

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "जी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष
BEFORE SHRI C.N. PRASAD, JM AND SHRI RAJESH KUMAR, AM

ITA NO.74/Mum/2015
(निर्धारण वर्ष / Assessment Year: 2010-11)

Goldstar Finvest P Ltd., Block H, Shri Sadashiv CHS Ltd, 6 th road, Santacruz (E), Mumbai-400055	बनाम/ Vs.	Dy. Commissioner of Income Tax, CC(46), Room No.659, 6 th floor, Aayakar Bhavan, M K Road, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN : AABCG3811B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Mukesh Chokshi in person
प्रत्यर्थी की ओर से/Respondent by	:	Ms.Anju Garodia

सुनवाई की तारीख /Date of Hearing	:	22.12.2016
घोषणा की तारीख /Date of Pronouncement	:	29.12.2016

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This is an appeal filed by the assessee challenging the order dated 31.10.2014 passed by the Id.CIT(A)-38, Mumbai for the assessment year 2010-11.

2. The ground raised by the assessee in this appeal is against the order of Id.CIT(A) upholding the imposition of penalty levied by the AO under

section 271(1)(c) of the Income Tax Act, 1961 amounting to Rs.65,09,000/-.

3. At the outset, the Id.AR submitted before us that the issue involved in the quantum appeal on which the penalty has been imposed and was a subject matter of the present appeal was decided in favour of the assessee by the Co-ordinate Bench of the Tribunal in ITA No.6120/Mum/2012 and others (AY-2010-11) order dated 1.6.2016 and therefore the penalty imposed on the basis of said addition should be deleted as it does not have legs to stand. The Id. AR also filed before us a copy of the decision rendered in ITA No.7570/-Mum/2014 (AY-2009-10) dated 24.8.2016 wherein the Tribunal deleted the penalty on identical facts. The Id. AR submitted that in view of the above said facts, the penalty as prayed to be deleted.

4. The Id.DR, on the other hand, appeared to be fairly in agreement with the Id.AR that the addition made by the AO in quantum appeal has been deleted by the Tribunal substantially and also penalty levied in the earlier year has also been deleted.

5. We have heard both the parties on the issue and perused the material placed before us including the order of Co-ordinate Bench of the Tribunal deleting the quantum. We find that the Tribunal has held that the commission should be taken at 0.15% and the expenditure claimed

should be restricted and allowed to the extent of 50% from such income.

For the sake of convenience, we reproduce the operative part of the decision rendered in ITA No.6120/Mum/2012 (supra) as under :

"4. In all these cases of the Group concerns of Sri Mukesh Chowksi including assessee, the assessments have been made in the wake of search and seizure action under section 132(1) dated 25.11.2009 carried out in the cases of M/s Mahavir Securities Private Limited; M/s Mihir Agencies P. Ltd; M / s Alliance Intermediaries and Network P Ltd and other Group companies including assessee which was managed by Shri Mukesh Chokshi himself and his family members. In all the Group concerns as well as in the case of the assessee, the main issues involved were determination of commission income or net profit for providing bogus share trading entries should be taken at 2%. We find that, in the various that, in the various Tribunal orders, which have been referred to above as well as in the case of the assessee itself, the net profit rate of 0.15% have been accepted. Not only that 50% of the expenses claimed have also accepted, In other words, only balance claim of expenditure of 500/0 have been confirmed. The relevant observation of the Tribunal in the case of M/s Mihir Agencies Pvt. Ltd reads as under:-

"6. After considering the relevant finding given in the impugned orders as well as submission made by the parties, we find that the assessee is one of the group concerns of Mukesh Chokshi Group. A search and seizure action u/ s 132(1) was conducted in the case of the assessee along with the other group companies on 25.11.2009 and on subsequent dates, wherein it was found that all these group companies belonging to Shri Mukesh Chokshi and his family members were involved in accommodation entries for for various kinds of activities has applied a commission income -@ 2%. Before the CIT(A), various appellate orders were relied upon which has been noted by the CIT(A) in the impugned order at para 2.1. The Ld. CIT(A) after referring to the various "material found at the Lime of search of Shri Mukesh Chokshi and his employees and the statements wherein various rates of commission charged have been stated ranging from 0.15% to 2% on different kind of accommodation entries. Accordingly,

Ld. CIT(A) updated the application of net profit rate of 2% as applied by the AO.

7. We find that in the case of Gold Star Finvest Ltd, which is a sister concern of the assessee, on similar facts for the assessment year 2003-04 and 2004-05, the Tribunal after referring to various decisions have upheld the percentage of commission on net profit @ 0.15% which was quite consistent with the statement recorded at the tune of search. Accordingly, following the judicial precedence in the case of the assessee's sister concern (supra), we uphold the rate of commission/rate of net profit from such activities at 0.15%. Accordingly, ground nos. 4 & 5 as raised by the assessee are allowed .

8. As regards the disallowance of business expenses, the Ld. CIT(A) has directed the AO not to allow any expenses against the net income of 2% determined. We find that the Tribunal in the case of Gold Star Finvest Ltd have disallowed only 50% of the business expenses. Accordingly, following the judicial precedence, which is applicable mutatis mutandis in the case of the assessee also, we direct the AO to allow the business expenses to the extent of 50%. Accordingly, ground no.8 is treated as partly allowed.

9. In the result, appeal of the assessee is partly allowed"

In assessee's own case also, this issue has been decided in the following manner:-

"4. On the other hand, the Id. DR relied upon the order of AO. Nothing has been brought on record by him to distinguish the orders relied upon by the Id. Counsel.

5. We have gone through the orders of lower authorities and the orders of the co-ordinate bench of Tribunal in assessee's own case and other orders relied upon by the assessee. It is noted by us that identical issue had come up before the Tribunal in assessee's own case for the assessment year 2002-03. The relevant observations from the Tribunal's order are reproduced below:

"12. Having, carefully examined the various orders in the case of different assessee's it has become amply clear that in these types of activities: brokers are only concerned with their commission on the value of transactions. Now the question comes what would be the reasonable percentage to the commission on the total turnover? The assessee has also made out a case that the customers do not come directly to him and they come through a sub-broker who also charges a particular share of commission. In all the judgments what has been stated is that an average percentage of commission is between 0.15% to 0.25%. In the case of Palresha & Co. and Kirari & Co (surpa), the Tribunal has considered reasonableness of percentage of commission to be earned on turnover was at 0.1 %. The assessee himself has offered the percentage of commission at 0.15%, which is more than the percentage of commission considered to be reasonable by the Tribunal in the case of Palresha & Co and Kiran & Co (supra) in similar type of transactions. The theory of Assessing Officer to treat the entire deposit as unexplained cash credits, cannot be accepted in the light of assessment orders in the case of beneficiaries and also in the light of the fact that assessee is only concerned with the commission earned on providing accommodation entries. We, therefore, of the view that since the assessee itself has declared the commission on turnover at 0.15% which is more than the percentage considered to be reasonable by the Tribunal in the case of Palresha & Co and Kiran & Co (supra), the same should be accepted. We, accordingly, accept the commission declared by the assessee and set aside the order of the CIT (A) in this regard ."

6. It is further noticed by us that this stand has been constantly accepted by the Tribunal in various orders, details of which have been given by the Id. Counsel, as mentioned above. We have gone through the orders as enclosed in the paper book filed by the assessee and find that the Id. AR has correctly stated that this issue has been unanimously accepted by the Tribunal in various cases including the case of assessee. Nothing has been brought on record by the id. DR to distinguish these cases. Therefore, respectfully following

the orders of the Tribunal including the order of Tribunal in assessee's own case in the immediately preceding year, we find that the Id. CIT(A) has rightly deleted the addition, no interference is called for in the order of Id. CIT(A), therefore, the same is upheld. Grounds No.1 and 2 taken by the revenue stand dismissed".

Thus, following the judicial precedence in cases of various groups concerns s well as that of assessee decided by the Tribunal, we hold that net profit rate /commission should be taken at 0.15% and the expenditure claimed should be allowed to the extent of 50% from such income. Accordingly, these two issues are decided in favour of the assessee. As regards the other grounds taken, the same have not been argued before us on the ground that they will become purely academic. Accordingly, the appeal of the assessee is treated as allowed. As stated in the operating part of the order the similar issues are involved in all the appeals, therefore, this finding will apply mutatis mutandis in all the impugned years. Thus, all the appeals filed by assessee' are treated as allowed.

" 4. In the result, all the appeals of the assessee stands allowed."

6. We also find that the penalty under similar circumstances and facts have been deleted by the Co-ordinate Bench of the Tribunal in the cases for the respective assessment years vide order passed in ITA No.7570/Mum/2014 (AY-2010-11) (supra) dated 24.8.2016, the operative part of the order is reproduced below:

"8. We notice that in M/s Mihir Agencies P. Ltd. vs. DCIT in ITA 996/M/2015 for the A.Y. 2004-05 and Mr. Mukesh Choksi vs. DCIT in ITA 996/M/2015 for the A.Y. 2005-06, the Co-ordinate Bench has decided the identical issue in favour of the assessee holding as under:-

"6. We have heard the rival submissions and produce the material before us. We find that case under consideration an action u/s.132 of the Act was carried out covering all the group entities including the assessee under consideration, that

it was found group concerns were engaged in providing accommodation bills/hawala entries, that the assessee did not dispute the said fact, that the AO estimated the income from the accommodation entries @ 2% of the total transactions appearing in the bank accounts of the assessee, that the then FAA confirmed the quantum addition made by the AO, that in the case under consideration the Tribunal had held that commission income should be taken at the rate of 0.15% (ITA /6435/Mum/2012 –AY-2004-05 and other six appeals dt.6.1.16). The undisputed fact is that there is difference of opinion as to how much income should be estimated for the hawala entries-the AO estimated at a particular percentage, whereas the assessee had shown the income at a different percent. The addition made by the AO and confirmed by the FAA in quantum addition may or may not be. But, levying penalty on the basis of an estimated addition could not be held to be justified. No authority is required to be cited that penalty and assessment proceedings are separate and distinct proceedings and the quantum proceedings should not result in automatic levy of concealment penalty. It is a case of estimation of income by the AO and the assessee.

Here we would like to discuss two cases. One of them is Aero Traders P. LTD.(322 ITR 316).In that case the assessee-company had filed its return of income for the year 1997-98 on a notice u/s.148 of the Act, 1961declaring a loss of Rs. 83, 64, 468/-.The assessee had, in the return attached a note stating that it was impossible for it to substantiate its claim of loss by way of any evidence as the relevant records were seized and were with the police authorities. The AO after being unable to obtain copies of the seized documents, based his assessment order on the limited documents provided and rejected the book results declared by the assessee. He estimated the income of the assessee at Rs.61,00,000/-.He also initiated penalty proceedings separately.The FAA estimated the total income of the assessee at Rs.1,02,980/-.The Tribunal confirmed this order. The AO observed that the profit was estimated after rejection of books of account due to certain discrepancies and imposed a penalty on the assessee of Rs. 36,41,003/-, on the ground that it was a clear case of furnishing inaccurate particulars of income. The FAA deleted the penalty holding that the addition made by the AO on the basis of estimated profit could not be a subject-matter of

penalty for concealment of income. The Tribunal confirmed this order. On appeal, the AO dismissed the appeal and held that the finding arrived at by the Tribunal did not warrant interference as it was purely a finding of fact. In the case of Durga Kamal Rice Mills (265 ITR 25) the Hon'ble Calcutta High Court has held as under:

"When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding, penalty cannot be imposed.....In quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings, the authority has to find conclusively that the assessee owns the concealed amount."

Considering the fact that Tribunal has adopted a particular rate for estimating the income of the assessee for the year under consideration, we hold that the FAA was not justified in confirming the order passed by the AO u/s. 271(1)(c) of the Act. Therefore, reversing his order, we decide the effective ground of appeal in favour of the assessee."

7. In our considered view, the facts and circumstances of the present case and the issue involved are identical to the facts and circumstances of the cases and issue involved in the above referred cases. Since, the Co-ordinate Bench has already decided the identical issue in favour of the assessee, we respectfully follow the decision dated 27.7.2016 rendered in the case M/s Mihir Agencies Pvt. Ltd. and Mukesh Choksi (supra) and allow the sole ground of the present appeal of the assessee.

8. Since, the facts and circumstances of the case and the issue involved in the remaining cases are identical to appeal No 7564/MUM/14 for the AY 2004-05 aforesaid, except the amounts of penalty and since we have decided the identical issue in favour of the assessee in the said case, we allow the remaining appeals, i.e., ITA No.7566/MUM/2014 for the AY 2005-06, ITA No7567/MUM/2014 for A Y2006-07, ITA No. 7568/MUM/2014 for A Y 2007-08, ITA No. 7569/MUM/2014 for A Y 2008-09 and ITA No 7570/MUM/2014 for the A Y 2009-10 of the assessee accordingly.

9. In the result, all the six appeals filed by the assessee for the A.Y's 2004-05 to 2009-10 are allowed."

7. We find that the co-ordinate Bench of the Tribunal has directed the AO to take commission at the rate of 0.15% and allow the expenses to the tune of 50% of the said commission and bring to tax the amount so worked out. Further, we find that on the identical facts the penalty has been deleted by the co-ordinate Bench of the Tribunal in ITA No.7570/Mum/2015 (AY-2010-11)(supra). Accordingly, we set aside the order of the Id.CIT(A) and direct the AO to delete the penalty.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 29th Dec,2016

Sd

sd

(C.N. Prasad)

(Rajesh Kumar)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :29.12.2016
SRL,Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai