

I.T.A. Nos. 524, 525/KOL/2014
Assessment Year: 2005-06 & 2006-07 &
I.T.A. No. 1866/KOL/2013
Assessment Year: 2007-08
M/s. Topgrain Management Pvt. Limited

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'C' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. Nos. 524 & 525/KOL/2014
Assessment Years: 2005-2006 & 2006-2007
&
I.T.A. No. 1866/KOL/2013
Assessment Year: 2007-2008**

*Deputy Commissioner of Income Tax,.....Appellant
Central Circle-VII, Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700 107*

-Vs.-

*M/s. Topgrain Management Pvt. Limited,.....Respondent
27A, Metcalf Street, Kolkata-700 001*

Appearances by:

*Dr. P.K. Srihari, CIT (D.R.), for the Appellant
None, for the Respondent*

Date of concluding the hearing : January 28, 2019
Date of pronouncing the order : February 08, 2019

O R D E R

Per Bench:-

These three appeals are preferred by the Revenue against three separate orders passed by the Id. Commissioner of Income Tax (Appeals), Central-I, Kolkata dated 22.01.2014, 22.01.2014 and 28.03.2013 for A.Y. 2005-06, 2006-07 and 2007-08 respectively and since the issues involved therein are common, the same have been heard together and are being disposed of by a single consolidated order.

2. The assessee in the present case is a Company. The investigation carried out by the Department of Income Tax (Investigation), Kolkata

revealed that some entities were involved in providing accommodation entries to various companies based in Mumbai, which in turn had used the said funds for payments to Madhipura Mercantile Cooperative Bank at Mumbai, which was controlled by Shri Ketan Parekh. Since the assessee-company was one of such entities, the statement of its Director Shri Pramod Sharma was recorded under section 131 by the DDIT(Investigation), Kolkata on 15.12.2006. In the said statement given on oath, Shri Pramod Sharma accepted that he had got cash of equivalent amount from the Mumbai based Companies belonging to Shri Ketan Parekh Group and after depositing the said cash into the Bank account of the assessee-company, cheques were issued to the said Companies. He also furnished a list of cheques so issued against cash that had been received by him. Although Shri Pramod Sharma subsequently filed an affidavit retracting his statement, the Assessing Officer did not accept the same on the basis of the enquiries conducted by the Investigation Wing on a test-check basis, which revealed that cash was deposited in various Bank accounts in different stages. According to the Assessing Officer, this factual position substantiated the statement of Shri Pramod Sharma, Director of the assessee-company that cash was indeed received by the assessee-company in lieu of cheques given to various companies belonging to Ketan Parekh Group. He accordingly held that accommodation entries were given by the assessee-company to various Mumbai based companies belonging to Ketan Parekh Group and since the accommodation entries so given during the previous year relevant to A.Y. 2007-08 aggregated to Rs.23,48,45,847/-, he added the commission income @ 2% amounting to Rs.46,96,907/- to the total income of the assessee in the assessment completed for A.Y. 2007-08 under section 143(3) vide an order dated 29.12.2009. In the assessment so made, he also made an addition of Rs.23,48,45,847/- in the hands of the assessee on protective basis observing that the unexplained income to that extent in the form of cash given by the Mumbai based companies was assessable

on substantive basis in the hands of the said companies. The Assessing Officer also reopened the assessments for A.Ys. 2005-06 and 2006-07 and in the assessments made under section 143(3)/147 vide orders dated 31.12.2008, he made similar addition on account of commission income at the rate of 2% amounting to Rs.83,74,760/- and Rs.37,43,840/- to the total income of the assessee for A.Y. 2005-06 and 2007-08 respectively. He also made additions of Rs.41,87,38,000/- and Rs.18,71,92,000/- similarly on protective basis in the assessments completed under section 143(3)/147 for A.Ys. 2005-06 and 2006-07 respectively for the total amount of accommodation entries provided by the assessee-company to the Mumbai based Companies belonging to Ketan Parekh Group observing that unexplained income to that extent was liable to be assessed on substantive basis in the hands of the said companies for the cash given to the assessee-company. The Assessing Officer made further additions of Rs.3,06,62,000/- and Rs.32,85,000/- to the total income of the assessee for A.Y. 2005-06 and 2006-07 respectively on account of unexplained cash deposits found to be made in the Bank accounts of the assessee.

3. Against the orders passed by the Assessing Officer under section 143(3)/147 for A.Y. 2005-06 and 2006-07 and under section 143(3) for A.Y. 2007-08, appeals were preferred by the assessee-company before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the Id. CIT(Appeals) deleted the addition made by the Assessing Officer to the total income of the assessee for A.Y. 2005-06 on account of the alleged accommodation entries given to the Mumbai based Companies in the form of commission income at the rate of 2% as well as further addition on account of protective basis for the following reasons given in paragraph no. 6 of his impugned order:-

"6. I have perused the relevant orders and considered the material placed on record. I find from the appeal folder that in course of the appellate proceedings, my learned

predecessor tried to ascertain about the cases where substantive additions were made corresponding to the protective addition in the present case; and also, about the fate of the appeals in those cases. The Ld CIT(A) called for the report vide his letter dated 23-07-2009 which was followed by reminders dated 17-08-2010, 13-07-2011, 30-10-2013 and 19-11-2013. However, though a substantial period of 4 & 1/2 years has elapsed, nothing has been heard in this regard from the AO. In this factual background; given the facts of the case and the findings of the AO in his assessment order;' and also, the decisions of the Hon'ble Benches of the jurisdictional ITAT in similar cases involving identical facts and circumstances, the present appeals now being decided on the basis of the material available on record. I find that the AO has made the additions on the basis of the admission made by the director before the DDIT(Inv) which was later retracted. It is a settled legal proposition that a mere admission which is later retracted and which is not corroborated or supported by any independent material cannot be made the basis for' addition. Once the admission made by the director was retracted, the onus was on the AO to bring positive material on record which could corroborate or support the admission. But, in the present case, no such material has been brought on record by the AO. On the contrary, the AO has simply rejected the retraction without assigning any reason. The AO has not even discussed in his assessment order as to why the retraction made-by the director through a sworn affidavit was not acceptable to him. Moreover, the AO has brought on record no independent material wh ch could possibly corroborate or support the admission made earlier by the director of the assessee company. In this factual background, I am of the considered view tha the AO has erred in law as well as on facts in resting his assessment on the admission of the director which was later retracted and which was not corroborated or supported by any independent material on record. I also find from the assessment order that the addition on account of unexplained cash was made by the AO on protective basis. The AO has himself given the finding in his assessment order that the assessee company had issued cheques by taking equal amount of cash from various companies; and that, such cash was assessable as unexplained income in the hands of those companies. The AO has then added the same cash on protective basis as unexplained income of the assessee company without assigning any concrete reasons. I find no basis or justification for the AO to consider on protective basis such cash as unexplained income of the assessee company which he himself held was assessable as unexplained income in the hands of the various companies who had allegedly purchased accommodation entries. The

addition on protective basis on account of unexplained cash by the AO contradicts his own findings that such cash was assessable as unexplained income in the 'hands of the various companies who had allegedly purchased accommodation entries. Above all, identical additions made by the AO in similar cases were deleted by my learned predecessor as well as by the Hon'ble Benches of the jurisdictional ITAT. In other words, similar additions based on the admission of the director of the company which was later retracted was deleted by the jurisdictional ITAT in the assessment of such company. In these cases, the director of the company made admission regarding providing accommodation entry in lieu of cash which was later retracted. Though the AO made similar additions on account of unexplained cash and commission income in the case of the company, the same was deleted by the Ld CIT(A) as well as by the jurisdictional ITAT. The issues in the present appeal are thus covered by the orders of the Hon'ble Benches of the jurisdictional ITAT wherein similar additions, made under identical facts and circumstances, were deleted. Respectfully following the decisions of the jurisdictional ITAT, it is to be held that the additions made by the AO on account of unexplained cash and commission income is neither sustainable in law nor on facts. The additions of Rs.41,87,38,000/- and Rs 83,74,760/- is directed to be deleted. Ground no 2 & 3 are allowed".

For almost identical reasons as given in his impugned order for A.Y. 2005-06, the Id. CIT(Appeals) also deleted the similar additions made by the Assessing Officer to the total income of the assessee for A.Y. 2006-07 and 2007-08 on account of the alleged accommodation entries given to the Mumbai based Companies in the form of commission income and further addition on account of protective basis.

4. As regards the addition of Rs.3,06,62,000/- made by the Assessing Officer to the total income of the assessee for A.Y. 2005-06 on account of unexplained cash deposits found to be made in the Bank accounts, the Id. CIT(Appeals) did not find the same to be sustainable for the following reasons given in paragraph no. 8 of his impugned order:-

"8. I have considered the assessment order and the remand reports of the AO. It was contended before me that the cash deposits in the bank account was verifiable from the

cash book of the assessee company. It was further contended that the cash balances available in the cash book were due to cash withdrawals made earlier from the bank account (which was verifiable from the bank statement) and the sale proceeds of shares (which was duly supported by sales invoices). The AO has admitted in his remand reports that the cash deposits in the bank account were verifiable from the cash book which was produced before him in course of the remand proceedings. The AO has further admitted that the sale proceeds of shares reflected in the cash book are duly supported by sales invoices which were also produced before him. The AO has found no defect in the cash book of the assessee company. The AO has not pointed out any receipts recorded in the cash book whose source was not explained. The remand reports of the AO contain no adverse finding or remark about the cash book. In this factual background, the only conclusion that can possibly be drawn is that the cash deposits in the bank account are explained with reference to the cash book of the assessee company. The AO has noted in his remand reports that apart from the bank statement, cash book and the sales invoices, the assessee could produce no other evidence for verification. But then, it has not been clarified by the AO as to what more evidence he required the assessee to produce for verification. The AO has observed that the transactions in shares were made in cash. But then, the sales invoices alongwith the PAN of the buyers was produced before the AO in course of the remand proceedings and the remand reports contain no adverse findings in this regard. I therefore agree with the Ld AR that there is no adverse finding in the remand reports of the AO. The AO has categorically admitted that the bank statement, cash book and sales invoices were produced before him and that the cash deposits in the bank account were verifiable from the cash book. I am therefore of the considered view that such cash deposits in the bank account which were duly verifiable from the cash book of the assessee company could not be treated as its undisclosed income. The addition of Rs.3,06,62,000/- is deleted. Ground no 4 is allowed. Ground no 5 is directed against the initiation of penalty proceedings u/s.271(1)(c) which is premature for adjudication at this stage. Hence, ground no 5 is dismissed. Ground no 6 is general in nature”.

For almost identical reasons as given in his impugned order for A.Y. 2005-06, the ld. CIT(Appeals) also held that the similar addition made by the Assessing Officer on account of unexplained cash deposits found to be made in the Bank accounts of the assessee for A.Y. 2006-07 was not

sustainable. Accordingly he deleted these additions made by the Assessing Officer to the total income of the assessee for A.Ys. 2005-06 and 2006-07. Aggrieved by the orders of the Id. CIT(Appeals) giving relief to the assessee for all the three years under consideration, the Revenue has preferred these appeals before the Tribunal.

5. At the time of hearing of these appeals fixed on 28.01.2009, none has appeared on behalf of the assessee. These appeals are, therefore, being disposed of *ex-parte qua* the respondent-assessee after hearing the arguments of the Id. D.R. and perusing the relevant material available on record. The two common issues involved in all these three appeals relate to the deletion by the Id. CIT(Appeals) of the additions made by the Assessing Officer on account of alleged accommodation entries given to the Mumbai based Companies on protective basis and the deletion by the Id. CIT(Appeals) of the addition made by the Assessing Officer on account of commission income allegedly received by the assessee for giving accommodation entries. It is observed that the similar issues were involved in some other cases and all these cases were adjourned in the past and also blocked for some period for getting the information about the status or outcome of the cases where the similar amounts were added on substantive basis. In spite of sufficient time given to both the parties, they have failed to furnish the said information. It is well settled that protective assessment is permissible in law and in case a doubt or ambiguity about real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to make a protective assessment. As held by the Hon'ble Supreme Court in the case of Lalji Haridas -vs.- ITO (43 ITR 387), the Officer may, when in doubt, to safeguard the interest of the revenue can assess it in more than one hand but this procedure can be permitted only at the stage of assessment. Protective assessment becomes redundant when the substantive assessment becomes final and if the substantive assessment fails, it is

protective assessment which is to be treated as substantive. Keeping in view this corollary between the substantive assessment and protective assessment, an appeal against the protective assessment should ordinarily await the outcome of the substantive assessment so that the protective assessment can be in conformity with the substantive assessment. In the case of CIT -vs.- Surendra Gulab Chand Modi (140 ITR 517), the appeal arising out of the protective assessment was disposed of by the appellate authority i.e. Tribunal vacating the protective assessment without waiting for the final outcome of the proceedings arising from the substantive assessment, which matter was pending in the Hon'ble Supreme Court. The Hon'ble Gujarat High Court held that the Tribunal was not justified in proceeding with the matter and in disposing of it instead of blocking it till the disposal of the matter pending in the Hon'ble Supreme Court in order to bring it in conformity with the view of the Hon'ble Supreme Court. The Hon'ble Gujarat High Court accordingly directed the Tribunal to keep the matter alive and pending awaiting the decision of the Hon'ble Supreme Court in the proceedings arising from the substantive assessment.

