

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND
SHRI PRAKASH CHAND YADAV, JUDICIAL MEMBER**

ITA No. 761/Bang/2024
Assessment Year: 2016-17

Pongianna Gounder, Mani Gounder, 39, Chinnamuthu 3 rd Street, E.K Valasu, Erode-638 004. PAN – BNPPM 2743 B	Vs.	The Asst. Commissioner of Income Tax, Central Circle- 2(4), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sreedhar, Advocate
Revenue by	:	Shri Chinmay Aanad Jain, JCIT (DR)

Date of hearing	:	01.07.2024
Date of Pronouncement	:	04.07.2024

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

This is an appeal filed by the assessee against the order passed by the Id. CIT(A)-15, Bangalore dated 22/03/2024 having DIN No. ITBA/APL/M/250/2023-24/1063190832(1) for the assessment year 2016-17.

2. At the outset, the Id. Counsel for the assessee before us submitted that he has been instructed by the assessee not to press ground Nos. 1 to 4 and therefore, we dismiss the same as infructuous.

3. The only ground raised by the assessee in ground No. 5 is that the Id. CIT(A) erred in confirming the addition made by the AO for Rs. 4,04,00,000/- on gross basis instead of estimating the same on some reasonable and scientific basis.
4. The necessary facts arising from the order of the authorities below are that the assessee in the present case is an individual and claimed to be engaged in the real estate business activity on a commission basis. In the consequence to the search carried out in the case of M/s Ramalingam Construction Company u/s 132 of the Act, the assessee was also made subject to search dated 30/11/2016. As a result of search, various documents were seized from the premises of the assessee bearing No. A/RCE7/1 representing the land transaction dealing of sale and purchase of the properties between the 3rd parties but evidencing that the assessee has earned an income of Rs. 4,04,00,000/- out of such land transaction deal. This fact was also admitted by the assessee having earned a profit of Rs. 4,04,00,000/- in the statement furnished u/s 132(4) and 131(1A) of the Act. However, the assessee furnished the return of income in response to the notice issued u/s 153C of the Act at Rs. 16,46,030/- being 2.5% of the total credits reflected in the bank statement amounting to Rs. 6,38,31,000/- including the sum of Rs. 4,04,00,000/- only. As per the assessee, he has been earning commission income on the real estate transaction deals @2.5%, which has been duly offered in the return of income. The assessee has also retracted from the statement furnished u/s 132(4) of the Act by stating that the gross amount of Rs. 4,04,00,000/- does not represent the income.
5. However, the AO disagreed with the contention of the assessee on the reasoning that the retraction was filed by the assessee after a gap

of 2 years and, therefore, such retraction is not reliable. Likewise, the AO also observed that the statement was furnished voluntarily in the presence of witnesses and without any undue influence, threat or coercion.

6. Likewise, the assessee has not furnished any documents suggesting the expenses incurred against such income of Rs. 4,04,00,000/-. Furthermore, no document suggesting the expenses against such income was found during the search proceedings, therefore, the AO calculated the income of the assessee for Rs. 4,04,00,000/- and added to the total income of the assessee.

7. Aggrieved, assessee preferred an appeal before the CIT(A) and contended that the notice u/s 153C of the Act was issued dated 21/06/2018 and the notice u/s 142(1) of the Act was issued dated 29/10/2018 for seeking clarification from the assessee for adding the income of Rs. 4,04,00,000/- on gross basis. The assessee immediately thereafter filed retraction statement dated 07/11/2018 and, therefore, it cannot be said that the statement was furnished after the gap of 2 years. Further, the assessee reiterated the contentions as made during the assessment proceedings. However, the Id. CIT(A) rejected the contentions of the assessee by observing that there were documents found in the form of memorandum of understanding evidencing that the assessee has earned an income of Rs. 4,04,00,000/- and, therefore, such transaction cannot be treated as mere land dealing transaction in the capacity of middleman for fixed commission. Furthermore, the Id. CIT(A) observed that there was no document furnished by the assessee suggesting that the expenses were incurred by him against the impugned income. Thus, the Id. CIT(A) was pleased to uphold the finding of the AO.

8. Being aggrieved by the order of the Id. CIT-A, the assessee is in appeal before us.

9. The Id. AR before us filed a written submission running from pages 1 and 2 and contended that the sum of Rs. 4,04,00,000/- represents the business receipts, which cannot be taxed on a gross basis. As such, the assessee has been acting as a commission agent only and has been offered income constantly @2.5% of the credits shown in the bank statement, which was accepted by the revenue for all the years after making minor additions.

10. On the other hand, the Id. DR vehemently supported the orders of the authorities below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that assessee in his statement furnished under section 132(4) and 131(1A) of the Act has admitted having earned business profit amounting to ₹ 4,04,00,000.00 on the land transaction deal. As per the assessee the amount of ₹ 4,04,00,000.00 represents the gross receipts and therefore only percentage of such gross receipt should be brought to tax. As such, the assessee has offered an income of ₹ 16,46,030.00 being 2.5% of all the credits appearing in the bank including the sum of ₹ 4,04,00,000.00. As per the assessee, he has been offering commission income at the rate of 2.5% since the many years which was also accepted by the revenue in all the years subject to minor variation. However, the Id. CIT-A rejected the contention of the assessee on the reasoning that the transaction in dispute was not in the nature of real estate transaction on commission basis. Furthermore, the assessee has also admitted such income in the statement furnished under section 132(4) and 131(1A) of the Act.

11.1 Now the controversy arises for our consideration whether the amount of ₹ 4,04,00,000.00 represents the income of the assessee in the given set of facts. In this regard, we note that assessee himself has considered the impugned amount while calculating the income on all the credits shown by him (the assessee) reflecting in his bank statement. However, the revenue has treated the sum of ₹ 4,04,00,000.00 as income on gross basis without adjusting the same from the total credits in the bank which were considered by the assessee as income on estimated basis. In simple words, the revenue has taken contradictory stand by adding the income of ₹ 4,04,00,000.00 on gross basis as well as by accepting the income shown by the assessee on the same amount of ₹ 4,04,00,000.00 on estimated basis. As such, the revenue should have reduced the amount of ₹ 4,04,00,000.00 from the gross receipts shown by the assessee while calculating the income on an estimated basis. In other words, it appears that the revenue has accepted the basis of estimating the income on percentage basis declared by the assessee on the sum of ₹ 4,04,00,000.00 only. On this count only, the addition made by the revenue is not sustainable.

11.2 However, the next aspect that arises for our consideration is whether the assessee is acting as a property agent as far as the transaction in dispute is concerned. In this regard, we note that the role of an agent is to bring parties together to buy and sell the properties. The property agent generally keeps the database of the parties who are willing to buy the properties as well as who are willing to sell the properties. As and when any deal strikes for the purchase and sale of the property, the agent generally takes some commission from the parties for arranging the deal done. The property agents generally are aware of the market rate and stamp value of the properties. Sometime,

any good deal comes to the agent, they also make advance payment to the concerned party for getting the property sold at the agreed price and on receipt of any amount over and above agreed price of the property on maturity of deal, that shall be treated as the business profit of the assessee but the possibility of sharing such profit with other agents who work in tandem in the property transaction deal and other connected expenses cannot be ruled out. But to our understanding in either of the cases the character of the income of the assessee will not change. As such the income should be classified as business income and by way of brokerage/commission. Accordingly, we hold that the nature of income shown by the assessee is from the activity of real estate dealings only.

11.3 The next controversy arises that the assessee has not furnished any details of the expenses incurred by him against the sale of the property and therefore the same should be made subject to the addition on a gross basis. If we go by the version of the revenue, the income earned by the assessee should be available to him in any form i.e. investment or the assessee should have incurred for his personal purposes. To this effect, nothing has been brought on record by the revenue despite having conducted the search on the premise of the assessee. Furthermore, on perusal of the bank statement of the assessee, we note that there are regular withdrawals from the bank statement which indicates that the money did not remain with the assessee. Admittedly, the assessee is not maintaining the books of accounts and has been declaring the income consistently on estimation basis which was also accepted by the revenue in the earlier years. Therefore, we are of the view that the income on gross basis cannot be added in the hands of the assessee.

11.4 It is pertinent to note that the Hon'ble Gujarat High Court in the case of CIT Vs president industries reported in 124 taxman 654 has observed that:

“The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative”

11.5 In view of the principles laid down by the Hon'ble Jurisdictional High Court, we hold that the business receipt shown by the assessee of ₹ 4,04,00,000.00 cannot be made subject to tax in its entirety. It is only the element of profit embedded in such gross business receipts which needs to be brought to tax. Thus, we hold that the authorities below have erred in treating the gross receipt as taxable income of the assessee.

11.6 The next controversy arises how to work out the income on an estimated basis. We are conscious of the fact that there is no standard formula for calculating the income on an estimated basis. In other words, some element of guesswork is involved for calculating the income based on some estimate, but it should be on scientific foundation. The Hon'ble Gujarat High Court in the case of Kiran industries Pvt Ltd in Tax Appeal No. 449 of 2011 has held as under:

Having perused the documents on record with the assistance of the learned counsel for the revenue, we notice that the Tribunal had though confirmed the view of the revenue authorities with respect to the rejection of the books of accounts of the assessee did not accept the re-computation of higher rate of gross profit on the premise that the average gross profit rate of last three years immediately preceding the year under consideration came to 14.79%. On such basis, the Tribunal found that the claim of gross profit rate @ 15.27% cannot be stated to be low. On such basis, the assessee's appeal was allowed.

We are of the opinion that the findings of the Tribunal are based on evidence on record and are purely factual in nature. The Tribunal after taking

into account relevant materials, came to the conclusion that a certain rate of gross profit presented by the assessee was acceptable.

11.7 From the above judgement, we note that the profit declared by the assessee in the earlier years should be the benchmark for estimating the income of the assessee if there is no major variation in the facts of the year in dispute viz a viz the facts of the earlier years. On perusal of the order of the authorities below, we note that there was no change in the facts of the case in the current year in relation to the earlier/ later assessment years. Therefore, we are of the view that the historical data can be adopted for estimating the income of the assessee. It is a known fact that the assessee in the earlier has been declaring income at the rate of 2.5% consistently which has also been admitted by the revenue especially in the assessment year 2016-17 where the scrutiny assessment was conducted by the AO under the provisions of section 143(3) of the Act. However, at the time of hearing, the Id. AR agreed to offer an income of 12.50% of the gross receipts discussed in the preceding paragraph. Thus, we set aside the finding of the Id. CIT-A and direct the AO to estimate the income at 12.5% of the gross receipts shown by the assessee to prevent any revenue leakage. Hence, the ground of appeal of the assessee is partly allowed.

12. In the result, the appeal of the assessee is partly allowed.

Order pronounced in court on 4th day of July, 2024

Sd/-

(Prakash Chand Yadav)

Judicial Member

Bangalore,

Dated, 4th July, 2024

Sd/-

(WASEEM AHMED)

Accountant Member

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore