

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'बी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A No.789/Kol/2023
Assessment year: 2015-16

DCIT, Central Circle-4(4), KolkataAppellant
vs.

Aryav Securities Pvt. Ltd.....Respondent
18, Unit-104, British Indian
Street, Kolkata-700069.
[PAN: AAICA8339D]

Appearances by:

Shri P. P. Barman, Addl. CIT- Sr. DR, appeared on behalf of the appellant.
Shri Manish Tiwari, FCA, appeared on behalf of the Respondent.

Date of concluding the hearing : September 14, 2023

Date of pronouncing the order : November 28, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the revenue against the order dated 31.05.2023 of the Commissioner of Income Tax (Appeals)-27, Kolkata (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The revenue in this appeal has taken the following grounds of appeal:

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and facts of the case is restricted the addition (undisclosed commission income @2%) to 0.1% of the total turnover (both of buy and sell). Rest of the addition has been deleted by the Ld. CIT(A) based on the statement of Mr. Aurn Shah, director of Aryav Securities Pvt. Ltd. at the time of appellate stage. Whereas, in this case addition had

been made on the basis of statement recorded from key person of the Ms Aryav Securities Pvt. Ltd. at the time Survey operation u/'s 133A of the income tax Act, 1961 as part of Project Falcon.

2. That the revenue reserves its rights to substantiate, modify, delete, supplement and/or alter the grounds at any time of the appeal proceedings.”

3. A perusal of the above grounds of appeal would reveal that the revenue is aggrieved by the action of the CIT(A) in restricting the addition on account of commission income @0.1% of the total turnover as against 2% determined by the Assessing Officer in respect of share trading activity/non-genuine transactions made by the assessee on behalf of his client over Bombay Stock Exchange during the year. The Assessing Officer determined the undisclosed income of the assessee @2% of the turnover, whereas, the ld. CIT(A) restricted the addition to the extent of 0.1% of the turnover observing as under:

I find that the AO, has relied completely and exclusively upon the statement given by Shri Arun Shah to come to the conclusion that the appellant was involved in providing accommodation entries to various clients against receipt of commission. He has brought on record nothing by way of investigative efforts, to show that there was anything false in the said statement. The entire modus operandi was accepted by him. He did not contradict the statement when it said that all clients in this connection were brought to the appellant by the two aforementioned persons, Mr. Anurag Jhunjhunwala & Mr. Sanjay Jhunjhunwala, and that it was they who dealt with the clients as well as gave directions to the appellant as also the fact it was these two who dealt with the cash part of the transactions (the commissions involved). The AO has not contradicted the statement or shown it otherwise to be incorrect when it says that a total commission of 2% was received by Shri Anurag Jhunjhunwala and Shri Sanjay Jhunjhunwala upon the total turnover of the transactions. I find that the AO has accepted all parts and aspects of the statement of Shri Arun Shah and has made additions based only upon this statement. The only place where he has, however, diverged from the said statement is that while Shri Arun Shah in his statement has stated that it was Shri Anurag Jhunjhunwala and Shri Sanjay Jhunjhunwala who received 2% in terms of Commission and of this the appellant received 0.1 % of the total turnover as commission, the assessing officer has considered the

commission @ 2% as having been received by the appellant itself, without providing any material evidence or reasoning for doing so. What is manifestly strange is that the assessing officer throughout the reassessment proceedings has relied only on the statement of Mr Arun Shah in determining the escapement of income; but while coming to the actual quantification of this escapement, he has ignored the assertion of the same statement that it was Shri Anurag Jhunjhunwala and Shri Sanjay Jhunjhunwala who received 2% in terms of commission and went ahead and assumed that the commission received. By the appellant itself was @ 2% - which is manifestly at divergence with the statement of Mr Arun Shah. | also find that the assessing officer has nowhere in the assessment order discussed either of the two important issues:

i. Why he disagreed with the rate of commission conceded to have been received as per the statement of Shri Arun Shah,

ii. How did he arrive at a rate of 2% for the said commission.

The first question assumes significance in view of the fact that the AO has nowhere contradicted Shri Arun Shah when the latter has specifically mentioned a rate of 0.1 % in his statement, nor has he contradicted the part of the statement where Shri Shah declares that the total commission was received from the client in cash by Shri Anurag Jhunjhunwala and Shri Sanjay Jhunjhunwala - who received 2% - while the appellant received only 0.1%. This ignoring of only one part of the statement without offering any reasons for doing so is tantamount to a summary and arbitrary rejection of this part, without as much as raising any queries with regard to the major portion of the statement; and therefore cannot form a proper or acceptable procedure for lawful assessment.

The second question takes us to the fundamental basis for making estimations. An estimate has to be based upon rational concrete material/evidence or reasoning. A basis for making an estimate has to be provided before making any such estimate. I find that the assessment order is also completely silent upon this matter. There is no basis whatsoever that has been provided for arriving at a commission rate of 2% for the appellant. This action of the assessing officer is unjustified and is inconsistent when examined in the light of statement of Mr Arun Shah - a statement that otherwise has been accepted in toto by the A.O without demur.

It was further brought to my attention through the written submissions and paper books submitted by the AR for the AYs 2014-15, 2015-16 and 2016-17 that the same assessing officer, based upon material emanating from the same survey, conducted on other share brokers, on the same day and in identical circumstances and issues, has ascertained different rates

of commission in different cases. It has been contented by the AR that when the facts and circumstances of all these cases are exactly the same, how could the same A.O arbitrarily take five different views in five different cases for making additions in respect of the same issues embedded within the same factual matrix. The AR has submitted copies of assessment orders of four other persons who were stock brokers covered by the same Survey, in this connection. I have examined the copies of the said assessment orders and found that the facts of the cases were similar to those in the case of the present appellant. However, the basis as well as the rates of commission assumed by the same AO are different in all four cases - including that of the appellant. The situation in this regard is somewhat as under:

Sl. No	Name of the assessee	Date of order	Date of survey	Assessing Officer	Rate of commission	Basis for assuming the said rate
1	Giriraj Stock Broking Pvt. Ltd.	24.03.22	3.12.19	Same as that of present appellant	Ad hoc Rs.10,00,000/-	Surrender by director of assessee
2	Lalit Kumar Tulshyan	29.03.22	3.12.19	Same as that of present appellant	Ad hoc Rs.50,000/-	Surrender by assessee
3	Kayan Securities Pvt. Ltd.	21.3.22	3.12.19	Same as that of present appellant	0.15%	Surrender by assessee
4	Vedica Vanijya Pvt. Ltd.	14.3.22	3.12.19	Same as that of present appellant	1%	No basis mentioned
5	Present appellant	7.2.22	3.12.19	Same as that in above cases	2%	No basis mentioned

The above table shows that marked differences in the rates of commission were taken for different assessees by the AO. The AO has taken an ad hoc figure in one case and in the others he has gone ahead and assumed commission rates varying from 0.15% to 2%. It is also noted that while the same AO, in most cases, has accepted what was stated by the Concerned person in his statement during the survey, and commission was calculated accordingly, in the case of the appellant, while the rest of the

statement was accepted as it is by the AO, the rate of commission was ignored without any discussions and an arbitrary rate assumed.

Assessments, especially estimated assessments, have to rest firmly on the bedrock of certain fundamental principles of law and of jurisprudence. Amongst these principles is the important principle of consistency. Consistency has the effect of removing internal arbitrariness of an estimate. In the present case, it is obvious that there is no internal consistency in the estimates formed by the AO. From an ad hoc acceptance of what was stated in the statement by the key person, to the acceptance of the rates of commission quoted by the key persons, to the complete ignoring of what was stated by the key person, under the same circumstances could hardly denote consistency.

The appellant has given details of the entire modus operandi followed by him and pointed out the names of two key persons, Mr. Anurag Jhunjhunwala and Mr. Sanjay Jhunjhunwala, who obtained clients for him with regard to the bogus trades. He has explained that it was these persons who made the dealings in cash with such clients. It was these persons who gave orders to the appellant on behalf of the clients. Therefore it stands to reasons that they would also partake of the maximum piece from the commission obtained from these clients. It has been specified in the statement of Shri Arun Shah, and not contradicted by the AO, that it was the aforementioned two persons who received the commission in cash from the clients and this was @ 2% of the total transactions (both, buy and sell). The AO has nowhere contested these averments of Shri Arun Shah. Once it is accepted that the main persons who used to liaison with the clients and would therefore automatically take away a large part of the commission obtained, it would not be unreasonable to accept the rate of Commission mentioned by the appellant which he kept for himself - after the two main persons (either singly or jointly) had taken their portions out of the total commission received of 2%. This appears to be reasonable in terms of business practice also. This is especially true in view of the fact that nothing at all has been brought on record by the AO to controvert anything whatsoever that was stated in the statement of Shri Shah.

Further, since the assessing officer himself has failed to bring on record any material to accept that the rate of commission of 2% should have been applied in this case, while several other disparate rates were being applied in other similar cases, this estimate assumes the colour of being arbitrary, unreliable and unacceptable. In other cases the A.O has accepted what was stated in the respective statements, while in the present case, I find that while everything stated in the statement of Shri Arun Shah has indeed been accepted, the rate of commission mentioned

therein has been ignored. I thereof cannot, agree with the AO's estimate in this regard. In my view, based on the statement of Mr Arun Shah and as per the aforesaid discussions, the rate of commission should be restricted to 0.1% as stated by Shri Arun Shah in his statement - under the present facts and circumstances since this is based upon a reasonable reasoning offered by Shri Arun Shah and has also not been controverted at any point by the AO. The AO is directed therefore to restrict the addition to 0.1% of the total turnover (both of buy and sell) as already calculated by him. The rest of the addition is to be deleted. These set of grounds are accordingly partly allowed subject to the above directions.”

A perusal of the above observation of the CIT(A) would reveal that the Id. CIT(A) has thoroughly discussed the statements of Shri Arun Shah which was recorded during the survey action and further has discussed the facts and circumstances of the case. The Id. CIT(A) has observed that the said Shri Arun Shah has specifically mentioned that the appellant had received commission of 0.1% only. The Id. CIT(A) has brought on record that in case of other parties, the Assessing Officer has assessed the commission income at different rates. He has further observed that the estimation made by the Assessing Officer was not based on any relevant material. He has further observed that the assessee had given details of entire modus operandi followed by him and pointed out names of key persons who obtained clients from him with regard to bogus trades. That the Assessing Officer has accepted every part of the statement of Shri Arun Shah recorded in survey action but ignored the statement, wherein, he had stated that the assessee had received commission income @ 0.1% only.

4. After hearing the rival submissions, we find that the order of the CIT(A) is well-reasoned and we do not find any reason to interfere with the same. In view of this, we do not find any merit in the appeal of the revenue and the same is accordingly dismissed.

5. In the result, the appeal of the revenue stands dismissed.

Kolkata, the 28th November, 2023.

Sd/-

[डॉक्टर मनीष बोरड /Dr. Manish Borad]
लेखा सदस्य /Accountant Member

Sd/-

[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य /Judicial Member

Dated: 28.11.2023.

RS

Copy of the order forwarded to:

- 1 DCIT, Central Circle-4(4), Kolkata
2. Aryav Securities Pvt. Ltd
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches