the amount of Rs.2.00 crores were related to specific projects mentioned earlier and it is the case of the assessee that these incomes were related to the earlier years. There should not be any dispute that the commission income is related to the sales/services rendered by the assessee. If the services had been rendered in the earlier years and further, if the payments were also made in the earlier years, then the said income shall also pertain to the earlier years only. The financial statements furnished by the assessee as well as M/s Magum Homes shows the balance of Rs.1.25 crores only as on 31.3.2009, being the amount received during the financial year relevant to AY 2009-10. Hence, there is merit in the contentions of the assessee that the amount of Rs.2.00 crores cannot be considered as his income of AY 2009-10. The assessee also submits that he was not aware of deduction of TDS at all, as the transaction of deduction of TDS was reported by M/s Magnum Homes to the Income tax department in the year 2015 only, i.e., the details of TDS was reflected in Form 26AS of the assessee, only in the year 2015, when the assessing officer called for details from them during the course of present assessment proceedings. This fact supports the case of the assessee.

12. With regard to the remaining amount of Rs.50.00 lakhs, we noticed earlier that the same consisted of TDS amount of Rs.28,32,500/- and cheque payment of Rs.21,67,500/-. From the explanations furnished by the assessee before the AO, it is noticed that the assessee was not aware of the above said cheque payment at all. The assessee has stated that the payment of Rs.2.00 crores has been grossed up to Rs.2.50 crores for the purpose of deduction of TDS. The ledger account in the books of M/s Magnum Homes also mentions the cheque payment of Rs.21,67,500/- as 'facilitators brokerage', i.e., it did not refer to any specific project, as was mentioned in the earlier years against each payment. In any case, the

assessee has declared brokerage income of Rs.2.00 crores during the year under consideration. Accordingly, we are of the view that the amount of Rs.50.00 lakhs cannot be assessed separately, by placing reliance on the ledger account of M/s Magnum Homes without establishing that the said amount, if it has been paid really to the assessee, has resulted into income in the hands of the assessee.

13. For the reasons discussed above, we are of the view that the addition of Rs.2.50 crores made in the hands of the assessee, in the peculiar facts of this case, is not justified. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete this addition of Rs.2.50 crores.

14. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on 17.10.2023

Sd/-
(Narender Kumar Choudhry)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 17/10/2023

SA

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai