

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.- 2365/del/2016
(Assessment Year: 2002-03)

ITO, Ward-51 (3),
New Delhi

Appellant

Vs. Rakesh Relan,
proprietor of H B Relan & Co.,
66/2253, gurdwara Road,
Karol Bagh,
New Delhi.
PAN No. AAEP9201I
Respondent

Assessee by Ms. Hasneeta Matta
Revenue by Sh. such Satpal Gulati, CIT-DR

Date of hearing: 22/12/2021
Pronouncement on 27/12/2021

ORDER

PER K. NARASIMHA CHARY, JM

Aggrieved by the order dated 5/2/2016 passed by the learned Commissioner of Income Tax (Appeals)-17, New Delhi ("Ld. CIT(A)") in the case of Sh. Rakesh Relan ("the assessee"), for the assessment year 2002-03, assessee preferred this appeal.

2. Brief facts of the case, necessary for disposal of this appeal, are that the assessee is a stock and share broker and member of Delhi stock

exchange. For the assessment year 2002-03, by order dated 31/3/2002 passed under section 147/143(3) of the Income Tax Act, 1961 (for short "the Act"), the learned Assessing Officer found that the assessee was providing accommodation entries to the tune of Rs. 19,86,06,566/-to various persons during the financial year 2001-02. Before the assessing officer, assessee submitted that he was earning brokerage at the rate of Rs. 0.25 percent on the said amount and offered a sum of Rs. 5 Lacs for taxation. Learned Assessing Officer, however, did not agree with such rate of brokerage and estimated the same at Rs. 3 percent and made an addition to the tune of Rs. 59, 70, 000/-.

3. When the assessee carried the matter in appeal before the Ld. CIT(A), Ld. CIT(A), by order dated 15/3/2010 observed that the mere statement of the assessee that he was receiving the brokerage at 0.25% cannot be accepted, and at the same time the learned Assessing Officer also does not possess any evidence in support of estimating the brokerage at 3%. In such situation, Ld. CIT(A) observed that in the interest of Justice and revenue to tax the assessee by adopting the brokerage rate on various bogus transactions amounting to Rs. 19,86,06,566/-at 0.75% is proper.

4. Aggrieved by such a finding by the Ld. CIT(A), both the assessee and the Revenue preferred appeals before the Tribunal, and the Tribunal by order dated 23/7/2010 observed that there was no evidence in support of the claim of the assessee that he was earning commission at the rate of Rs. 0.25 percent only and at the same time the action of the learned Assessing Officer in applying the commission rate of 3% and the CIT(A) fixing it at 0.75 percent was also without any basis. In the

circumstances, the matter was remanded to the file of the learned Assessing Officer for fresh decision after examining the concerned parties, the details of whom like addresses etc., were available with a direction to the learned Assessing Officer to examine the parties, if not all but at least a few of them with whom there is high amount of transaction and, thereafter, if the assessee failed to prove the rate of commission, learned Assessing Officer should not make any addition on account of commission, but the addition should be made under section 68 of the Act on account of unexplained cash credit. Tribunal, however, further observed that because the Tribunal has no power of enhancement, the amount of addition shall be restricted to Rs. 59.70 Lacs which was originally added by the learned Assessing Officer.

5. Against such an order of the Tribunal, Revenue went in appeal to the Hon'ble High Court in the Hon'ble High Court by order dated 21/7/2011 observed that inasmuch as there is no basis for the assessee to contend that the commission rate was at 0.25% or for the learned Assessing Officer to estimate it at 3% or for the Ld. CIT(A) to say for 0.75%, the order of the Tribunal remitting the case back to the file of the learned Assessing Officer for a fresh determination of the rate of commission after examining the parties, is without any blemish and does not call for any interference. Hon'ble High Court called upon the assessee to examine the parties to whom the accommodation entries were given for ascertaining the exact rate of commission which was received by the assessee from such parties, and if the assessee fails to prove that he had received 0.25% only as a commission from various parties, adverse inference could always be drawn against him.

6. Pursuant to the orders of remand, learned Assessing Officer issued notice under section 143(2) of the Act and called upon the assessee to produce evidence to support the claim of the assessee that the rate of commission was only 0.25% and also to prove the identity/creditworthiness/genuineness of the deposits, failing which the entire unexplained cash credit will be added to the income of the assessee. Assessee pleaded that the time for reopening of the case under section 147 of the Act was barred by limitation and that the evidence is submitted earlier may be considered. It was further submitted by the assessee that since the assessee was a share broker and showing brokerage which is normally charged in his profession, the brokerage rate at 0.25% may be accepted and no addition was called for under section 68 of the Act.

7. Learned Assessing Officer observed that the assessee had nothing to offer an explanation, but repeated the submissions made on the earlier occasion. Further even according to the assessee, entire amount deposited in assessee's account was from the bank account maintained by Sh. Mahesh Kumar but the assessee failed to produce Mahesh Kumar to offer proper explanation as to the source of such deposits. Learned Assessing Officer further observed that the assessee did not bring anything on record that the cash deposited in the account of Sh. Mahesh Kumar was provided by the beneficiaries, namely, the persons to whom cheques were issued by the assessee and therefore the entire money deposited in the bank account of the assessee as a check from Sh. Mahesh Kumar remains unexplained. On this premise learned Assessing Officer, in the 2nd round of assessment proceedings, proceeded to add

the entire amount of Rs. 19, 89, 26, 581/-to the income of the assessee under section 68 of the Act.

