

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

[Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member]

I.T.A. No. 1483/Kol/2015
Assessment Year: 2006-07

I.T.A. No. 1484/Kol/2015
Assessment Year: 2007-08

I.T.A. No. 1485/Kol/2015
Assessment Year: 2009-10

I.T.A. No. 1486/Kol/2015
Assessment Year: 2010-11

I.T.A. No. 1487/Kol/2015
Assessment Year: 2012-13

A.C.I.T., CC-1,(1), Kolkata.....Appellant
Ayakar Bhawan Poorva
110, Shantipally
3rd Floor
Kolkata - 700 107

M/s. Hariram Jagdish Prasad..... Appellant
218A, J.L. Street
1st Floor
Kolkata - 700 007
[PAN : AACFH 0643 L]

Appearances by:

Shri B.C Jain, A/R, appeared on behalf of the assessee.

Shri Goulen Hangshing, CIT, appearing on behalf of the Revenue.

Date of hearing : March 9th, 2018

Date of pronouncement : April 13th, 2018

O R D E R

Per J. Sudhakar Reddy :-

All these appeals are filed by the revenue directed against separate but identical orders of the Id. Commissioner of Income Tax (Appeals)-20, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 24/09/2015.

2. The assessee submitted that it had income from commission and interest. Before the Assessing Officer, the assessee explained its nature of business vide its letter dt.27/05/2011, addressed to the Income Tax Officer 43(4), Kolkata, which is at pages 11 to 12 of the paper book. Further explanation was given on the nature of business to the DCIT CC-2, Kolkata, in response to a show cause notice dt.10/03/2014, a copy of which is at pages 65-66 and 66(a) of the paper book. The Assessing Officer completed the assessment by holding as follows:-

"6. In the background of above discussion the contention of the assessee is not acceptable. Hence, the **peak credit of Rs.5,65,98,782/-** reduced by the capital available in the balance sheet is hereby added to total income of the assessee being undisclosed working capital. Thus, the quantum of undisclosed working capital is (Rs.5,65,98,782/- minus Rs.2,48,68,535/-) **Rs.3 17 30,247/-**. **Penalty proceeding u/s. 271(1)(c) of the Act is initiated separately.**

7. Subject to above discussion, the total income of the assessee is computed as follows:-

Computation of Total Income:-

Income as per return	Rs. 34,013/-
Add:- Undisclosed working capital (As discussed in para-6)	<u>Rs.3,17,30,247/-</u>
Total income:-	<u>Rs.3,17,64,260/-</u>

Calculation of Tax

Tax payable @ 30%:-	Rs.95,29,278/-
Surcharge @ 10%:-	<u>Rs. 9,52,928/-</u>
	Rs.1,04,82,206/-

Add:- Education cess @ 3%:-	<u>Rs. 3,14,466/-</u>
	Rs.1,07,96,672/-
Add:- Interest u/s. 234A	Rs. 735/-
Add:- Interest u/s. 234A(3) (11%)	Rs. 11,87,633/-
Add:- Interest u/s 234B	Rs. 1,138/-
Add:- Interest u/s. 234B(3)(34%)	Rs. 36,70,868/-
Add:- Interest u/s. 234C	<u>Rs. 369/-</u>
	Rs.1,56,57,415/-
Less:- Tax paid u/s. 140A	<u>Rs. 10,510/-</u>
Balance Payable:-	<u>Rs.1,56,46,905/-</u>

2.1. Identical orders were passed for all the Assessment Years bringing the peak credit in the bank accounts to tax. Aggrieved, the assessee carried the matter in appeal. The Id. CIT(A) called for a remand report from the Assessing Officer on the submissions made by the assessee. In its remand report dt.31/07/2015, the Assessing Officer disputed the nature of business conducted by the assessee on the ground that (a) the assessee's case was never subjected to scrutiny assessments in the years mentioned by the assessee. (b) Facts brought out by the assessee regarding search and assessment during the earlier Assessment Year 1991-92, 1992-93, could not be verified as the record is not available with him. (c) On the nature of business explained by the assessee before the Income Tax Officer, Ward-43(4), Kolkata, it cannot be considered as the same was prior to transfer of the case by way of centralization. (d) The cash found at the premises of the assessee during the course of search could not be explained as the assessee did not produce the parties to whom he claimed that the cash belonged to and that only three affidavits were submitted to him. (e) On the issue of computation of peak, he admitted of certain typographical mistakes.

After considering the remand report of the Assessing Officer and submissions of the assessee, the Id. CIT(A), on the issue of peak credit held as follows:-

"10. I have considered the finding of the AO on this issue and submissions made by the AR during the appellate proceedings. The AR has also submitted copies of affidavit by a number of parties claiming and owning cash handed by them to the assessee for which they had collected account payee cheques in the name of their suppliers in different cities. It has also been brought on record by the AR that in the year 1992 also a search operation u/ s 132 was carried on in the business premises of the assessee and after thorough investigation, the income tax department had accepted the claims of the assessee. I have gone through supporting documents filed by the AR in support of his claims and arguments. I find that in this type of business peak amount of different bank accounts on different dates and in different branches cannot be taken as amount of working capital of the assessee. It is because the account payee cheques issued by the assessee in the name of different suppliers in different cities are presented on different dates. So, the amount of presented cheque and the amount of deposited cash

will never tally. Accordingly AO's of making addition on the basis of peak amount in different bank accounts on different dates and in different branches is not justified. Therefore addition made on the basis cannot be sustained. Hence assessee's appeal on this ground is allowed."

On the legal argument of the assessee that the assessment is bad in law, as it is not based on any incriminating material found and seized during the course of search and as regular assessments were completed before the date of search and hence they did not abate, he rejected this contention, by holding that, there is not such requirements of law. He held that from a plain reading of Section 132, it is clear that, whenever there is any action u/s 132 and any books of account or documents are seized then the Assessing Officer had to initiate proceedings u/s 153A of the Act. He allowed the appeal in part.

3. Aggrieved the revenue is appeal before us on the following grounds:-

"That on the facts and circumstances of the case, the CIT(A) erred in allowing the claim of the respondent that it is in line of business, there was no requirement of working capital.

The appellant craves leave to add, alter or modify and/or submit further or more grounds of appeal either before or at any time during the hearing of the appeal".

3.1. As the facts, issues and grounds in all the appeals for all the Assessment Years are common, they are heard together and disposed off by way of this common order.

4. The ld. D/R, Shri Goulen Hangshing, submitted that the ld. CIT(A) has committed an error in holding that no working capital is required in view of the nature of business of the assessee. He argued that working capital is a must in any nature of business and as the assessee could not explain and substantiate the deposits in its bank accounts, the Assessing Officer has added the peak credit.

5. The Id. Counsel for the assessee, on the other hand submitted that the nature of business has been explained in detail during the course of the first search operation during the years 1991-92 & 1992-93 and also before the ITO Ward 43(4), Kolkata on 27/05/2011, a copy of which is at page 11 to 12(a) of the paper book. He further drew the attention of the Bench to the reply given to the DCIT, CC-2, Kolkata, a copy of which is at page 65, 66 & 66(a) of the Paper book and submitted that there is no dispute that the assessee earned only commission income from providing service. He vehemently contended that this is the nature of business carried on by the assessee for the last many years and from an examination of the nature of business would take us to a conclusion that no work capital would be required. Cash is collected by the assessee from different small traders and account payee cheques are issued to them as per their instructions and such cash collected is deposited in the Bank. Hence he supported the order of the Id. CIT(A).

On the issue of assessment u/s 153A, he submitted that the assessee had originally filed the return of income for all the Assessment Years except for the Assessment Year 2012-13 on or before the date of search i.e. 29/04/2011 and as no notice u/s 143(2) of the Act, was issue to the assessee before the period of limitation prescribed under the Act, no proceeding is pending before the Assessing Officer for the Assessment Year 2006-07, 2007-08 & 2009-10 and hence the assessments have been abated and as no incriminating material whatsoever, was found and seized during the course of search, the assessments are bad in law. For the Assessment Year 2012-13 in ITA No. 1487/Kol/2015, he submitted that the tax effect is less than Rs.10 Lakhs/- and hence the appeal is not maintainable. The assessee submits that the order of the Id. First Appellate Authority be upheld and the revenue appeals be dismissed.

6. After hearing the rival contentions, perusing the papers on record, orders of the authorities below and the case-law cited, we hold as follows:-

The assessee had filed his return of income for the Assessment Year 2006-07 on 31/10/2006 and the same was processed on 28/02/2007. Similarly for the Assessment Year 2007-08 was filed on 31/08/2007 and intimation was processed on 03/03/2009. For Assessment Year 2009-10, the return of income was filed on 18/09/2009. No notice u/s 143(2) was issued to the assessee for these three Assessment Years. No proceeding is pending before the Assessing Officer. There is no incriminating material found during the course of search. For these Assessment Years the entire addition have been based on bank accounts and books of accounts produced before Assessing Officer which are disclosed documents. The legal position in such cases is that no addition can be made in an assessment made u/s 153A r.w.s. 143(3) of the Act, which is not based on any incriminating material found during the course of search, in cases where the assessment is not abated. This proposition has been laid down in the case of *Commissioner of Income Tax (Central-III) v. Kabul Chawla (2016) 380 ITR 573 (Del)*. Thus, assessments for the Assessment Year 2006-07, 2007-08 & 2009-10, wherein an addition is made u/s 153A r.w.s. 143(3) of the Act, is not based on any incriminating material found and seized during the course of search, is bad in law.

7. We now consider the revenue's appeal for the Assessment Year 2012-13. This appeal of the Revenue is to be dismissed as not maintainable in view of the CBDT Circular No. 21/2015, dated 10th December, 2015, as the tax effect is admittedly below Rs. 10 Lakhs.

8. This leaves us with the appeal for the Assessment Year 2010-11 in ITA No. 1486/Kol/2015.

Brief facts of the case are as follows:-

The assessee is an individual and earns income by way of commission. A search and seizure operation u/s 132 of the Act, was conducted at the business premises of the assessee on 29/04/2015. Notice u/s 153A of the Act, was issued on 18th December, 2012. The Assessing Officer was of the view that the assessee has not

filed its return or income and issued a notice u/s 276CC of the Act. The assessee had approached the Director General of Income Tax under *CIRCULAR NO. 10/2012 [F. NO. 282/22/2012-IT (INV. V)]*, DATED 31-12-2012, and requested that only one year assessment should be made as no incriminating material was found during the course of scrutiny in earlier Assessment Years. Later the assessee filed the return of income in response to notice u/s 153A of the Act. Along with Form No. 36 and grounds of appeal, the ACIT CC-1(1), Kolkata submitted the facts of the case as follows:-

“Search and seizure operation was conducted at the office of the assessee on 29/04/2011. Notice u/s 153A was issued and assessment was completed u/s. 143(3)/153A on 31/10/2014 on a total income of Rs. 3,17,64,260/-. The assessee has a unique nature of business which basically revolves around whole sale garments market of Manglahat. Traders and manufacturers of almost all states of India assemble at Manglahat on Tuesdays and purchase and sale of mainly non-branded readymade merchandise takes place. The assessee acts as an intermediary and issues pan-India cheques to traders on basis of cash paid by them, and sometimes on credit also. The assessee facilitates transactions as it has goodwill and the cheques issued by the firm have acceptance with all traders. It charges commission on cheques issued in lieu of cash. Cheques are issued for genuine transactions only as no adverse findings have been made.

During assessment proceedings, addition to returned income was made on account of undisclosed working capital amounting to Rs. 3,17,30,247/-.

The Ld. C.I.T.(A)-20, Kol. in his order in appeal no. 145/CIT(A)-20/CC-1(1)114-15 dated 24/09/2015 has deleted the addition made on account of undisclosed working capital by commenting that the addition made on the basis of peak amount in different banks is not justified in the case of the assessee and cannot be sustained.”

8.1. From the above, it is clear that the findings in the remand report are against the facts of the case. When the Assessing Officer himself states the nature of business of the assessee as an intermediary, who issues pan-India cheques to traders on basis of cash paid by them, the question of working capital requirement being there for the assessee does not arise. In other words, the claim of the assessee that it received cash from up country customers and on their instructions issues cross cheques for a commission is not in dispute in such nature of business, where money is received from third parties in advance and deposited in bank accounts and, therefore, when cheques are given, the question of working capital

or seed capital being required does not arise. Hence, factually also, the order of the Id. First Appellate Authority has to be upheld.

8.2. Thus, we uphold the findings of the Id. First Appellate Authority and dismiss these appeal of the revenue on this ground.

9. In the result, the appeals of the revenue are dismissed.

Kolkata, the 13th day of April, 2018.

Sd/-

[S.S. Viswanethra Ravi]
 Judicial Member

Sd/-

[J. Sudhakar Reddy]
 Accountant Member

Dated : 13.04.2018

{SC SPS}

Copy of the order forwarded to:

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2. A.C.I.T., CC-1,(1), Kolkata
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3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary
 Head of Office/ D.D.O. ITAT, Kolkata Benches

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