

आयकर अपीलीय अधिकरण, न्यायपीठ – “वि” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.978/Kol/2019
Assessment Year: 2006-07

Manoj Kumar Jain 19, Gallif Street, Kolkata-700 004 [PAN No.ACOPJ 3303 K]	बनाम / V/s.	Income Tax Officer Ward- 44(1), 1 st Floor, 3, Govt. Place (West), Kolkata-001
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

ITA No.1400/Kol/2019
Assessment Year: 2006-07

Income Tax Officer Ward- 44(1), 1 st Floor, 3, Govt. Place (West), Kolkata-001	बनाम / V/s.	Manoj Kumar Jain 19, Gallif Street, Kolkata-700 004 [PAN No.ACOPJ 3303 K]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Anil Kochar, Advocate
राजस्व की ओर से/By Revenue	Smt. Ranu Biswas, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	18-08-2020
घोषणा की तारीख/Date of Pronouncement	10-09-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

The assessee and Revenue have filed their cross-appeal for assessment year 2006-07 arise against the Commissioner of Income Tax (Appeals)-13, Kolkata's order dated 29.03.2019 passed in case No.64/CIT(A)-13/W-44(1)/Kol/2015-16 restricting the Assessing Officer's action making undisclosed income addition of ₹2,45,62,196

made in assessment order dated 24.03.2015 to peak credit sum of ₹24,33,711/- involving proceedings u/s 143(3) r.w.s. 254 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. We notice from a perusal of the rival pleadings that assessee's solitary substantive grievance seek to reverse the CIT(A)'s action adding the foregoing peak amount of ₹24,33,711/- whereas the Revenue's corresponding grievance is that the Assessing Officer's entire addition amount of ₹245,62,195/- deserves to be restored.

3. Case file indicates that this is the second round of litigation between the parties *qua* the instant sole issue. This tribunal's co-ordinate bench's order decided on 15.02.2013 in **ITA No.1772/Kol/2009** had restored the same back to the Assessing Officer as under:-

"2. At the outset, the Ld. counsel for the assessee stated that the outcome of the appeal for AY 2006-07 as direct bearing on the appeal of AY 2007-08 and issues are common. According to Ld. counsel, who has drawn our attention to the order of CIT(A) at page 9, which reads as under:

"The most important discrepancy noticed is that the appellant failed to furnish the relevant transfer deeds indicating purchases and sales. Even at the time of Remand Report stage, the correspondence transfer deeds have not been furnished. In the rejoinder given with respect to Remand Report, the appellant submitted that he purchased unquoted shares for which delivery was obtained along with transfer memo and sales were affected by him and the transfer memos were handed over to buyers of the shares. This kind of argument, in my opinion would not support the appellant's case. At least the appellant could have submitted the purchase memos and sale memos wherein the description and the distinctive number of shares are mentioned. Without these vital details and in the absence of demat account it is hard to believe that the assessee could have carried out any real transactions in share trading business. Firstly, that the appellant has not maintained any books of account prima facie indicating the share trading business. Secondly, the substantial sale transactions have not been established. Thirdly, the assessee could neither produce the Transfer Deeds/Memos effecting the sale transactions in shares. Most importantly the assessee failed to produce any distinctive numbers of such shares purchased and sold. This information is very crucial since the share transactions done by the appellant did not come under demat account. As such the possession of shares and parting of shares physically with reference to distinctive numbers could not be established to prove that the appellant really carried out purchase and sale of shares."

3. From this para, Ld. counsel for the assessee stated that these documents are now filed before the Tribunal for the first time and also filed document at Sl. Nos. 5, 6 to 10 of the paper book, which are submitted before CIT(A) for the first time and CIT(A) has not considered these documents. It was also stated that the documents at Sl. Nos. 11 & 12 i.e. details of date wise purchase and sales, trial balance, balance sheet, P&L Account and ledger, account copies are filed for the first time before the Tribunal. In view of this, Ld. counsel for the assessee urged this Bench to admit these documents and in the eventuality of admission of these documents by the Tribunal, these needs verification at the level of AO. Hence, in both the years the issues will go back to the AO for fresh adjudication. On query from the Bench, the Ld. CIT(DR), however, relied on the orders of the lower authorities but he stated that the documents being new, these have to be admitted because these are vital for adjudication of the assessee and once these are admitted, these have to be remitted back to the file of AO for examination, verification and investigation. We are in agreement with the factual aspect noted by CIT(A) that the assessee has not produced before him demat accounts, transfer deeds, memos effecting sale transactions in shares and in the absence of the same, the CIT(A) could not have taken any decision except to confirm the addition.

4. We have heard rival submissions and gone through facts and circumstance of the case. We find that the documents produced by assessee before us relate to both the years and these require further investigation. The documents are cash deposit in bank and sources, copy of bank statement, details of purchases, summary and letters of confirmations, details of sales, summary and letters of confirmations, copy of declaration dated 05.05.2009, details of date wise purchases and sales and Trial Balance, Balance Sheet, P/L A/c & Ledger. As these documents require verification, we set aside the assessments to the file of the AO and remand 3 **ITA Nos. 1772/K/2009 & 1004/K/2011** Manoj Kr. Jain A.Y. 2006-07 & 2007-08 back the proceedings de novo. The AO will frame assessments afresh after examining the details and evidence to be produced by the assessee. Appeals of **assessee are allowed** for statistical purposes.”

It is in this backdrop of facts that the Assessing Officer's consequential assessment dated 24.03.2015 reiterated the impugned addition. He issued sec. 133(6) notices to the parties whose list had come from assessee's side for the purpose of verifying the impugned sales / purchases. He was of the view that the said parties did not maintain the books of account regarding the corresponding share transactions. He thus concluded that most of the assessee's purchasers and sellers turned out to be the same parties and therefore, it was an instance involving accommodation entries wherein share trading had been shown as a colorable device to legitimise channeling of amounts from unaccounted sources. All this resulted in the impugned undisclosed income addition of ₹245,62,195/-.

4. The assessee preferred appeal. The CIT(A) has confirmed only the peck sum addition amount of ₹24,33,744/- vide the following discussion:-

“6. It was a case of the appellant before the AO that the cash deposited in the undisclosed back account was sale consideration of shares sold to various parties over the financial year involved. From the tenor of the two assessment orders I was looking for the explanation as to the nature of cash deposit in the bank account. He did not concern himself much with relevant purchases claimed by the assessee. It may further be noted that once purchase of shares are claimed the cash deposit cannot be viewed in isolation of the said purchases which involved payments to various parties from which shares are claimed to have been purchased. From the pattern of the deposit and withdrawal in the bank account it appears that the cash deposits /. Found was transferred to various parties and there is no cash withdrawal in the bank.

*7. Once the claim is made by the appellant that the said bank account was used for sale and purchase of shares in private companies, without any findings that purchases were long term investment and not the stock in trade (**which is transitory having the holding of short period**), aggregating the whole cash deposit and equating the sum to the income of the assessee may not be correct. That approach would amount to inferring that the assessee accumulated the asset in the form of shares or otherwise by making cash deposit appearing in the bank account.*

8. From the assessment order I do not see any suggestion coming from the AO that the purchases represented investment or acquisition of long term assets. Lack of any such findings becomes very relevant in deciding the income represented by deposits and withdrawals appearing in respect to he bank statement.

*9. Once the above approach of the AO is not accepted, accepting his decision (**even for the time being**) about the failure to offer the satisfactory explanation about the source of cash deposits, I have to come up with the method to estimate the income associated with these transactions.*

10. I do not discuss at length about the enquiries and findings about the genuineness of the sales for brevity sake. From the nature of the documents submitted and the extent of comp0liacne made on behalf of the parties claimed to have given cash to the assessee and from the finding of the AO, I get the impression that it is very difficult to prove with finalty even for the assessee that the cash were indeed given by these parties.

*11. Now coming to the point of income to be estimated associated with the transactions involved, I proceed with that part of the Assessing Officer's findings which treats the cash as the assessee own money. But one relevant consideration which was ignored by the AO is that the said cash was turned over in subsequent purchases and sales. In other words he (**assessee**) seems more as a trader of stocks in private equities.*

12. I discuss a little about the Assessing Officer' findings of treating this much of transactions as one for fund transfer. But it does not mean that the whole of the money transferred was assessee's own money. Because in absence of any positive findings to the said effect it is difficult to support the Assessing Officer' decision to aggregate the cash deposits as the appellant's income. this is all the more relevant in view of the assessee's assertion or claim that the ape used the said bank account for purchase of shares, which were sold in cash mainly which was again routed back to the bank account for further purchases.

13. I find intriguing that purchases have been made always in cheque but sales have been made mostly in cash though sales in cheque is also quiet appreciable, which has not been touched by the AO. I also find it strange that the AO has completely ignored cheque deposits

in this account which was found undisclosed by the AO. If the AO was looking for the explanation of deposits in this undisclosed bank accounts, cheque deposits of almost two core in the said account should also have attracted the Assessing Officer's attention. This gives me further impressions that the AO was probably not sure of the aggregate deposits in the said undisclosed account being the income of the assessee.

14. Coming back to the cash deposits I support the Assessing Officer's view that the assessee did not give the satisfactory explanation about the ownership of the cash deposits in the bank account being not his own money. It may be noted that the documents which has been furnished in assessment proceeding has been made later. One method usually applied in cases where deposits and withdrawals are not fully ascertainable, is peak theory method, which assumes that assessee may be assumed to be the owner of the money which may be in his possession at any item and so the maximum amount of cash or money found in the hand of the assessee may be treated as an income for the purpose of assessing estimated income associated with such unexplained withdrawals and deposits. In view of the facts and circumstances of the case I therefore find this case a fit one for the application of said peak method.

15. A perusal of the said undisclosed bank account shows various amount as balances in the said bank account. These amounts vary from a few lakh on various dates to a maximum figure of Rs.24,33,744/- on 06/04/2005. These being the peak amount I treat it as the undisclosed income for the purpose of this assessment. The balance addition of Rs.2,21,28,452/- (Rs.2,45,62,196/- - Rs.24,33,744/-) is hereby **deleted**."

This leave both the parties aggrieved to the extent indicated in their respective pleadings (supra).

5. We have given our thoughtful consideration to rival pleadings against and in support of the impugned sec. 68 addition of ₹2,45,62,196/-. We notice that the Assessing Officer's case in his assessment is that the assessee is engaged in accommodation entries business only who has taken recourse alleged fictitious share transactions (supra). He has treated all sales & purchase as bogus in other hands. That being the case, we see no reason to sustain even the peak credit addition amount as well since his entry operator activity can be very well presumed to be taking credits through banking transactions and channeling the same to other parties in lieu of entry charges only. This tribunal's co-ordinate bench's decision in **ITA No.190/Kol/2020** in *SaraswatiGupta vs. Income Tax Officer Ward-47(1), Kolkata* decided on 06.07.2020 holds that only the profit rate and not the entire sum(s) deserves to be added in such a case as follows:-

"2. The assessee in the present case is an individual, who filed her return of income for the year under consideration on 31.03.2013 declaring total income of Rs.2,34,620/-. The said return was initially

processed by the Assessing Officer under section 143(1) of the Income Tax Act, 1961 on 11.02.2014. Thereafter he received information about the Bank account maintained by the assessee with Bank of India, Salkia Branch, Howrah, wherein huge transactions were reflected. On the basis of the said information, the Assessing Officer reopened the assessment for the year under consideration and issued a notice under section 148 to the assessee. During the course of assessment proceedings, the assessee was called upon by the Assessing Officer to explain the nature and source of total credits/deposits found to be made in her Bank account with Bank of India, Salkia Branch, Howrah aggregating to Rs.2,39,30,000/-. In reply, it was explained by the assessee that the said credits/deposits represented sale proceeds of her trading business. It was also submitted by the assessee that profit calculated @ 2% in respect of the said sale could be treated as her income from the transactions reflected in the Bank account with Bank of India, Salkia Branch, Howrah since the profit declared by her from the trading business for the year under consideration as well as for the earlier years was around 2%. This explanation of the assessee was not found fully acceptable by the Assessing Officer. He treated the peak credit appearing in the bank account of the assessee calculated on incremental basis at Rs.25,30,000/- as the unexplained cash credit and an addition to that extent was made by him to the total income of the assessee under section 68. He also made a further addition of Rs.19,14,400/- to the total income of the assessee on account of profit @ 8% on the unaccounted turnover of Rs.2,39,30,000/- as reflected in the Bank account of the assessee with Bank of India, Salkia Branch, Howrah. Accordingly a total addition of Rs.44,44,400/- was made by the Assessing Officer to the total income of the assessee in the assessment completed under section 143(3)/147 of the Act vide an order dated 20.12.2018.

3. Against the order passed by the Assessing Officer under section 143(3)/147 of the Act, an appeal was preferred by the assessee before the Id. CIT(Appeals). After considering the submissions made on behalf of the assessee as well as the material available on record, the Id. CIT(Appeals) found merit in the contention raised on behalf of the assessee that the peak credit in the Bank account of the assessee as worked out by the Assessing Officer on incremental basis at Rs.25,30,000/- could not be added under section 68 as the Bank account of the assessee with Bank of India, Salkia Branch, Howrah did not constitute books of account of the assessee. To arrive at this conclusion, he relied on the various judicial pronouncements as discussed in his impugned order. He accordingly deleted the addition of Rs.25,30,000/- made by the Assessing Officer on account of incremental peak credit in the Bank account of the assessee by invoking the provisions of section 68. He, however, confirmed the addition of Rs.19,14,400/- made by the Assessing Officer on account of profit from the unaccounted profit @ 8% allegedly earned by the

assessee from the unaccounted sale of Rs.2,39,30,000/- observing that even though the profit of 2% was declared by the assessee in respect of disclosed sales, no evidence could be provided by the assessee to show that the profit on undisclosed sales was the same as declared in respect of sales recorded in the books of account. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. I have heard the arguments of both the sides and also perused the relevant material available on record. As submitted by the Id. Counsel for the assessee, the profit from the disclosed sales as declared/recorded by the assessee in her books of account for the year under consideration as well as for the immediately preceding years being around 2%, the presumption could justifiably be drawn that the profit earned by the assessee from the unaccounted sales should be around 2%, especially when there was nothing brought on record by the Assessing Officer that the profit actually earned by the assessee from the undisclosed sales was abnormally higher than the profit declared by the assessee in respect of disclosed sales. The Id. D.R., on the other hand, has submitted that since the huge amount of sales as reflected in the Bank account of the assessee with Bank of India, Salkia Branch, Howrah was not declared by the assessee and the same was also not recorded in the books of account, the actual profit earned by the assessee from such unaccounted sales was unverifiable and there being no evidence produced by the assessee to show that any expenditure other than purchases was actually incurred by the assessee for making such unaccounted sales separately, the application of higher profit rate to estimate the income of the assessee from the unaccounted sales is fully justified. Keeping in view the submissions made by the Id. Representatives of both the sides and having regard to the facts of the case, I am of the view that it would be fair and reasonable to apply a profit rate of 4% to estimate the income of the assessee from the unaccounted sales of Rs.2,39,30,000/-. I accordingly modify the impugned order of the Id. CIT(Appeals) on this issue and direct the Assessing Officer to restrict the addition on this issue by applying a profit rate of 4% to the undisclosed sales of the assessee."

6. Hon'ble Bombay high court's recent judgment in **ITA No.1512 of 2017** in *Principal Commissioner of Income Tax-14 vs. Alag Securities Pvt. Ltd.*, (formerly known as Mahasagar Securities and Richmond Securities Pvt. Ltd.) dated 12.06.2020 has also upheld the tribunal's decision in assessing only 0.15% commission in case of such accommodation entry business. We draw support from the foregoing judicial precedents and hold that a lump sum commission income component of 2% of the

impugned undisclosed sum of ₹2,45,62,196/- only shall meet the interest of justice with a raider that same shall not be treated as a precedent in any other case or assessment year; as the case may be. The assessee gets part relief in his appeal ITA 978/Kol/2019 whereas Revenue's cross appeal ITA No. 1400/Kol/2019 is dismissed as necessary corollary. Necessary computation to follow as per law.

7. This taxpayer's appeal **ITA No.978/Kol/2019** is partly is allowed and Revenue's appeal **ITA No. 1400/Kol/2019** is dismissed. A copy of this common order be placed in the respect case file(s).

Order pronounced in open court on 10/09/2020

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 10/09/2020 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक /Assessee-Manoj Kr. Jain 19, Gallif Street, Kolkata-004
2. राजस्व /Revenue-ITO Wd-44(1), 1st Fl, 3, Govt. Place (West), Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।