

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'G' NEW DELHI**

**MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**AND**

**SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No. 2229/DEL/2013 ( A.Y 2006-07)**

**ITA No. 2230/Del/2013 (A.Y 2007-08)**

DCIT Central Circle-II Faridabad  <b>(APPELLANT)</b>	Vs	S.V.S Propmart Pvt. Ltd. 2 <sup>nd</sup> Floor, D, Global Business Park, M. G. Road, Gurgaon AAHCS1214L <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. S. S. Rana, CIT DR</b>
<b>Respondent by</b>	<b>Sh. Rajesh Arora, CA</b>

<b>Date of Hearing</b>	<b>05.03.2018</b>
<b>Date of Pronouncement</b>	<b>07.03.2018</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

These appeals are filed by the Revenue against the order dated 08/02/2013 passed by CIT(A)-, Gurgaon.

2. The grounds of appeal are same in both assessment year and the same is as under: -

1. *Whether on facts and in the circumstance of the case, the Ld.CIT(A) was right in deleting the addition of Rs.58,53,262/-, Rs.7,24,000/- and Rs.17,64,000/- made by the A.O on account of commission/brakeage receivable especially when the assessee had raised bills of commission and had not included the same in its income?"*

3. The factual aspect of the matter are similar in both the assessment year, therefore the facts of A.Y. 2006-07 are narrated hereinafter. The Director (Investigation) Chandigarh u/s132(1) (A) of the Income Tax Act, 1961 in the case of the assessee among others carried out search and seizure operations at the business premises of S.V. S Propmart Pvt. Ltd, 2<sup>nd</sup> Floor, Tower-D, Global Business Park, M. G. Road, Gurgaon, on 29/4/2008. A search operations u/s 132(1) and survey u/s133A(1) of the Act were also conducted in the various premises of other assessee's of the "Spaze Group", simultaneously and some relevant books and documents were seized and impounded in the course of the operations. The seized documents and the appraisal report in the group were received by the Assessing Officer on 14/05/2009 in accordance with the provisions of Section 153A(1) (a) read with Section 132 of the Act. A notice was issued to the assessee requiring him to file his return of income in respect of Assessment Year 2006-07 and Assessment Year following within the six Assessment Years immediately preceding the Assessment Year relevant to the previous year in which search was conducted in his case on 29/04/2008 and the same was properly served on the assessee by the registered post in response to the same notice. The assessee filed his return of income duly verified and signed as per the provisions of Section 140 of the Act on 14/05/2010 declaring a total income of Rs.3,09,30,570/-. Notice u/s 143 (2) and 142(1) to furnish details related to search issue was issued on 25/05/2010 for compliance by 22/06/2010. The assessee acknowledged a notice on 22/06/2010 and requested that the case may be postponed for a few days. The authorized representative of the assessee attended the proceedings from time to time and discuss the matter. The assessee company is dealing in the business of commission and brokerage on real estate transaction from the office premises at IInd Floor, Tower D, Global Business Park, M. G. Road, Gurgaon. The Assessing Officer on the basis of search documents and the reply given by the Director of the assessee company made an addition of Rs.58,53,262/- in respect of documents relating to Vipul World by observing

that brokerage on the cash component on total consideration was already received by the assessee. The Assessing Officer also added 7,24,000/- in respect of cash received against the deduction made in the working out commission receivable/received further the Assessing Officer also made an addition of Rs.17,64,000/- as the income of the assessee company commission income not reflected in the books of accounts.

4. Being aggrieved by this assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. DR submitted that the CIT(A) has not taken the cognizance of the documents which were seized during the search and seizure operations especially when the assessee has raised bills of commission and had not included the same in its income.

6. The Ld. AR submitted that the CIT(A) has taken cognizance of all the documents which was seized during the search and seizure at the assessee business premises in Para 5 of the CIT(A)'s order the detailed finding was given.

7. We have heard both the parties and perused the order of the CIT(A) held as under:-

*"5.2 I have considered the submissions of the assessee and the impugned order. There no doubt that the documents were seized during the course of search. These documents however categorically state that money was receivable, payable or were only claims. No corroborative evidence is there to prove that the assessee had indeed received the money. . Even the statement recorded of Shri Aman Sharma on the date of search does not bear any such receipt. The response to the summons u/s 131 issued by the AO, also do not prove that the money had indeed been paid to the assessee. The books of accounts also do not have any entries either in the case of the assessee or that of M/s Vipul. Therefore it emerges that there is not even a shred of evidence to show that the assessee has received the money or for that matter even that a debt had been created in the name of the assessee in the books of M/s Vipul.*

*In National Handloom Development Corporation Ltd. (v) DCIT 266 ITR 647 (All), it has been held that a basic concept of in the income tax law is that the assessee must have received or have the right to receive income before it can be taxed. There must be a debt owed to him by somebody, if the amount is to be taxed on mercantile basis. Unless a debt has been created in favour of the assessee by some body it cannot be said that the income has accrued to him or he has a right to receive the income. When one refers to the right of the assessee to receive an amount so as to make it taxable, it necessarily means a right enforceable under law. If the claim is not legally enforceable the assessee cannot be said to be vested with a right to claim the amount.*

*In Shoorjt Vallabhdas & Co (1962) 46 ITR 144,148 (SC), it was held Income tax is a law on income. No doubt, the Income Tax Act takes into account two points of time at which the liability to tax is attracted, viz. the accrual of income or its receipt; but the substance of the matter is in the income. If income does not result at all there cannot be a tax even though in book-keeping an entry is made about a hypothetical income, which does not materialise.*

*Unless a debt has been created in favour of the assessee it cannot be said that the income has accrued to it or it has a right to receive the income as held in ED Sassoon & Co Ltd. (v) CIT (954) 26 ITR @7 (SC); Seth Pushaal Mansingka (P) Ltd. (v) CIT (1967) 66 ITR 159 (SC) and CIT (v) Ashokbhai Chimanbhai (1965) 56 ITR 42 (SC).*

*In view of the above discussion, it is apparent that there is no evidence, least of all a corroborative one, which would prove that a debt had been created or that the assessee had received the amount even outside the books of accounts. As such, I am inclined to hold that the amount of Rs. 58,53,262/- cannot be taxed in the hands of the assessee. The assessee succeeds in this ground of appeal.*

5.3 *Similar ground of appeal for AY 2007-08 was raised which reads as under:*

- 1. The Ld A.O has erred in law & facts of the case in making addition on account of commission income alleged to be receivable by the company amounting Rs. 2,00,59,459/- at a notional rate of 4% on the cost of the flats/ property, which is highly arbitrary,*

*Unjustified, bad-in law, uncalled for and merely on presumption of the Ld. A.O.*

5.3.1 *The facts are identical. The notional rate taken in this year was 4% instead of 5%. The amount of Rs. 2,00,59,459/- here has been clubbed but the issue is the same. Thus, for the detailed discussion in para 5.2 above, 6.2 and 7.2 hereunder, the addition also stand deleted.” .....*

*“6.2 I have gone through the submissions of the assessee. I have also gone through the impugned order. There is no doubt that the seized material does not lead any evidence that the assessee has been paid any commission, in cheque or in cash. In such circumstances, upholding an addition on notional income would be non-judicious. When the legislature desired to have/ consider notional income, the same has been provided such as MAT, Section 50C. Consequently, the stand taken by the AO is directed to be deleted.” .....*

*“7.2 I have gone through the submissions of the assessee. I have also gone through the impugned order. There is no doubt that the seized material does not lead any evidence that the assessee has been paid any commission, in cheque or in cash. In such circumstances, upholding an addition on notional income would be non-judicious. When the legislature desired to have/ consider notional income, the same has been provided such as MAT, Section 50C. Consequently, the stand taken by the AO is directed to be deleted.”*

It is pertinent to note here that the Assessing Officer has mentioned in the Assessment order about the submissions made by the assessee that the commission was not received by the assessee company on account of dispute with the said party. Since the commission income has not been settled and crystallized, the same has not accrued to the assessee company. The said contention of the assessee was not dealt with by the Assessing Officer. There was no finding given by the Assessing Officer that the amount was received by the assessee outside the books of account. This aspect was taken into account by the CIT(A). The CIT(A) has given detailed finding for both the years the factual aspects are similar. Therefore, there is no need to interfere with the order of the CIT(A). Both the appeal of the Revenue are dismissed.

8. In result, both the appeals of the Revenue are dismissed.

**Order pronounced in the Open Court on 07th MARCH, 2018.**

Sd/-

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 07/03/2018

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	06/03/2018	PS
2.	Draft placed before author	06/03/2018	PS
3.	Draft proposed & placed before the second member	.2018	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	7.03.2018	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	7.03.2018	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		