8. When the assessee challenged the assessment order pursuant to the remand, Ld. CIT(A) called for a report from the learned Assessing Officer as to the enquiries conducted and the details of the miscellaneous applications if any filed before the Hon'ble High Court or the SLP, if any filed by the Revenue, before the Hon'ble Supreme Court. Learned Assessing Officer submitted that inasmuch as the assessee did not provide any details to support the contention of the rate of commission at 0.25%, no enquiries were made from the parties; and that no SLP was filed against the orders of the Hon'ble High Court upholding the order of the Tribunal remanding the matter to the learned Assessing Officer.

9. Ld. CIT(A) considered the submissions made on behalf of both the parties and observed that during the remand proceedings, some parties were produced or present before the learned Assessing Officer, but they have given contradictory replies. On a perusal of the statements given by Sh. Mahesh Kumar and the assessee and other relevant documents, Ld. CIT(A) formed an opinion that inasmuch as the assessing officer could not bring on record any material to establish the fact that those are not accommodation entries but the deposits in the assessee's account representing his own unaccounted money, it has to be concluded that the assessee was engaged only in giving accommodation entries to various parties and there is no justification for adding the entire deposits to the income of the assessee under section 68 of the Act. Ld. CIT(A), on the question of rate of commission, observed that going by the decision of the Tribunal in the case of JRD stockbrokers private limited vs. ACIT

124 TTJ (del) 566, rate of commission at 0.60% would be reasonable and on that remise he restricted the addition to Rs.11,93,559/-.

10. Revenue is, therefore, before us in this appeal contending that the direction of the Tribunal to the learned Assessing Officer was to make addition under section 68 of the Act the rate of commission at 0.25%, subject to the restriction of the addition to Rs. 59.70 Lacs, and therefore the Ld. CIT(A) is not justified in holding that the assessee was receiving only brokerage/commission are that the entire deposits in his account or not to be added to the income of the assessee. Ld. DR submitted that inasmuch as the learned Assessing Officer made an addition under section 68 of the Act, the question of any percentage does not arise and therefore, subject to the restriction on the quantum of addition, the addition has to be upheld.

11. Per contra, it is the submission on behalf of the assessee that when the total addition was to be restricted to 59.70 Lacs as directed by the Tribunal, firstly, the tax effect in this case comes to less than 50 lakhs and hit by the circular No. 17/2019 dated 8/8/2019 with clarification dated 20/8/2019. It is further argued that the assessment contrary to the directions of the Tribunal is bad under law and further that the assessing officer failed to take into consideration the submissions made on behalf of the assessee. She further submits that inasmuch as the Revenue does not dispute the contention of the assessee that the assessee is an accommodation entry provider receiving only commission, the scope of dispute in this matter is only in respect of the rate of commission but not otherwise. She, however, submits that in view of the deletion of the Tribunal in ITA No. 97/Del/ 2018 commission at 0.50% is appropriate.

12. We have gone through the record in the light of the submissions made on either side. It is not in dispute that in the 1st round of proceedings, it was the case of the Revenue that the assessee is an accommodation entry provider receiving commission on the amounts for which they have provided entries. According to the assessee the rate of commission was 0.25% whereas according to the learned Assessing Officer and the Ld. CIT(A) the quantum of such commission was to be estimated at Rs. 3 percent and 0.75% respectively. Since there was no evidence for determination of the rate of commission, Tribunal restored the issue to the file of the learned Assessing Officer for such a determination of examining the parties and if the assessee fails to prove the same, the addition had to be made under section 68 of the Act but subject to the restriction of 59.70 Lacs which was originally added by the learned Assessing Officer. It could be seen from the order of the Hon'ble High Court, while upholding the remand made by the Tribunal, Hon'ble High Court observed that in case the assessee fails to prove the exact rate of commission received by him, adverse inference could always be drawn against him.

13. It is, therefore, clear that in the 1st round of litigation, it has been the case of both the parties that the assessee was an accommodation entry provider receiving commission. Only dispute was in respect of the quantum of commission. Tribunal, while remaining the matter, directed the assessing officer to have a fresh look at this issue after examining the parties, and if the assessee fails to prove the rate of commission, let there be addition under section 68 of the Act, but subject to the restriction of Rs. 59.7 Lacs.

14. It is argued by the Ld. AR, and according to us rightly so, that the order of the Tribunal merges with the order of the Hon'ble High Court wherein the Hon'ble High Court directed the assessee to examine the parties to whom the accommodation entries were given for ascertaining the exact rate of commission which was received by the assessee from such parties, and if the assessee was unable to prove that he had received 0.25% only as commission from various parties, adverse inference can always be drawn against him. In the light of the directions of the Hon'ble High Court, is not open for the Revenue to contend that the learned Assessing Officer was empowered, in case the assessee fails to prove the exact rate of commission, to make addition of the entire deposits to the income of the assessee under section 68 of the Act.

15. On the face of the directions given by the Tribunal and also the Hon'ble High Court, it is, therefore, clear that the learned Assessing Officer is not justified in making the entire deposits to the tune of Rs. 19, 89, 26, 581/- to the income of the assessee under section 68 of the Act. Even going by the directions of the Tribunal, the learned Assessing Officer was to restrict the addition to Rs. 59.70 Lacs only. In that event, it is evident that after the impugned orders of the Ld. CIT(A) restricting the addition to Rs. 11, 93, 559/-, the matter false in the ambit of circular No. 17/2019 dated 8/8/2019 read with clarification dated 20/8/2019.

16. Ld. CIT(A) categorically observed that the AO did not bring on record any material to establish that the deposits in the assessee's account were not accommodation entries but represent his own unaccounted income. In view of the fact that, from the beginning the case of the Revenue has been that the assessee is an accommodation

entry provider and receiving the commission on the amounts he dealt with, Ld. CIT(A) reasonably concluded that making addition of the entire deposits under section 68 of the Act was not justified and there is nothing contrary to the contention of the assessee that he has been an accommodation entry provider and he receives only commission.

17. It could be seen from the record that except the observations of the Tribunal that in case the assessee fails to prove the rate of commission, the deposits may be added under section 68 of the Act subject to the restriction of Rs. 59.70 Lacs, absolutely there is no material on record to suggest that the assessee is not an accommodation entry provider are that the entire deposits represent his unaccounted money. It seems the learned Assessing Officer mistook the burden of proof in this matter and failed to read the observations of the Hon'ble High Court in proper perspective. When once it was not the case of any party that the entire deposits were to be taxed under section 68 of the Act, the observation of the Hon'ble High Court that if the assessee fails to prove the exact rate of commission, adverse inference be drawn against him should not have been understood by the learned Assessing Officer to mean that instead of adverse inference in respect of rate of commission, on the failure of assessee to prove the aspect of commission, adverse inference as to the treatment of entire deposits should be drawn. As a matter of fact, there was no material before the learned Assessing Officer to treat so. Context provides the meaning, purpose and aspect of adverse inference.

18. Hon'ble High Court took cognizance of the fact that the entire dispute in this matter revolves around the question of rate of commission

and directed the assessee to examine the parties to whom the accommodation entries were given for ascertaining the exact rate of commission, which was received by the assessee, and in case of any failure of the assessee to prove that he received only 0.25%, as commission from various parties, adverse inference can always be drawn against him. In these circumstances, we are of the considered opinion that after the order of the Hon'ble High Court, the entire dispute in this matter is confined to the rate of commission only and on that aspect, we are of the considered opinion that the Ld. CIT(A) is right in holding that the making addition of the entire deposits under section 68 of the Act by the learned Assessing Officer was not justified.

19. No coming to the course of quantum of commission, initially in the 1st round of litigation, Ld. CIT(A) estimated it at 0.75% whereas in the 2nd round of litigation, by following the decision of the Tribunal in the case of JRD stockbrokers private limited vs. ACIT reported in 124 TTJ (del) 566, Ld. CIT(A) estimated the same at 0.6% and restricted the addition to Rs. 11, 93, 559/-. It is the submission on behalf of the Revenue that inasmuch as the Tribunal directed in the 1st round of litigation that let the addition be restricted to Rs. 59.70 Lacs, it would be just and proper, now to restrict the addition to Rs. 59.70 Lacs inasmuch as the assessee failed to prove the exact rate of commission received by him.

20. On a careful consideration of the matter we are of the considered opinion that the Ld. CIT(A) considered the material very carefully, including the reasons for estimating the commission at 0.750% in the initial round of litigation and while following the decision of the Tribunal in the case of JRD stockbrokers (supra) in the 2nd round of litigation, took

a view that commission at 0.60% is appropriate and on that premise estimated the addition to Rs.11,93,559/-. Though the assessee argued that in Adonis Financial Services Private Limited, a coordinate Bench of this Tribunal held that a rate of commission of 0.50% would be the appropriate in the transaction which involves providing accommodation entry.

21. In view of our finding in the preceding paragraphs that the assessee is an accommodation entry provider and his real income is only towards the commission/brokerages, we are of the considered opinion that the estimate shall be reasonable having regard to the business conducted by the assessee. In the case of JRD stockbrokers (supra) it was held to be appropriate at 0.6% whereas in the case of Adonis financial services private limited it was held to be at 0.5%. Inasmuch as the assessee accepted the commission at 0.6% by not preferring any appeal against the impugned order, we are not inclined to disturb the findings of the Ld. CIT(A) in this matter to the effect that the commission at 0.6% is appropriate. On this premise, we uphold the findings of the Ld. CIT(A) and find the grounds of appeal of the Revenue is devoid of any merits. Accordingly, the appeal of the Revenue is liable to be dismissed.

22. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this the 27th day of December, 2021.

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER
Dated: 27.12.2021.

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI