



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.7304/Mum./2012
(Assessment Year : 2003-04)

Shri Ramesh B. Doshi
Chartered Accountants
297, Tardeo Road, Willie Mansion
Nanachowk, 1st Floor
Opp. Bank of India
Mumbai 400 007
PAN – AADPD3476E

..... Appellant

v/s

Income Tax Officer
Ward-16(2)(4), R.No.217
Matru Mandir, Tardeo Road
Mumbai 400 007

..... Respondent

Revenue by : Shri B.S. Bist
Assessee by : Shri Rajesh Kumar Singh

Date of Hearing – 02.05.2016

Date of Order – 06.05.2016

ORDER

PER SAKTIJIT DEY, J.M.

Instant appeal of the assessee is directed against the order dated 20th September 2012, passed by the learned Commissioner (Appeals)-27, Mumbai, for the assessment year 2003-04. Assessee has raised three grounds.

2. Ground no.3, being general in nature, need not be adjudicated.

3. Ground no.1, was not pressed by the assessee. Hence, this ground is dismissed as "*not pressed*".

4. In ground no.2, assessee has challenged estimation of commission income at ₹ 6,84,047 by applying the rate of 0.5%.

5. Brief facts are, the assessee an individual filed his return of income for the impugned assessment year on 16th March 2004, declaring total income of ₹ 2,36,540. A search in assessee's case was conducted on 10th April 2003 by the Enforcement Directorate, Mumbai, under provisions of Foreign Exchange Management Act, 1999 (FEMA). During the said search action, certain incriminating documents were found revealing assessee's involvement in hawala transaction. On the basis of material seized / found by the E.D., a proceeding was initiated under FEMA and an order was passed by the Special Director of Enforcement observing that the assessee was involved in distribution of payment totalling to ₹ 14,71,05,306, which has resulted in a monetary benefit of ₹ 7,35,527 in the form of commission to the assessee. The Special Director of Enforcement also observed, cash of ₹ 80,000 found and seized during the search action also related to hawala transaction. Thus, the Special Director of Enforcement ultimately held that the assessee along with one of his employee Shri

Mahendra Jain alias Bhandari having been involved in hawala transaction amounting to ₹ 14,60,68,120, having violated the provisions of FEMA and accordingly, proceeded imposed penalty. On the basis of information obtained from the E.D., the Assessing Officer re-opened the assessment under section 147 of the Act. From the information obtained from the material seized by the E.D. as well as the order of the Special Director of Enforcement, the Assessing Officer found that the hawala transactions indulged in by the assessee during the financial year 2002-03 amounted to ₹ 13,68,09,938. He further observed, in the ordinary course of hawala transaction commission of ₹ 450 to ₹ 550 is charged per ₹ 1,00,000 of sum distributed. Therefore, taking the average value of commission of ₹ 500 per one lakh rupees which works out to 0.5% of the transaction the Assessing Officer estimated undisclosed income from commission arising out of hawala transaction for the impugned assessment year at ₹ 6,84,047. Further, the cash seized of ₹ 80,000 was also treated as part of commission income. Accordingly, he proposed to treat the amount of ₹ 7,64,047, as the undisclosed income for the year under consideration and called upon the assessee to explain. As alleged by the Assessing Officer, the assessee in response to the query made by him, did not file any explanation opposing the proposed addition. Therefore, the Assessing Officer completed the assessment by adding back the amount of ₹

7,64,047, as undisclosed income. Being aggrieved of such addition made by the Assessing Officer assessee preferred appeal before the learned Commissioner (Appeals).

6. In the course of hearing of appeal, the assessee reiterating the stand taken before the Assessing Officer submitted, the commission income in such type of transaction approximately is 10 paisa to 15 paisa per dollar arranged. Therefore, the average commission per dollar can be reasonably taken at 12.50 paisa. It was submitted, considering that the assessee has transacted approximately USD 29,10,850, the commission which can be assessed at the hands of the assessee is ₹ 3.63.856. Without prejudice to the aforesaid contention, it was submitted by the assessee that as per order of the Special Director of Enforcement, the assessee along with Shri Mahendra Kumar Jain, had jointly carried out the hawala operations. Therefore, the commission income has to be assessed in both hands equally. Alternatively, it was submitted by the assessee that deduction of ₹ 1,80,000 against the commission income should be allowed towards salary paid to Shri Mahendra Kumar Jain, calculated at ₹ 15,000 per month. On the basis of submissions made by the assessee, learned Commissioner (Appeals) called for a remand report. After perusing the remand report of the Assessing Officer and other materials on record,

the learned Commissioner (Appeals) observed that assessee's claim that it was earning 10 paisa to 15 paisa per U.S. dollar towards commission is not acceptable nor the claim of payment of salary paid to Shri Mahendra Kumar Jain. He also observed that the assessee's claim that the commission income should be equally assessed at the hands of the assessee and Shri Mahendra Kumar Jain is not acceptable as there is no finding in the order of the Special Director of Enforcement in respect of quantum of hawala transaction conducted by the assessee and Shri Mahendra Kumar Jain. Accordingly, he upheld the estimation of commission @ 0.5% of the total transactions made by the assessee.

7. Learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted that against penalty order of the Special Director of Enforcement, the assessee has preferred appeal before the FEMA Tribunal, which is still pending. Learned Authorised Representative extensively referring to the observations made in the penalty order by the Special Director of Enforcement submitted, the assessee was getting commission of 10 paisa to 15 paisa per exchange of one U.S. dollar of transaction, therefore, estimation of commission @ 0.5% is high and excessive. Alternatively, it was submitted, the Special Director of Enforcement in

the penalty order has given a categorical finding that both the assessee and Shri Mahendra Kumar Jain, were jointly involved in hawala transaction. Therefore, the commission income earned from such transaction has to be equally assessed in the hands of both assessee and Shri Mahendra Kumar Jain, and not alone in the hands of the assessee. Alternatively, it was submitted by the assessee that since it is proved that Shri Mahendra Kumar Jain was working with the assessee as far as the hawala transactions are concerned, deduction towards payment of monthly salary of ₹ 15,000 to Shri Mahendra Kumar Jain, should be allowed.

8. Learned Departmental Representative on the other hand strongly supporting the order of the Assessing Officer and the learned Commissioner (Appeals) submitted, the material on record having clearly proved assessee's involvement in hawala transaction the estimation of commission @ 0.5% on the total hawala transaction is reasonable.

9. We have considered the submissions of the parties and perused the material available on record. The fact that the assessee was involved in hawala transaction, is evident from the search and seizure operation conducted by the E.D., which is reflected in the penalty order passed by the Special Director of Enforcement dated 31st

October 2008. In fact, to certain extent, the assessee has also accepted that he was involved in hawala transaction which is evident from the pleading of the assessee not only before the Special Director of Enforcement but also before the Assessing Officer and the learned Commissioner (Appeals). Therefore, the issue before us is the rate at which the commission from hawala transaction has to be estimated and whether it should be assessed entirely at the hands of the assessee or a part of it can be assessed in the hands of Shri Mahendra Kumar Jain. Undisputedly, the very basis for the assessment of commission in the hands of the assessee is the order passed by the Special Director of Enforcement. On a perusal of the said order, a copy of which is at page-18 of the assessee's paper book reveals, though, the assessee claimed that effective rate of commission is 10 paisa to 15 paisa per dollar arranged by him but he failed to substantiate such claim through any evidence. Therefore, assessee's claim that the average commission of 12 paisa per dollar is to be applied is not acceptable. As far as the alternative contention of the assessee that the commission income cannot be assessed entirely at the hands of the assessee, but has to be shared between the assessee and Shri Mahendra Kumar Jain is also not acceptable. As could be seen from the order of the Special Director of Enforcement, in the statement recorded on 10th April 2003, it was stated by the assessee that Shri

Mahendra Kumar Jain was his employee in the hawala business and he pays ₹ 15,000 per month as salary to him. That being the statement of the assessee, it cannot again be a claim that the commission payment was shared by the assessee and Shri Mahendra Kumar Jain. As far as the claim of assessee that ₹ 15,000 was paid towards salary to Shri Mahendra Kumar Jain, in our view, assessee has not produced any record to prove such fact. In fact, even the assessee has failed to submit a confirmation letter from Shri Mahendra Kumar Jain. However, at the same time, it cannot be said that Shri Mahendra Kumar Jain was doing hawala transaction on behalf of the assessee without taking any remuneration. Keeping the overall facts and circumstances of the case, we hold that the monthly salary of ₹ 10,000 would reasonably be accepted to have been given by the assessee to Shri Mahendra Kumar Jain. Therefore, we direct reduction of ₹ 1,20,000 from the addition made by the Assessing Officer.

10. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 06.05.2016

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 06.05.2016

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	02.05.2016	}	Sr.PS
2.	Draft placed before author	04.05.2016		Sr.PS
3.	Draft proposed & placed before the second member	--		JM/AM
4.	Draft discussed/approved by Second Member	--		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	06.05.2016	}	Sr.PS
6.	Date of pronouncement	06.05.2016		Sr.PS
7.	File sent to the Bench Clerk	09.05.2016		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			