

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 1013/Del/2014
A.Y. 2005-06**

Smt.Meeta Gutgutia vs. DCIT, Central Circle 10
Prop. M/s Ferns N Petals, ME1 New Delhi
M Block Market, GK Part I
New Delhi 110 048

PAN: AFDPG2744 B

**ITA No. 799/Del/2014
A.Y. 2005-06**

ACIT, Central Circle 10 vs. Smt.Meeta Gutgutia
New Delhi New Delhi

(Appellant)

(Respondent)

Appellant by : Sh. Rajesh Jain, C.A.

Respondent by : Ms. Nirupama Katra, CIT, D.R.

ORDER

PER J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

These are Cross Appeals directed against the order of the
Ld.Commissioner of Income Tax (Appeals)-XXXII, New Delhi

dated 25.11.2013 pertaining to the Assessment Year (A.Y.) 2005-06.

2. Facts in brief:- The facts as brought out by the Ld.CIT(A) at para 2 page 2 of his order are as follows.

The brief facts of the case are that appellant is engaged in the business of sale of flowers and related products like bouquet through her proprietorship concern namely M/s Fern N Petals. Besides the sales through her proprietorship concern, the appellant is also selling flowers and related products through various franchisee outlets through India. A search and seizure operation u/s 132 was conducted by the Investigation Wing of the Department on 23.12.2005 in the Ferns N Petals group of cases. The search operation also included the appellant's business premises at Farm No. 9, Satya Farms, Sultan Pur, New Delhi. In response to notice 153A dated 12.12.2006, the appellant filed her return of income on 9.01.2007 declaring an income of Rs.9,09,302/- which was the income originally returned earlier on 31.10.2005 in the return filed with the Addl. CIT, Range-23, New Delhi. Hence, the appellant did not declare any undisclosed income in the return filed in response to notice issued u/s 153A dated 12.12.2006. Thereafter, statutory notices u/s 143(2) and 142(1) of the I.T. Act, 1961 dated 3.10.2007 alongwith a questionnaire were issued and served upon the appellant. In response to the same the AR of the appellant attended the assessment proceedings and furnished the details, information and documents as called for by the Assessing Officer from time to time. However, no books of account alongwith bills/vouchers were produced before the Assessing Officer during the course of

ITA 1013/Del/14 and
ITA 799/Del/14
A.Y. 2005-06
Mrs Meeta Gutgutia, New Delhi

assessment proceedings. The assessment was completed in terms of order u/s 153A/143(3) dated 28.12.2007 at a total income of Rs.2,02,56,800/- as against the return income of Rs.9,09,302/- wherein the Assessing Officer made the following additions:

Addition u/s 69 on account of unexplained investment in property -	Rs. 2,89,200/-
Addition on account of undisclosed franchisee commission -	Rs.93,58,143/-
Addition on account of non-refundable securities -	Rs.1,15,000/-
Addition on account of suppression of income from the self controlled outlets -	Rs.6,30,000/-
Addition on account of disallowance out of expenses debited under various heads not relatable to business -	Rs. 9, 71,500/-
Addition on account of amounts receive from M/s Anslwma Sachdev as per pages 14 and 15 of Annexure A-6 -	Rs.4,00,000/-
Addition by treating is hire charges as income from undisclosed sources as per page 47 of annexure A-5 -	Rs.30,09,147/-
Addition u/s 69 on account of unexplained investment in stock -	Rs.45,74,503/-

2.1. The First Appellate Authority granted part relief.

2.2. Aggrieved both the assessee as well as the Revenue are in appeal before us.

3. We first take up assessee's appeal in ITA 1013/Del/2013 pertaining to the Assessment Year (AY) 2005-06 which is on the following grounds.

“That the learned CIT (Appeal) erred in upholding the addition of Rs. 50,000/- out of Rs. 1,15,000/- made by the AO., on account of security deposits received from various Franchisees without considering the facts & submission of the appellant filed during the appellate proceedings. The addition upheld by the Learned CIT (Appeal) is totally arbitrary and has no basis.

2. That the learned CIT (Appeal) erred in upholding the addition of Rs. 9,43,050/- out of Rs. 9,71,500/- on ad hoc basis out of bonafide expenditure incurred for the business purpose inspite of the fact that the books of accounts were duly audited by the Firm of Chartered Accountants who also prepared Tax Audit Report u/s-44AB of the Act.

3. That the learned CIT (Appeal) erred in sustaining the addition of Rs.30,09,1471- on the basis of annexure A5/ 47 alleging income from undisclosed source made by the Assessing Officer without giving opportunity. The learned CIT(A) also did not appreciate the submission judicially & sustained the addition arbitrarily.

4. That the Learned DCIT erred in charging interest u/s-234B of the Act from the 1st day of the Assessment Year in place of the date of intimation Order in terms of the provision of section-234B(3) of the Act. This ratio has been laid down by the various Benches of ITAT, i.e., *Baby Marine Exports vs. A.C.I.T.*

5. That the Orders of the Assessing Officer & CIT(A) are not based on the facts of the case & as per law and hence additions sustained by the CIT(A) are totally illegal and not based on binding judicial precedents.”

3.1. Ground nos. 1, 3 and 4 are dismissed as ‘not pressed’.

3.2. Ground no.5 is general in nature.

4. This leaves us with ground no.2. The assessee disputed the adhoc disallowance of 10% made by the Assessing Officer (AO). The expenses in question were claimed under various heads. The ground of disallowance is the failure of the assessee to produce books of accounts along with bills and vouchers for verification.

The Ld.CIT(A) granted relief of Rs.28,470/-. The assessee submits that the expenses have been incurred for the purpose of business and supported by vouchers. It is further submitted that books of accounts have been audited under Companies Act as well as under the Income Tax Act. As the computer systems were seized by revenue during the course of search, the allegation of the revenue that the assessee has not produced books of accounts is not correct. He submitted that in the previous A.Y. 2003-04, under similar circumstances, the Ld.CIT(A) granted relief of 70% and the ITAT deleted the balance 30% of such adhoc disallowance.

4.1. A chart was produced giving details of adhoc disallowance from the A.Y. 2000-2001 to the A.Y. 2003-04 and it was claimed that the adhoc additions made by the AO in these AYs were deleted.

4.2. The Ld.Sr.D.R. submitted that, the assessee failed to produce vouchers and bills and hence the expenditure remained unverified. He submitted that the disallowance is reasonable and be sustained.

5. After hearing rival submissions we find that the ground for disallowance is not furnishing of bills and vouchers by the assessee. The Ld.AR disputes the same by citing audit under the Companies Act and the Income Tax Act. We are of the considered opinion that merely because audits were done under both the Companies Act and Income Tax Act, the expenditure cannot be

allowed in full, when vouchers and bills have not been produced before the A.O. The A.O. has the power to act and verify the expenditure independently and decide on the allowability of the same.

6. Coming to the quantum of disallowance, we find that Rs.97,14,970/- consisted of bank charges of Rs.15,847/-, depreciation of Rs.2,34,450/-, insurance charges of Rs.16,00,224/- etc. The Ld.CIT(A) has considered these specific expenditure and granted part relief to the assessee. We see no reason to interfere in this factual finding of the first appellate authority, wherein he confirmed partially the factual finding of the AO. Hence we uphold the order of the Ld.CIT(A) and dismiss this ground of the assessee.

7. In the result the appeal of the assessee is dismissed.

ITA 799/Del/2014 : AY 2005-06

8. This is Revenue's appeal on the following grounds.

- 1. The Commissioner of Income Tax (Appeals) erred in admitting additional evidences under Rule 46A.*
- 2. That the commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleted the addition of Rs. 93,58,143/- on account of undisclosed franchisee commission.*
- 3. That the commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs. 65,000/ - on account of non-refundable securities.*

4. That the commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs. 6,30,000/- on account of suppression of income from the self controlled outlets.

5. That the commissioner of Income Tax (Appeals) erred in law and on facts of the case in allowing part relief of Rs. 28,470/- on account of disallowance out of expenses debited under various heads which are not relatable to business.

6. That the commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs. 4,00,000/- on account of amount received from Ms. Anshuma Sachdev as per seized document "Annexure-A".

7. That the commissioner of Income Tax (Appeals) erred in law and on facts in deleting the addition of Rs. 45,74,503/- on account of unexplained investment in stock under section 69 of the Act.

8. The Commissioner of Income Tax (Appeals) erred in not invoking provisions of Section 250(4), which empowers Ld. CIT(A) to make further enquiries.

(a) The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.

(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

9. After hearing rival contentions we find that the Ld.CIT(A) had at para 6 page 16 gave a finding that the AO had issued notice u/s 143(2) and 143(1) on 3rd October,2007 and completed the assessment on 28.12.2007 i.e. in less than three months and hence the assessee was prevented by sufficient cause from

furnishing the evidence. He relied on the decision of Jurisdictional High Court in the case of CIT vs. Virgin Securities Pvt.Ltd. (2011) 332 ITR 396 (Del.) and admitted additional evidence. We find no infirmity in the same. Thus ground no.1 of the revenue is dismissed.

10. Ground no.2 is on the addition made by the AO on account of undisclosed franchisee commission. This issue is admittedly covered in favour of the assessee by the order of the ITAT in assessee's own case in ITA 2409 to 2413/Del/2012 order dt. 13th May, 2016 where at page 11 para 7 it is held as follows.

“6.1. It is observed from the order of the Ld.CIT(A) that the assessee had submitted additional evidence in the form of agreements which were sent to the AO for his report.

6.2. The Ld.CIT(A) observed that AO has raised general objection against the admission of additional evidences and he has not made any adverse comments regarding the genuineness of these documents filed as additional evidence. The Ld.CIT(A) admitted these documents in the interest of Justice and for deciding the issue in proper perspective. After going through the documents and the submissions made by the assessee CIT(A) deleted addition of Rs.88 lacs on account of undisclosed franchisee commission.

6.3. Aggrieved by the order of Ld.CIT(A) the revenue has preferred an appeal before us. The act of admission of additional evidence by the Ld.CIT(A) has not been challenged by Revenue.

6.4 The Assessing Officer has made addition on the ground that the assessee has not declared Income on account of commission from 52 franchises operated and controlled by her

and 4 wedding franchises during the Assessment Year 2004-05. The assessee's contention is that she never admitted that she is having 52 controlled and operated franchises outlets during the Assessment Year 2004-05.

6.5 It is a case of the assessee that no material was found during the course of search, which supports the case of the Assessing Officer and which is contrary to the submissions on affidavit by the assessee. The assessee has submitted the name and addresses of all the parties that is Franchise outlets, wedding franchises and retail outlets of her year-wise and Assessing Officer verified the same and has not made any advance comments.

6.6 Ld. CIT(A) after considering all the evidence on record, held as under:

"6.3 On the basis of appreciation of the views of the AO in the assessment order and the remand report, the contention of the appellant and the verification of the original franchisee agreements by the AO and the undersigned, the following facts emerge:

(a) That during October -December 2007, the AO asked the appellant to give details of various controlled outlets/franchisees outlets of the appellant's business without asking for any year-wise bifurcation of the same. The same question.

'Please give the details which complete names and address of 46 outlets, 65 strategic alliance and 156 vendor partners outside India as mentioned in your group profile' was included by the AO in all questionnaires issued for various assessment years from 7.001-02 to 2006-2007 on basis of information collected from the appellant's website.

(b) That the appellant gave a general reply based on the factual position as on the date of submission of details without giving any bifurcation year-wise in response to the above question in replies

submitted for all the assessment years starting from 2001-02 to 2006-2007. Since the appellant had during the period October-December 2007, 52 owned controlled/ franchisee outlets and 4 weddings franchisees, the information was supplied by her in respective replies supplied for all the assessment years involved.

(c) The AO has treated this information as applicable to all the assessment years from 2001-02 to 2006-07 on the basis of the replies filed by the appellant. The appellant on the other hand has disputed this finding through an affidavit dated 18/03/2010 which was forwarded to the AO for examination. In his remand report dated 03/10/2011, the contents of the affidavit have not been rejected by the AO on the basis of any evidence to the contrary.

(d) Since the appellant had made a disclosure of Rs.11 0 Lakh during the search proceedings on account of change in method of accounting of franchise fees and undisclosed franchise fee for the F. Y. during which the search was conducted, the AO presumed that the appellant must have such undisclosed income in the earlier years also. Since he presumed that the number of outlets remained constant in all the assessment years from 2001-02 to 2006-07, . he estimated the undisclosed income at a certain percentage of the amount of disclosure made by the appellant during her statement u/ s 132(4). He estimated such undisclosed income for various assessment years as under:

a. A.Y. 2001-02	@ 50% of disclosed amount	Rs.55,00,000/-
b. A.Y. 2002-03	@60% of disclosed amount	Rs.66,00,000/-
c. A.Y. 2003-04	@ 70% of disclosed amount	Rs.77,00,000/-
d. A.Y. 2004-05	@80% of disclosed amount	Rs.88,00,000/-
e. A.Y. 2005-06	@90% of disclosed amount	Rs.99,00,000/-
A.Y. 2006-07	@100% of disclosed amount	Rs.1,10,00,000/-

(e) Although the appellant had made a disclosure during the F. Y. relevant to A. Y. 2006-07, no such disclosure was made for earlier years, nor was there, any evidence unearthed during 'the search

by the Department that such franchise income was not disclosed by the appellant during these years.

(f) Verification of record produced by the appellant showed that there were different number of owned/controlled outlets and franchisee outlets of the appellant during various assessment years Involved as mentioned by the appellant in her affidavit dated 18/03/2010. From the details which are part of the affidavit, it is seen that for the A Y 2004-05, there were only four owned outlets and there were twenty-one franchisee outlets. No evidence to dispute the affirmations in the affidavit have been brought on record by the AO in the remand proceedings.

6.3.1 In view of the above factual position, it is seen that the estimated addition made by the AO to the tune of RS.88,00,000/- is based' on misconception of the factual position with regard to the number of outlets in existence during the relevant previous year as well as on the suspicion that the appellant must have earned undisclosed income during the year under appeal also since she had made a disclosure during the period relevant to A. Y. 2006-07. It is pertinent to note here that in the appellant's case a search & seizure operation was conducted but no incriminating material relating to the A. Y. 2004-05 has been brought on record which could support such presumption as made by the AO in her case. The presumption of the AO is based on mere suspicion and not on any evidence whatsoever. It has been held by the Hon. Supreme Court in the case of Dhirajlal Giridharilal vs. CIT 26 ITR 736 (SC) that mere existence of reason for suspicion would not tantamount to evidence. Since the AO has made the impugned addition on mere suspicion and without any evidence, the same cannot be sustained and the same is hereby deleted. (Deleted addition of Rs.88,00,000/-).

6.7. We find no infirmity in the factual findings of Ld.CIT(A). We uphold the same. In the result, we dismiss this ground of appeal.”

10.1. Consistent with the view taken therein, this ground of revenue is dismissed.

11. Ground no.3 of the revenue is against deletion of addition made on account of non refundable securities. This issue also is covered in favour of the assessee by the Order of the Tribunal referred to above for the A.Y. 2000-2001 to 2004-05, wherein at page 15 para 7 to 7.3 it was held as follows.

“7. Ground No. 3:

3. That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case / allowing relief of Rs.14,04,175/ - out of total addition of Rs.17,32,511/ - made by the Assessing Officer on account of non-refundable securities."

7.1 The AO observed that during the period under consideration, the appellant has claimed to have received fresh deposits amounting to Rs.17 ,32,511/ - as per balance sheet. The appellant was asked to furnish copies of account duly confirmed indicating complete address, PAN and Ward/Circle in respect of these deposits. The appellant vide letter dated 12.12.2007 furnished the confirmations. From perusal of these confirmations it was' clear that these deposits have been received by the appellant from various franchisees to whom outlets have been allotted during the year. The AO was of the view that these deposits have been received by the appellant in pursuance of para 3.2.1 of "Franchisee Proposal-Ferns 'N' Petals" which deals with franchisee fee etc. which are non-refundable. As such, he concluded that these deposits constitute the income of the appellant for the year under

consideration. Accordingly a sum of Rs.17 ,32,511/ - was added to the income of the appellant on account of non-refundable security deposits received by her during the year.

7.2 Ld. CIT(A) held as follows:

7.3 I have carefully considered the facts of the case and had arguments of the appellant as well as the remand report of the Assessing Officer and the rejoinder of the appellant. The appellant has produced copy of the relevant Franchisee Agreement as additional evidence. Although the AO has raised general objection that since the appellant was allowed two' opportunities vide letters dated 03/10107 and 06/ 12/2007 for furnishing details and evidences during the assessment proceedings, she should not be allowed to submit additional evidence, no adverse comments on the genuineness of the additional evidence produced have been made. I, therefore, in the interest of justice. allow the additional evidence u/ s 46A and proceed to decided the Issue.

7.3.1 In his remand report, it appears that the AO has copied wrong figures of refundable and non-refundable security deposits received by the appellant during the year. However, the AO has given a clear finding that the appellant's submission as to non-taxability of refundable deposits is acceptable. At the same time, he has emphasized that the non-refundable security deposit being one time non-refundable revenue receipt is to be treated as the appellant's income. This issue has also been decided by the undersigned on the above principle while deciding the appeals in the appellant's own case for A. Y.2003-04. Therefore, it is held that out of the total addition of Rs.17,32,511/ - the addition of Rs.3,28,336/ - (Rs. 4,48,168/ - received as non refundable

security deposit minus Rs.1,19,832/- credited as income on deferred basis) is justified and correct. The appellant gets a partial relief of Rs.14,04,175/- only.”

7.4. We find no infirmity in these findings of Ld.CIT(A) when the AO himself has given a clear finding in the remand report that the submissions of assessee as to non taxability of refundable deposits is acceptable, the question of challenging the order of Ld.CIT(A) on this issue does not arise. In the result, this ground is dismissed.”

11.1. Respectfully following the decision of the Coordinate Bench on the very same issue, we uphold this finding of the Ld.CIT(A) and dismiss this ground also.

12. Ground no.4 is against deletion of addition of Rs.6,30,000/- on account of suppression of income from self controlled outlets. This issue also is covered in favour of the assessee by the order of the Tribunal at para 8 of page 17 which is extracted for ready reference.

“8.1. The Ld.CIT(A) has based on his findings recorded while disposing of the addition of Rs.88 lakhs deleted the addition. The AO has made this addition on the sole presumption that the assessee has not disclosed all the franchisee agreements.

8.2. We have dealt with this issue while disposing of ground no.2 of this appeal. Consistent with the view taken therein we uphold the order of Ld.CIT(A) wherein he held that the estimated addition made by the AO was based on wrong appreciation of facts. We do

not find any infirmity in the findings of ld.CIT(A). Accordingly, this ground raised by Revenue stands dismissed.”

Respectfully following the same we delete the disallowance.

13. Ground no.5 is similar to ground no.2 of the assessee's appeal. We have dismissed assessee's appeal on this issue. Consistent with the view taken therein we dismiss revenue's ground on this issue.

14. Ground no.6 is against deletion of Rs.4 lakhs made on account of amount received from M/s Anshuma Sachdev. As this was a proforma Memorandum of Understanding which was not signed by any party, which was the basis of addition, we find no infirmity in the order of the Ld.CIT(A) in deleting this addition. In the result this ground of Revenue is dismissed.

15. Ground no.7 is against deletion of addition of Rs.45,74,507/- made by the AO on account of unexplained investments in stock, u/s 69 of the Income Tax Act, 1961 (the Act).

16. After hearing rival contentions we find that the Ld.CIT(A) had at para 30 and 31 held as follows.

“30. I have considered the facts of the case, written submissions of the appellant, remand report of the Assessing Officer and the rejoinder of the appellant. Vide letter. dated 14.12.2012 the Assessing Officer was specifically asked to go through the

submissions of the appellant and examine this issue by conducting necessary enquiries and ascertain the correctness of the claim of the appellant. However, the Assessing Officer in his report dated 8.11.2013 has not given any comments on this issue.

31. The total turnover recorded on the excel sheet was at Rs.45,75,503/- which the Assessing Officer treated as the income of the appellant from E-Commerce and added Rs.45,75,503/- to the income of the appellant. On considering the facts of the case I find that the information contained in annexure A-8 (file name "01-20 nov fnp business"), does not convey that the items mentioned therein is stock of the appellant. . The appellant is doing business 'under the name and style-of-Ferns N Petals- E- Commerce", and earning commission from her various franchisees/vendors on account of their turnover sold through internet with the assistance of various websites, advertising the product of the appellant. The ownership of this stock/products sold by the franchisees/vendors is not the stock of the appellant and the appellant earns commission only from such transactions. The information downloaded from the EXCEL file was only showing that that the said products' were sold by some franchisees/vendors through the website of the affiliates of the appellant. Therefore, the inference of the Assessing Officer that the quantity mentioned the said file is the unaccounted stock of the appellant is not only Justified but impracticable too as the appellant is doing the business in perishable items whose life is short. Further the average commission of the appellant in the business of E-Commerce is around 10% and if 10% of commission on such E-commerce transactions are -applied which found recorded on excel sheet, the

income of the appellant would be Rs.4,57,450/-, whereas the appellant already declared a commission income of Rs.64,99,561/- for the year under consideration. A.s per the books of account for the period 1-20 Nov.2004, the period which is recorded on excel, I find the total commission earned by the appellant was Rs.5,55,143/-. It is also a matter of fact, that the AO did not bring any material on record to prove that the information recorded on the said excel document was the stock of the appellant. The excel document on which the AO relied while making addition did not consist the date and year of transactions and on the basis of such vague recordings, surmises and conjectures, addition cannot be sustained. Considering the circumstances and facts of the case, I am of the considered view that the AO was not justified in making such addition without any substantiating evidence. Accordingly, the addition of Rs.45,75,503/- made by the AO is deleted.”

17. We find no infirmity in the same. The assessee is doing business by running an e-portal, wherein the vendors and the buyers are brought together and a commission is charged on the transaction. The stock in this business segment does not belong to the assessee.

18. The Ld.D.R. could not controvert these factual finding of the Ld.CIT(A). Thus we uphold this finding and dismiss ground no.7 of the Revenue.

19. Ground nos. 8 and 9 are general in nature.

20. In the result Revenue's appeal is dismissed.

21. In the result the assessee's appeal in ITA 1013/Del/14 and the Revenue's appeal in ITA 799/Del/14, both are dismissed.

Order pronounced in the Open Court on 17th March, 2017.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 17th March, 2017 .

- *Manga*

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR