

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1512 OF 2017

Principal Commissioner of Income Tax-14 ... Appellant
Vs.
Alag Securities Pvt. Ltd.
(Formerly known as Mahasagar Securities and
Richmond Securities Pvt. Ltd.) ... Respondent

Mr. Suresh Kumar for Appellant.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.**
Reserved on : FEBRUARY 11, 2020
Pronounced on : JUNE 12, 2020

P.C.:

Heard Mr. Suresh Kumar, learned standing counsel, Revenue for the appellant.

2. This appeal under Section 260-A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) has been preferred by the Revenue assailing the order dated 18.11.2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench 'A', Mumbai ('Tribunal' for short) in ITA No.886/Mumbai/2012 for the assessment year 2003-04.

3. The appeal has been preferred by the Revenue projecting the following questions as substantial questions of law:-

“1. Whether on the facts and in the circumstances of the case and in law, Tribunal erred in restricting the addition of Rs.4,78,94,000.00 made by the Assessing Officer on account of unexplained cash credits under Section 68 of the Act to commission income calculated at 0.15% without appreciating that the assessee had failed to furnish satisfactory explanation with regard to identity of the parties, source and genuineness of the transactions?

2. Whether on the facts and in the circumstances of the case and in law, Tribunal erred in restricting the addition made by the Assessing

Officer to the commission income at 0.15% without considering that the material found during the course of search clearly established that the net commission charged by the assessee varied between 1.5% to 3.6% and that the decision in M/s. Mihir Agencies Pvt. Ltd. relied upon by the First Appellate Authority was clearly distinguishable?”

4. Thus from the above, it is quite evident that the issue involved in the present appeal is restriction of the addition of Rs.4,78,94,000.00 made by the Assessing Officer on account of unexplained cash credits under Section 68 of the Act to the commission income at the rate of 0.15%.

5. Respondent is an assessee under the Act having the status of resident company (hence also referred to as 'assessee'). Assessee is engaged in the business of providing accommodation entries to entry seekers. A search and seizure operation under Section 132(1) of the Act was carried out on 28.06.2006 in the case of one Shri Hitesh M. Bagthariya who deposed that he was an entry operator and that he used to arrange cheques of the assessee and M/s. Goldstar Finvest Pvt. Ltd. Following the same, assessment under Section 143(3) read with Section 153-C of the Act in the case of the assessee was made by the Assessing Officer for the assessment year 2003-04 on 26.12.2008 determining the total income of the assessee at Rs.62,480.00 as against the returned loss of Rs.14,596.00.

6. It may be mentioned that another search action under Section 132 of the Act was subsequently carried out on 25.11.2009 in the case of Mahasagar Group of Companies, now known as Alag Securities, to which assessee belongs. Following the same, assessment completed under Section 143(3) read with Section 153-C of the Act in the case of the assessee was reopened after recording the reasons and after taking prior approval of the higher authority. After hearing the assessee and considering the materials on record, Assessing Officer passed the assessment order dated 31.12.2010 under Section 143(3) read with Section 147 of the Act. Assessing Officer held that the identity of the parties involved in the transactions were not furnished as well as genuineness of the transactions relating to total cash

deposits of Rs.4,78,94,000.00 were not satisfactorily explained by the assessee. Holding that the source, nature, genuineness and credit worthiness of the creditors relating to the transactions were not proved by the assessee, the aforesaid amount which were found in deposits in various bank accounts was added back to the total income of the assessee as unexplained income from undisclosed sources under Section 68 of the Act.

7. Aggrieved by the above and raising other issues as well, assessee preferred appeal before the Commissioner of Income Tax (Appeals)-37, Mumbai (referred to hereinafter as 'CIT (A)' or 'the First Appellate Authority'). By the appellate order dated 08.11.2011, CIT (A) noted that the same issue had cropped up before the Tribunal in several appeals including in the case of ITO Vs. Mihir Agencies Pvt. Ltd., ITA No.4912/Mumbai/2005 for the assessment year 2002-03 wherein Tribunal had held that only 0.15% of the total deposits were to be treated as income from commission in the hands of the respective entities. Following the above, CIT (A) directed the Assessing Officer to adopt only 0.15% of the total deposits as commission in the hands of the assessee and to delete the balance addition.

8. Revenue challenged this order of CIT (A) before the Tribunal. Tribunal vide the order dated 18.11.2016 noted that the same issue arose in the case of M/s. Goldstar Finvest Pvt. Ltd. for the same assessment year i.e., assessment year 2003-04. In M/s. Goldstar Finvest Pvt. Ltd., Tribunal took the view that assessee was only concerned with the commission earned on providing accommodation entries. Commission in that case was assessed at 0.15%. Since assessee was part of the group of entities in respect of which the same view was taken, Tribunal upheld the order passed by the CIT(A) and dismissed the appeal of the Revenue.

9. Hence the present appeal by the Revenue.

10. Mr. Suresh Kumar, learned standing counsel, Revenue has referred to Section 68 of the Act and submits that Assessing Officer was fully justified in adding the cash deposits amounting to Rs.4,78,94,000.00 to the income of the assessee thus bringing those within the ambit of the tax net as the assessee had failed to discharge the primary onus on it by satisfactorily explaining those cash deposits. Assessing Officer had recorded a clear finding that assessee could not satisfactorily explain the source, nature, genuineness and credit worthiness of the creditors of those transactions. The First Appellate Authority was not at all justified in restricting the addition to only a percentage of commission, that too, at the low rate of 0.15%. Tribunal committed a manifest error in affirming such decision of the First Appellate Authority. In this connection learned standing counsel has referred to and relied upon a decision of the Supreme Court in *Principal Commissioner of Income Tax Vs. NRA Iron and Steel (P) Ltd.*, **(2019) 103 Taxmann.com 48**. He finally submits that the two questions proposed are substantial questions of law which may be answered in favour of the Revenue.

11. Submissions made by Mr. Kumar have been considered. Also perused the materials on record.

12. At the outset it would be apposite to deal with the assessment order in question. As already noticed above, following search and seizure operation under Section 132(1) of the Act assessment order under Section 143(3) read with Section 153C of the Act was passed on 26.12.2008 by the Assessing Officer determining the total income of the assessee at Rs.62,480.00 as against the returned loss of Rs.14,596.00.

13. Another search action under Section 132(1) of the Act was carried out subsequently on 25.11.2009 in the case of Mahasagar Group of Companies, now known as Alag Securities. Assessee was one of the companies of the above group. Consequent thereto, the concluded assessment was reopened after recording

reasons and after taking prior approval of the higher authority. It was mentioned in the reasons recorded that the assessee along with the related 34 odd companies forming part of the Mahasagar Group of Companies, now Alag Securities, were engaged in fraudulent billing activities and in the business of providing bogus entries. Shri Mukesh Choksi and Shri Jayesh K. Sampat were directors of those companies. From their statements, it came to light that the said group of companies was engaged in activities of laundering unaccounted cash of various clients by having the cash deposited in the bank accounts of various companies, transfer of funds between various group companies and issue of cheques, etc. to the clients with bogus bills showing making of speculation profit / loss or short term capital gains / loss etc. It was noticed that there were cash deposits totalling Rs.4,78,94,000.00 in the bank accounts of the assessee which were not disclosed to the Income Tax Department.

14. During the assessment proceedings, the assessee submitted that it was involved in the business of facilitating and providing accommodation entries to the beneficiaries, details of which were explained during the search action. It was also explained that for such services rendered, assessee used to charge commission and the rate of commission was taken at 0.15%. It was contended that assessee had deposited the cash received from the customers / beneficiaries and issued corresponding cheques to them for which it earned commission. This is the admitted case. Therefore, Section 68 of the Act would not be attracted in such a case because the cash credits did not belong to or formed part of the income of the assessee.

15. However, the Assessing Officer did not accept the contention of the assessee. Taking the view that the cash credits were not satisfactorily explained, the total cash deposits of Rs.4,78,94,000.00 was added to the total income of the assessee as unexplained income from undisclosed sources under Section 68 of the Act.

16. In appeal before the CIT (A), assessee reiterated its contention. It was explained that customers made deposits in cash amounts and in turn they took cheques from the assessee for amounts slightly lesser than the amounts of cash deposits, the difference representing the commission realized by the assessee. The commission rate on such dealings was 0.15%. CIT (A) noticed that in the case of Mihir Agencies Pvt. Ltd. belonging to the same group of companies for the assessment year 2002-03, a similar issue had cropped up before the Tribunal. In that case, Tribunal held that the action of the Assessing Officer in treating the entire deposits as unexplained cash credits could not be accepted in the light of assessment orders passed in the case of the beneficiaries and also in the light of the fact that assessee was only concerned with the commission earned in providing accommodation entries. Tribunal had noted that in earlier cases the average percentage of commission was between 0.15% to 0.25% which was found to be reasonable. Since the assessee i.e. Mihir Agencies Pvt. Ltd. had itself declared the commission at 0.15%, the same was accepted. CIT (A) held that facts of the present case were identical to the facts of Mihir Agencies Pvt. Ltd. Therefore, following the above decision, CIT (A) directed the Assessing Officer to adopt only 0.15% of the total deposits as commission in the hands of the assessee and to delete the balance addition.

17. When this issue came up before the Tribunal in appeal by the Revenue, Tribunal noticed that similar issue had arisen before it in the cases of M/s. Goldstar Finvest Pvt. Ltd., M/s. Mihir Agencies Pvt. Ltd., M/s. Alliance Intermediaries and Network Pvt. Ltd. and Shri Mukesh Choksi, which were relied upon by the assessee. In fact, Tribunal found that in the case of M/s. Goldstar Finvest Pvt. Ltd., the dispute pertained to the assessment year 2003-04 which was also the assessment year in the appeal relating to the assessee and that the grounds of appeal raised by the Revenue were verbatim similar to the grounds raised in the appeal by the assessee, the only difference being in the figures of

amounts involved. Therefore, Tribunal held that its decision in the case of M/s. Goldstar Finvest Pvt. Ltd. was applicable to the present case and following the same, Tribunal affirmed the order of CIT (A). Tribunal further held that assessee and the other entities were part of the group of companies controlled by Mr. Mukesh Choksi and therefore the decision in M/s. Goldstar Finvest Pvt. Ltd. was clearly applicable to the case of the assessee. Since the order of CIT (A) was in conformity with the view taken by the Tribunal in the group concerns of the assessee, the appeal of the Revenue was dismissed.

18. Since Tribunal had relied upon its own decision in the case of M/s. Goldstar Finvest Pvt. Ltd., it would be useful to examine the same. In M/s. Goldstar Finvest Pvt. Ltd. which pertained to assessment year 2003-04, Tribunal noted that the same issue had arisen before it in the assessee's i.e., M/s. Goldstar Finvest Pvt. Ltd., own case for the assessment year 2002-03. In that case, Tribunal had observed that in these type of activities, brokers are only concerned with their commission on the value of transactions. Therefore, Tribunal posed the question to itself as to what would be the reasonable percentage of commission on the total turnover. Tribunal observed that in all similar cases the average percentage of commission was between 0.15% to 0.25%. In the cases of Palresha and Company and Kiran and Company, Tribunal had considered 0.1% as reasonable percentage of commission to be earned on such turnover. Assessee itself had offered the percentage of commission at 0.15% which was more than the percentage of commission considered to be reasonable by the Tribunal in the above two cases having similar type of transactions. Tribunal held that the action of the Assessing Officer in treating the entire deposits as unexplained cash credits could not be accepted in the light of assessment orders in the case of the beneficiaries and also in the light of the fact that the assessee was only concerned with the commission earned on providing accommodation entries. Therefore, Tribunal took the view that since the assessee had itself declared the commission on turnover at 0.15% which was more than the percentage considered to be reasonable by the Tribunal,

the same should be accepted. Accordingly, Tribunal accepted the commission declared by the assessee i.e., M/s. Goldstar Finvest Pvt. Ltd., and set aside the order of CIT (A). Tribunal further noticed that the above stand had been consistently followed by the Tribunal in various orders. No distinguishing feature could be brought on record by the Revenue. Therefore, Tribunal following the above orders including the order in the case of the assessee i.e., M/s. Goldstar Finvest Pvt. Ltd. in the immediately preceding year had upheld the order of the CIT (A).

19. As noticed above, Tribunal observed that this issue was present in all the appeals of the group of entities controlled by Mr. Mukesh Choksi. Be it stated that assessee was also part of the said group of entities. Therefore, maintaining uniformity Tribunal held that CIT (A) made no mistake in arriving at the impugned decision which was in conformity with the position taken by the Tribunal in all the cases pertaining to the said group of entities. Thus, order of the CIT (A) was affirmed and appeal of the Revenue was dismissed.

20. We are in agreement with the view taken by the Tribunal. In a case of this nature Section 68 of the Act would not be attracted. Section 68 would come into play when any sum is found credited in the books of the assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by the assessee is not in the opinion of the Assessing Officer satisfactory. In such a situation the sum so credited may be charged to income tax as the income of the assessee of the relevant previous year. But that is not the position here. It has been the consistent stand of the assessee which has been accepted by the First Appellate Authority and affirmed by the Tribunal that the business of the assessee centered around customers / beneficiaries making deposits in cash amounts and in lieu thereof taking cheques from the assessee for amounts slightly lesser than the quantum of deposits, the difference representing the commission realized by the assessee. The cash amounts deposited by the customers i.e., the

beneficiaries had been accounted for in the assessment orders of these beneficiaries. Therefore, question of adding such cash credits to the income of the assessee, more so when the assessee was only concerned with the commission earned on providing accommodation entries does not arise.

21. Coming to the percentage of commission, Tribunal had already held 0.1% commission in similar type of transactions to be a reasonable percentage of commission. Therefore Tribunal accepted the percentage of commission at 0.15% disclosed by the assessee itself. This finding is a plausible one and it cannot be said that the rate of commission was arrived at in an arbitrary manner. The same does not suffer from any error or infirmity to warrant interference, that too, under Section 260-A of the Act.

22. In so far the decision of the Supreme Court in **NRA Iron and Steel Pvt. Ltd.** (*supra*) is concerned, the same is not attracted in the present case in as much as facts of the present case are clearly distinguishable. Unlike the present case, the assessee in **NRA Iron and Steel Pvt. Ltd.** (*supra*) claimed the cash credits as its income. However, it was found that the creditors had meagre or nil income which did not justify investment of such huge sums of money in the assessee. The field enquiry conducted by the Assessing Officer revealed that in several cases the investor companies were non-existent. Thus, it was held that the assessee had failed to discharge the onus which lay on it to establish the identity of the investor companies and the credit worthiness of the investor companies. In such circumstances, the entire transaction was found to be bogus. But as already discussed in the preceding paragraphs, assessee never claimed the cash credits as its income. It admitted its business was to provide accommodation entries. In return for the cash credits it used to issue cheques to the customers / beneficiaries for slightly lesser amounts, the balance being its commission. Moreover, the cash credits had been accounted for in the respective assessment of the beneficiaries. Therefore, the decision in **NRA Iron and Steel Pvt. Ltd.** (*supra*) is clearly

distinguishable and not attracted to the facts of the present case.

23. On a thorough consideration of all relevant aspects, we have no hesitation to hold that the impugned order of the Tribunal does not suffer from any error or infirmity to warrant interference and no substantial question of law arises therefrom. There is no merit in the appeal. Appeal is accordingly dismissed. However, there shall be no order as to costs.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)