6. In the present case, the Id. CIT(Appeals) did not await the outcome of the proceedings arising from the substantive assessment and since the said information was not forthcoming even after a considerable period from the concerned assessing officer, he proceeded to dispose of the appeals arising from the protective assessments by his impugned orders and deleted the addition made on protective basis without awaiting the final outcome of the proceedings arising from the substantive assessment. Keeping in view the decision of the Hon'ble Gujarat High Court in the case of CIT -vs.- Surendra Gulab Chand Modi (supra), we hold that the Id. CIT(Appeals) was not justified in deleting the additions made by the Assessing Officer on protective basis in all the three years under consideration without awaiting for the final outcome of the proceedings

arising from this substantive assessment. We, therefore, set aside the impugned orders of the Id. CIT(Appeals) on this issue and remit the matter back to him for keeping it alive and pending till the outcome of the proceedings arising from the substantive assessment.

7. As regards the issue relating to the additions made on account of commission income allegedly received by the assessee for giving accommodation entries, we find that this issue is consequential to the issue relating to the addition made on protective basis on account of accommodation entries allegedly given by the assessee company to the Mumbai based companies. Since the said issue is remitted back by us to the Id. CIT(Appeals), we also remit the consequential issue relating to addition on account of commission income back to the Id. CIT(Appeals) for deciding the same afresh. Grounds No 1 & 2 of the Revenue's appeals for all the three years under consideration are accordingly treated as allowed for statistical purposes

8. As regards the remaining third issue relating to the deletion by the Id. CIT(Appeals) of the addition made by the Assessing Officer on account of unexplained cash deposits found to be made in the Bank account of the assessee, which is involved in A.Y. 2005-06 and 2006-07, we find that the impugned cash deposits were claimed to be made by the assessee out of cash balances available in the cash book on the respective dates as well as the sale proceeds of shares and in his remand report submitted to the Id. CIT(Appeals), this claim of the assessee was accepted by the Assessing Officer himself by stating that the cash deposits in the bank account were verifiable from the cash book which was produced before him and even the sale proceeds of shares reflected in the cash book were duly supported by sales invoices which were also produced before him. Keeping in view this remand report submitted by the Assessing Officer accepting the claim of the assessee regarding the availability of cash for

deposits made in the Bank account after verification, the Id. CIT(Appeals) deleted the addition made by the Assessing Officer on account of the alleged unexplained cash deposits found to be made in the Bank account of the assessee and we do not find any infirmity in the impugned orders of the Id. CIT(Appeals) giving relief to the assessee on this issue for A.Y. 2005-06 and 2006-07. Even the Id. D.R. has not raised any material contention in this regard. We accordingly uphold the impugned order of the Id. CIT(Appeals) on this issue and dismiss Ground No. 3 of the Revenue's appeals for A.Y. 2005-06 and 2006-07.

9. In the result, the appeals of the Revenue for A.Y. 2005-06 and 2006-07 are treated as partly allowed for statistical purposes, while the appeal of the Revenue for A.Y. 2007-08 is treated as allowed for statistical purposes.

Order pronounced in the open Court on February 08, 2019.

Sd/- **Sd/-**
(S.S. Viswanethra Ravi) **(P.M. Jagtap)**
Judicial Member **Vice-President (KZ)**

Kolkata, the 8th day of February, 2019

- Copies to :
- (1) **Deputy Commissioner of Income Tax,
Central Circle-VII, Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, Kolkata-700 107**
 - (2) **M/s. Topgrain Management Pvt. Limited,
27A, Metcalf Street, Kolkata-700 001**
 - (3) *Commissioner of Income Tax (Appeals), Central-1, Kolkata,*
 - (4) *Commissioner of Income Tax- ,*
 - (5) *The Departmental Representative*
 - (6) *Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.