

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

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER**

**ITA Nos. 2962, 3010, 3011 & 3013/Mum/2024
Assessment Year: 2011-12, 2012-13 & 2013-14**

Income Tax Officer 13(1)(1), Mumbai	Vs.	Nirnay Commodities and Derivatives Pvt. Ltd. 26B, Dattani Apartment, 2 nd Floor, Chitabhai Patel Road, Kandivali East, Maharashtra-400101.
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri S. Srinivasu, CIT, DR & Shri
Ashok Kumar Ambastha, Sr. DR

Date of Hearing : 29.07.2024
Date of Pronouncement : 23.08.2024

ORDER

PER PRASHANT MAHARISHI, ACCOUNTANT MEMBER:

1. **All** these appeals involve common ground of appeal and therefore these are disposed of by this common order.
2. The Ld Assessing officer has challenged the deletion of following additions for respective years as under :-

A Y	Assessment Order	Appellate Order	Addition Deleted u/s 68 by the Ld CIT (A)	Addition confirmed by the Ld CIT (A) as Commission Income
2011-12 ITA No 2962/M/2024	U/s 143 (3) rws 147 of the Act dated	31/03/2024	Rs 27,36,17,764/-	Rs 6,84,044/- 0.25 % as Commission Income

	26/12/2018			
Ay 2012-13 ITA no 3010/Mum/2024	U/s 143 (3) rws 147 of the Act dated 27/12/2019	31/03/2024	Rs 29,61,46,275/-	Rs. 37,01,828 being 1.25%
AY 2012-13 ITA No 3013/MUM/2024	U/s 143 (3) rws 147 of the Act dated 26/12/2018	31/03/2024	Rs 4,16,77,284/-	Rs. 1,04,193 being 0.25%
AY 2013-14 ITA No 3011/MUM/2024	U/s 143 (3) rws 147 of the Act dated 27/12/2019	31/03/2024	Rs 1,34,58,520/-	Rs. 1,68,231 being 1.25%

3. Therefore, the learned assessing officer is aggrieved by that and is in appeal before us.
4. Brief facts of the case show that :-
 - i. Assessee for assessment year 2011 - 12 (ITA number 2962/MUM/2024) has filed its return of income on 30/9/2011 at a total income of Rs 5530/-. This return of income was processed and not selected for scrutiny.
 - ii. Subsequently the return of income was picked up for reopening of the assessment because assessee is involved in providing accommodation entries in the earlier name of Mega Money commodities and derivatives private limited for the financial year 2010 - 11, 2011 - 12.
 - iii. For financial year 2010 - 11 it was found that the amount of Rs. 273,617,761 has been credited in the several bank accounts of these entity and was further transferred to various beneficiaries. Therefore, notice under section 148 was issued

on 30/3/2018 which was returned as the assessee has left the address.

- iv. Several notices were issued and none of them replied. In paragraph number 3.2 of the assessment order the complete modus operandi of providing bogus accommodation entries through different accounts of the assessee company from different banks was noted.
- v. Information from banks was also called for under section 133(6) of the act.
- vi. Summons were also issued to the directors of this company. One director attended and confessed that he is an accommodation entry provider, and he has 12 different firms in his name and his family members. He explained the detailed modus operandi of provision of the bogus accommodation entries. It was stated that for financial year 2010 – 11 the total accommodation entries were Rs. 273,617,764/-, for financial year 2011 – 12 total accommodation entries provided were 4,16,77,284/-.
- vii. The Deputy Director of Income Tax (Investigation) had specifically recommended the assessing officer that the addition is required to be made in the hands of the beneficiaries however till then the addition should also be made in the hands of the assessee.
- viii. Assessee made submissions on 7/12/2018 and therefore a show cause notice was also issued to the assessee why the entire amount of Rs. 273,617,764/- should not be treated as the unexplained income of the assessee.
- ix. The assessee submitted its reply stating that Mr. Lavkush Gadhiya, director of the company, has provided accommodation

entries to many persons. He also provided an affidavit, stating methodology adopted for providing these accommodation entries by opening various bank accounts in different names on behalf of assessee company with various banks, he also gave a working of the accommodation entries and stated that he has earned commission income at the rate of 1% – 1.25% usually however out of that the director used to take a commission of 0.25%.

- x. Therefore, the above amount should not be added into the hands of the assessee under section 68 of the income tax act but commission income at the rate of 1% amounting to Rs. 2,736,177 may be considered as income.
- xi. However, it was further stated that in several other cases the commission income has been earned by the accommodation entry providers from 1% to 0.25%.
- xii. Assessee further submitted a letter dated 24/12/2018 wherein he has repeatedly confirmed that he is an accommodation entry provider and requested the assessing officer to tax the assessee only on the accommodation entries commission at the rate of 0.10%.
- xiii. The learned assessing officer in paragraph number 3.7 categorically considered the answer of the assessee and submitted that income in the hands of beneficiaries in the above amount of Rs. 273,617,764 has not yet crystallized and therefore the addition is required to be made in the hands of the assessee and therefore he considered it to be the income of the assessee under section 68 of the income tax act.
- xiv. He further made a computation of commission on above accommodation entries at 0.25% amounting to Rs. 684,044/-.

- xv. He held that if the assessee is found to be the accommodation entry providers and if the beneficiaries are found then only the amount of commission can be added into the hands of the assessee, therefore, he did not make any addition with respect to the commission income of Rs. 684,044/-.
5. Accordingly, the assessment order was passed under section 143 (3) read with section 147 of the income tax act 1961 on 26/12/2018 determining the total income of the assessee at Rs. 273,623,290/- against the returned income of Rs 5530/-.
6. Similarly, in ITA number 3010/MUM/2024, for assessment year 2012 - 13, the assessee filed its return of income on 30/3/2013 declaring total income of Rs. 22,124/-. The assessment was reopened under section 147 and assessment order under section 143 (3) read with section 147 of the act was passed on 26/12/2018 assessing the total income at Rs. 41,699,400/-. Once again, the case of the assessee was reopened, and it was found that there is unexplained cash credit in the hence of the assessee of Rs. 125,597,901/-. Ultimately in the reasons recorded the learned assessing officer noted that the total accommodation entry provided by the assessee for this year is Rs. 267,587,743/-. Notice under section 148 was issued on 29/3/2018. It was later also found that a further accommodation entry has also been transferred of Rs. 18,358,532 from credit cooperative society. In response to notice under section 148 of the income tax act the assessee filed its return of income on 25/11/2019 at rupees Nil. The notices were issued under section 142 (1) of the act. After collecting all the information and the other information available, show cause notice was issued by the learned assessing officer on 13/12/2019 to the assessee wherein after the coordinate enquiry made by the various investigation wing of the Bhopal and Indore it was found that total credit of Rs. 285,946,275/- has been recorded in the books of

the assessee. Assessee gave the same reply which was given for earlier years and requested to make the addition with respect to commission only. The assessee also invokes the provisions of section 144A and the directions were received. As per the direction dated 24/12/2019 the addition was required to be made in the hands of the assessee on protective basis of the above sum of Rs. 296,146,206 75/- and further the commission at the rate of 1.25% on such sum should also be made on substantive basis. Based on this, the learned assessing officer made an addition under section 68 of the income tax act of Rs. 296,146,275/- under section 68 of the income tax act over and above the already made addition under the assessment order passed under section 143 (3) read with section 147 of the act dated 26/12/2018 assessing the total income at Rs. 337,845,675/-. The learned assessing officer further noted that if the above addition is found to be taxed in the hands of the beneficiaries, the commission income of Rs. 3,701,828 may be added in the hands of the assessee.

7. ITA number 3011/M/2024 is also filed by the learned assessing officer for assessment year 2013 - 14 wherein the assessee filed its return of income on 31/3/2014 declaring a total income of rupees 5530/-. This case was also reopened under section 147 of the income tax act wherein it is found that the assessee has provided accommodation entries of Rs. 13,458,250/-. The assessment proceedings also continued in a similar manner as in earlier years and based on the direction under section 144A of the act the total income of the assessee was assessed at Rs. 13,464,050/- wherein the addition under section 68 of the act was made of rupees one crore 34,58,520 under section 68 of the act and further the commission of Rs. 168,231/- was not added to the total income of the assessee under the pretext that same should be retained if later it is found that the beneficiaries are traced.

8. ITA number 3013/M/2024 is filed by the learned assessing officer for assessment year 2012 – 13. For this year the assessee filed its return of income at Rs. 22,124/-. Same case was reopened as in earlier years and the assessment was made under section 143 (3) 147) of the act at an unexplained cash credit of Rs. 41,677,284/- came to be added under section 68 of the act. In this case the learned assessing officer has made the addition of the cash credit of Rs. 41,677,284/- under section 68 of the income tax act and has not made an addition of commission income of Rs. 104,193/- as in the earlier years
9. On appeal, for all these years the learned CIT – A deleted .the addition under section 68 of the income tax act and retained the commission income. Therefore, the learned assessing officer is aggrieved with the appellate order passed by the learned CIT – A.
10. The learned departmental representative categorically submitted that.
 - i. assessee can be termed for considered as an accommodation entry provider if and only if the real beneficiaries of such accommodation entries are found .
 - ii. It is the basic duty of the accommodation entry provider to state with necessary facts, modus operandi, and conclusive evidence that it is merely used as an accommodation entry provider and the real beneficiaries is the other entity. Unless that other entity is taxed on the real income, the assessee cannot be considered at all as the accommodation entry provider.
 - iii. issue is squarely covered in favour of the revenue by the decision of the honourable Delhi High Court in case of Mr. DK Garg.

- iv. Rules of section 68 applies to even accommodation entry provider also , there is no exception that a conduit cannot be subjected to addition u/s 68 of the Act.
 - v. There is no finding by LD CIT (A) that beneficiaries are already taxed.
 - vi. Merely on submission of assessee Id. CIT (A) , without verifying the fact has deleted the addition.
 - vii. There is huge inconsistency in the finding of the Id. CIT (A) in determining commission income also. He referred to differing rates of commission taken by the dl CIT (A) and no basis was given.
11. Despite notice none appeared before us, therefore the appeal is decided on the merits of the case as per information available on record.
12. We have carefully considered the contentions raised by the learned departmental representative and perused the orders of the learned that lower authorities. The facts clearly show that the assessee is an entity wherein huge credits have been appearing in various bank accounts for last several years. There was a coordinated enquiry being carried out by the investigation wing situated at various places such as Bhopal and Indore etc. The director of the assessee found a most convenient mode and stated that he is an accommodation entry provider and therefore he shrugged his responsibility to identify the beneficiaries and get out of the addition under section 68 of the act. The learned assessing officer has tabulated the amount of accommodation entries, if any, provided by the assessee in crores of Rs. for each of the years.

13. The accommodation entry provider can be taxed on the commission income only and only if, he provides the name of the beneficiaries, the modus operandi how he provided the accommodation entries to the beneficiaries, with support of various bills, invoices, loan confirmations etc., showing that these are bogus, he lacks creditworthiness and transaction are ingenuine, Such beneficiary should also confirm that these are the accommodation entries taken by that beneficiary from this entity which is an accommodation entry provider. Consequent to that, the logical conclusion would be that accommodation entry provider is assessed on the commission income involved in that accommodation entry transaction and the beneficiary is taxed as its income under section 68-69 of the act. Otherwise, there is no exception in the provision of section 68 of the Act for accommodation entry provider. He also required to explain each and every credit in the books showing its nature and nature and source to the satisfaction of the Id AO.
14. In case of D K Garg honourable Delhi High Court [2017] 84 taxmann.com 257 (Delhi)/[2017] 250 Taxman 104 (Del) did not allow even the peak credit in the case of an accommodation entry provider holding that merely based on accountancy, overlooking the settled legal position that peak credit is not applicable where deposits remain unexplained under Section 68 of the Act.it held as under:-

“19. The legal position in respect of an accommodation entry provider seeking the benefit of 'peak credit' appears to have been totally overlooked by the ITAT in the present case. Indeed, if the Assessee, as a self-confessed accommodation entry provider wanted to avail himself of

the benefit of the 'peak credit', he had to make a clean breast of all the facts within his knowledge concerning the credit entries in the accounts. He has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The Assessee should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the Assessee, the identity of the creditors and that the money paid from the accounts of the Assessee has returned to the bank accounts of the creditors. The Assessee has to discharge the primary onus of disclosure in this regard.

20. While the AO in the present case did not question the working out of the peak credit by the Assessee, he, at the same time, insisted that the additions made by him to the returned income of the Assessee should be sustained. The peak credit worked out by the Assessee was on the basis that the principle of peak credit would apply, notwithstanding the failure of the Assessee to explain each of the sources of the deposits and the corresponding destination of the payment without squaring them off. That is not permissible in law as explained by the Allahabad High Court in the aforementioned decisions which, this Court concurs with."

15. The learned CIT – A has not given any finding that how the beneficiaries are identified, and the assessee is to be assessed only at the commission income, the decision of the learned CIT – A is against

the principle laid down by the honourable Delhi High Court in D K Garg's case(supra). Therefore, it cannot be upheld.

16. The Id. CIT (A) failed to appreciate that Id. AO has put in the hands of the assessee on substantive basis to protect the revenue and it is not protective addition. Protective addition concept has been misunderstood by him without knowing where the substantive addition is made.
17. So far as commission income estimated by the Id. CIT (A) , there is no justification that how in different assessment years same is taken. This makes the order of Id. CIT (A) without application of mind. He also did not delve into the kind of accommodation entries provided by the assessee company to justify determination of commission income.
18. It has Come to our notice that ITA number 2963/M/2024 has been heard on 5/8/2024 and disposed of by another bench vide order dated 6/8/2024 where the appeal of the revenue is dismissed. We have also perused that order and find that in that case the decision of the honourable Delhi High Court cited before us in case of Mr. DK Garg was not at all considered.
19. In view of the above facts we restore all the appeals back to the file of the learned CIT – A to consider the principle laid down by the decision of the honourable Delhi High Court as stated above, identify the beneficiaries involved in the above accommodation entries and whether the amount is taxed in the hands of those assesses or not, unless that is decided, the addition in the hands of the assessee cannot be deleted. We are also further surprised that how the learned CIT – A deletes the addition on protective basis without ascertaining the fact that where the substantive addition is have been made. It is the case of the learned assessing officer himself that till the

beneficiaries are found, the addition cannot be deleted in the hands of the assessee. The learned CIT – A without identification of any of the beneficiaries has merely upheld taxability of commission income in the hands of the assessee. Therefore, the order of the learned CIT – A cannot be sustained. Hence restored back with above direction.

20. In the result all the appeals filed by the assessing officer are allowed for statistical purposes.

Order pronounced in the open court on 23.08.2024.

**Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER**

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Mumbai, Dated: 23.08.2024
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR

//True Copy//

[

By Order

Assistant

Registrar

Mumbai

ITAT, Mumbai Benches,