

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT
MEMBER

ITA.No.694/Ind/2017
Assessment Year 2009-10

Shri Navin Malde,
402, Sukh Sagar Apartments,
Goyal Nagar,
Indore
PAN : ABUPM8035E : Appellant

V/s
ACIT,
Central Circle-2
Indore : Revenue

Assessee by	S/Shri R.K. Vora & Chetan Khandelwal, CAs
Revenue by	Shri S.S. Mantri, CIT
Date of Hearing	11.02.2021
Date of Pronouncement	18.02.2021

ORDER

PER MANISH BORAD, A.M

The above captioned appeal filed at the instance of the assessee pertaining to Assessment Year 2009-10 is directed against the orders of Ld. Commissioner of Income Tax-III (in short 'Ld. CIT],

Navin Malod

ITA No.694/Ind/2017

Indore dated 29.08.2017 which is arising out of the order u/s 143(3) r.w.s. 153A of the Income Tax Act 1961(In short the 'Act') dated 23.03.2016 framed by ACIT (Central)-2, Indore.

2. Assessee has raised following grounds of appeal:-

1.On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in sustaining the addition of Rs.17,00,000/- on account of brokerage, without considering the facts and circumstances of the case.

2.The appellant craves leave to add, amend, alter or delete the said grounds of appeal.

Additional Grounds:

1.On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in sustaining the addition of Rs.17,00,000/- on account of brokerage, without considering the facts that no incriminating material was found during the course of search in respect of A.Y. 2009-10. Therefore, no addition could have been made in the assessment order under Section 153A of the I.T. Act 1961, as the assessment of 2009-10 is already concluded.

2. The appellant craves leave to add, amend, alter or delete the said grounds of appeal.

3. Brief facts of the case as culled out from the records are that the assessee is engaged in the business of brokerage and

commission from property dealing. Assessee filed its return of income on 31.3.2010 u/s 139(1) declaring total income of Rs.4,25,650/-. A search and seizure action u/s 132 of the Act was conducted on the Doshi Group of Indore on 28.02.2014. Since the assessee had business relations with Doshi Group, he was also subjected to search and various documents were seized from his residential premises. A notice u/s 153A was issued to the assessee to file return of income but the assessee did not file the return stating that no additional income has been offered in this year and the return filed u/s 139(1) may be treated as the return filed u/s 153A.

4. During the course of assessment proceedings Ld. A.O confronted the assessee with the seized documents found during the course of search and the statements given u/s 132(4) of the Act with regard to the land deal materialised during financial year 2008-09 relevant to Assessment Year 2009-10 between M/s D.S. Enterprises (a firm of Doshi Group) and late Maharani Laxmi Kumari. The assessee stated that for this land deal he was to receive a brokerage of Rs.27,00,000/-. He further stated that out of

this Rs.27,00,000/-, Rs.5,00,000/- has been received through cheque during financial year 2008-09, Rs.5,00,000/- was further received through cheque during financial year 2009-10 and Rs.10,00,000/- was received in cash during financial year 2013-14 and all these receipts have been offered to tax. The balance of Rs.7,00,000/- has not been received till date. Though it was contended that the assessee shows income on cash basis but Ld. A.O was not satisfied and he after considering the submissions made by the assessee concluded that Rs.17,00,000/- has not been offered to tax by the assessee during the year. Accordingly the income was assessed at Rs.21,25,650/- u/s 143(3) r.w.s. 153A of the Act by adding Rs.17,00,000/- on account of undisclosed brokerage income.

5. Aggrieved assessee preferred appeal before Ld. CIT(A) but failed to succeed.

6. Now the assessee is in appeal before the Tribunal.

7. With regard to the additional legal ground raised by the assessee in view of the judgment of Hon'ble Apex Court in the case

of *National Thermal Power Co. Ltd V/s CIT 229 ITR 383* Ld. Counsel for the assessee submitted that since no incriminating material was found during the course of search with regard to the impugned addition and the assessee's case was not selected for scrutiny by way of issuance of notice u/s 143(2) of the Act for the return filed u/s 139 of the Act on 31.03.2010, the assessment year under appeal is non abated/concluded assessment. The Ld. Counsel for the assessee placing reliance on the decision of this Tribunal in the case of *DCIT V/s M/s MCS Trading Company Pvt. Ltd IT(SS) A No.141/Ind/2016 order dated 09.04.2019* submitted that such non abated/concluded assessments cannot be disturbed by the Ld. A.O without referring to any incriminating material found during the course of search.

8. As regards the merits of the case Ld. Counsel for the assessee submitted that the assessee discloses the income in the Income Tax Return on cash basis. Rs.20,00,000/- have already been offered in respective assessment years when they were received. Rs.7,00,000/- is still outstanding and in case if it is received the same would be offered to tax.

9. Per contra Ld. Departmental Representative vehemently argued supporting the order of both the lower authorities.

10. We have heard rival contentions and perused the records placed before us. As regards the legal ground raised by the assessee which we have admitted for adjudication in view of the judgment of Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd V/s CIT 229 ITR 383 (supra)*, we on examination of the records observe that during the course of search certain documents were been seized which have been referred by the Ld. A.O in para 8 of the assessment order. During the course of search itself assessee was asked the questions about the brokerage income received on the land transaction between the two parties, the proof of which was found during the course of search. It is not the case that the Ld. A.O has initiated fresh enquiry during the assessment proceedings carried out u/s 143(3) r.w.s. 153A of the Act. Had there been no reference to any seized material *qua* the statement given during the course of search the assessee had a strong case on legal ground but it is not so in the instant case. Therefore since there is a specific reference in the assessment order of the

incriminating material found during the course of search which instigated the search team to ask various questions regarding the actual income earned by the assessee, it cannot be said that the alleged addition is made without referring to any incriminating material. Therefore the assessee fails to succeed on this legal ground which in our considered view deserves to be dismissed. Accordingly the additional ground raised by the assessee is dismissed.

11. Now we take up ground raised on merits. Regarding the addition of Rs.17,00,000/- for unaccounted brokerage income made by the Ld. A.O and sustained by Ld. CIT(A), we find that during the course of search assessee was asked specific question regarding the alleged unaccounted brokerage income which was subsequently confronted to the assessee during the assessment proceedings also by raising following question:-

1. During the search & seizure operation u/s 132 of the Act in your case it was noticed that you along with one Sanjay Badjatya had brokered the land dealing at Narsingh Kothi, Kanadia Road, Indore between Late Maharani Smt. Laxmi Kurnari and M/s D.S. Enterprises, a firm of Doshi group. In reply to Q. No. 4,5,6,7 of your statement recorded on 28/2/2014 u/s 132(4) of the Act, you have stated that an amount of Rs. 27, 00,000/-

was received by you as brokerage. You are requested to explain as to why this amount of Rs. 27, 00,000/- should not be treated as your income and why addition of Rs. 27,00,000/- should not be made for the F.Y. 2008-09 (A.Y. 2009-10).

12. The assessee gave following reply to the above said query:-

Reply: It is correct to say that, I along with Shri Sanjay Badjatya brokered the land deal of Narsingh Kothi between Late Maharani Smt. Laxmi kumari & M/S D. S enterprises, a firm of Doshi group. I also confirm that Shri Sanjay Badjatya used to interact with late Maharani in respect of this deal. It is also correct to state that in this deal I was to get an amount of Rs. 27 Lakh by way of brokerage. However, owing to death of Sanjay Badjatya I had received Rs. 20 Lakh as under

1. 5,00,000/- (Through cheque of BOR drawn on B01 19.01.2009) credited in my account on

2. 5,00,000/- (Through cheque of BOR drawn on BOI credited in my account on 21.04.2009)

3. 10,00,000/- (Rs. 10 Lakh cash in August 2013)

***It** is pertinent to mention that brokerage of Rs. 5 Lakh each was received by me by way of cheque in March 2009 & April 2009 respectively. Consequently, I have offered this income in return of income filled for A.Y 2009-10 & 2010-11. For the, cash brokerage of Rs. 10 Lakh was received by me in august 2013 & hence the same has been offered for tax for A.Y- 2014- 15. However, regarding the receipt of cash brokerage of Rs. 10 Lakh, I would like to mention that there was inordinate delay to receive the same from late maharani as my, co broker Shri Sanjay Badjatya who used to interact with late maharani, died in a road accident on*

14.11.2011. Even till the death of Shri Sanjay, I have not received the cash brokerage of Rs. 10 Lakh & in his absence I had to personally pursue this matter with the late maharani & ultimately I could received Rs. 10 lakh out of Rs, balance Rs. 17 Lakh in august 20\3. J may add that the balance Rs. 7 lakh has not been received by me hither to; hence there is no question of taxing the receipt of Rs, 7 lakh in my hand, as J am offering income by way of brokerage & commission on cash basis since last more than 25 years.

In nutshell, I may state that J was to get brokerage of Rs. 27 Lakh but out of this amount I have received RS. 20 Lakh till now & same has been offered for taxation as under

1.5,00,000/- (A.Y-2009-10)

2.5,00,000/- (A.Y-2010-11)

3.10,00,000/- (A.Y-2014-15)

As the balance Rs. 7 Lakh has not been received by me so far, therefore, the same has not been offered for tax.

As & when this balance 7 Lakh is received by me, the same will be offered for tax

13. From going through the above reply as well as the observation of the lower authorities and facts placed before us we find that there is no issue with regard to the income offered at Rs.5,00,000/- each for Assessment Year 2009-10 and 2010-11. Out of the brokerage of Rs.27,00,000/-, the fact that Rs.10,00,000/- has been offered to tax is accepted by the Ld. A.O. Regarding the

remaining amount of Rs.17,00,000/-, sum of Rs.7,00,000/- is claimed by the assessee to have not been received till date. Revenue has failed to discharge its onus by bringing any material on record found during the course of search or post search by way of gathering information from the parties who agreed to give brokerage to assessee that the assessee has actually received the brokerage of Rs.7,00,000/-. Ld. Departmental Representative could not controvert the fact that the assessee is showing the income on cash basis and in absence of any material against the assessee we find no justification in the addition of Rs.7,00,000/- for the income which the assessee has not received yet. However Ld. Counsel for the assessee has stated that in case it is received in subsequent year/years the same shall be offered to tax.

14. As regards the remaining amount of Rs.10,00,000/- which the assessee has accepted to have received in cash during financial year 2013-14 relevant to Assessment Year 2014-15 and duly claimed to have been offered to tax, the same can be examined by Ld. A.O by calling necessary details relevant to Assessment Year

2014-15 in order to ascertain the correctness of the assessee's claim. In case it is found correct then the Ld. A.O will delete the addition of Rs.10,00,000/- . The Ld. A.O is directed to extend reasonable opportunity of being heard to the assessee to place necessary submission and documents on record.

15. We therefore in the given facts and circumstances of the case are of the considered view that out of the impugned addition of Rs.17,00,000/-, the addition of Rs.7,00,000/- stands deleted and the remaining addition of Rs.10,00,000/- shall stand deleted if the assessee is able to prove to the satisfaction of Ld. A.O that sum of Rs.10,00,000/- towards brokerage income earned from the transaction of immoveable property between M/s D.S. Enterprises and late Maharani Laxmi Kumari (concluded during Assessment Year 2009-10) have been offered to tax in the Income Tax Return filed for Assessment Year 2014-15.

16. In the result the appeal of the assessee is partly allowed for statistical purposes.

Navin Malod
ITA No.694/Ind/2017

Order was pronounced in the open court on 18.02.2021

Sd/-

Sd/-

(KUL BHARAT)

(MANISH BORAD)

JUDICIAL MEMBER

ACCOUNTANT MEMBER

दिनांक /Dated : 18 February, 2021

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore