

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

AND

SHRI. S. JAYARAMAN, ACCOUNTANT MEMBER

I.T(TP).A No.1432/Bang/2013  
(Assessment Year : 2005-06)

M/s. KHT Agencies P. Ltd,  
No.10, Pallavi Complex, Subbaiah Circle,  
Mission Road,  
Bengaluru – 560 027 .. Appellant  
PAN : AAACK7822R

v.

Asst. Commissioner of Income Tax,  
Circle – 11(5), Bengaluru 560 001 .. Respondent

Assessee by : Shri. H. V. Gowthama, CA  
Revenue by : Shri. Kamaladhar, Standing Counsel

Heard on : 03.11.2016  
Pronounced on : 25.01.2017

**ORDER**

**PER S. JAYARAMAN, ACCOUNTANT MEMBER :**

This is an appeal filed by the assessee against the order of CIT (A)-I, Bengaluru, dt.08.03.2010, for the assessment year 2005-06.

02. M/s. KHT Agencies P. Ltd, the assessee , a private limited company is an authorised dealer and service agent for Swaraj Mazda vehicles at Bangalore, filed its return for the a y 2005-06 on 27.10.2005, declaring a total income at Rs.47,34,288/-. In

the assessment made u/s 143(3) dated 28/12/2007, the A O , inter alia, disallowed the following amounts, the first four disallowances were made u/s 40 A(2)(a), which were claimed as deductions :

i) Commission paid to PBP Associates	Rs. 12,78,000
ii) Commission paid to Kirit Morzaria	Rs. 4,19,500
iii) Commission paid to Adit Morzaria	Rs. 7,64,500
iv) Commission paid to Smt.Harshida Mozaria	Rs. 4,82,080
v) Rent paid to Snit. Harshida Morzaria	Rs. 3,15,500
vi) Labour charges paid to Morzaria Motors	Rs. 4,30,845
vii) Loss added back	Rs. 91,670
Total	Rs.37,82,015

03. On appeal, the CIT (A) -1, Bangalore in his order in ITA No 320/AC-11(5)/A-1/07-08 dt 08.3.2010 allowed the the first five disallowances, supra, and confirmed the disallowance of Rs.4,30,8451 relating to the labour charges paid to M/s Morzaria Motors.

04. Aggrieved by the above order, the Revenue filed an appeal before this Tribunal. The Hon'ble ITAT in its order in ITA No 776/Bang/2010, dt 25.11.2011 , inter alia, accepted the contention of the Department that the CIT (A) has not given any reason while deleting the addition made by the AO. Therefore , it set aside this issue to the CIT (A) with a direction to pass a well-reasoned and speaking order. Consequently, the CIT (A) passed an order in ITA No 320/AC-11(5)/A-1/07-08 dt 19.07.2013 dismissing

the appeal. Aggrieved, the assessee filed this appeal with the following grounds of appeal:

1. The Learned Commissioner of Income Tax erred in passing a fresh order u/s.250 against the order restored by Hon'ble Income Tax Appellate Tribunal, 'B' Bench, Bangalore, in which he has erred on the facts and circumstances of the case.
2. The Learned Commissioner of Income Tax erred in holding that the commission paid to Directors and relatives of the Directors are excess of the fair market value of the services rendered by the Directors and their relatives and hence the same is disallowable as per provisions of section 40A(a)(2)(b) of Income Tax Act.
  - 2a) The Learned Appellant submits that originally when the order was passed by Hon'ble Commissioner of Income Tax (Appeals)-I, vide his order No.320/AC-11(5)/A-I/07-08 dt.8.3.2010 had considered all the facts and circumstances of payment and had held that the commission paid is reasonable and therefore is allowable as deduction against business income.
  - 2b) The Learned Commissioner of Income Tax(Appeals) erred in not appreciating the fact that the commission paid in similar circumstances by the Appellant themselves to the same Directors and relatives of the Directors has been allowed in both earlier Asst. Year as well as later Asst. Year, by the Assessing Officer themselves in scrutiny order, considering the payment of commission as reasonable and is for the business carried on by the Appellant.
  - 2c) The Learned Commissioner of Income Tax (Appeals) erred in not appreciating the fact that even the Directors as well as the relatives of the Directors have offered the same income, subject to certain expenses incurred by them, which is in their respective assessments. Therefore the disallowances made by the Learned Assessing Officer and confirmed by the Learned Commissioner is erroneous.
3. The Learned Commissioner of Income Tax (Appeals) erred in confirming the disallowances of rent paid to Smt. Harsida Morzaria, Director of the Company for the area in occupation of the Appellant Company in Baroda, which was originally allowed in the Appeal order passed filed by the Appellant by Learned Commissioner of Income Tax (Appeals)-I, vided his order dated 8.3.2010.
  - 3a) The Learned Commissioner of Income Tax ought to have considered the payment of rent is well within the standard rent prevailing in the market in Baroda and it was paid by the Appellant Company for the portion of property occupied by the Appellant Company at Baroda.
  - 3b) The Appellant further submits that the Learned Commissioner of Income Tax has wrongly stated in the order that the rent paid by the Company is for the portion occupied by the different firm.

05. The assessee filed the following additional grounds also :

1. The learned Assessing Officer, assessing two of the persons viz., Mr. Kirit Morzaria (father of the Director) and Mr. Adit Morzaria (Director) to whom commissions have been paid for, considered the commission as part of salary and assessed as salary. Therefore the Appellant submits that being a salary taxed in full, the Assessing Officer was wrong in disallowing the commission paid to the above referred persons.
2. The Appellant further submits that the natural justice requires any income should be taxed at only one place. Hence the appellant submits that the commission disallowed by the Assessing Officer in the hands of the Appellant be allowed.

06. The AR submitted that the CIT (A) is not correct in confirming the disallowances ,when he had considered all the facts and circumstances in his order dt 08.3.2010 and did not appreciate the fact that the commission paid in similar circumstances has been allowed in the earlier assessment year and later assessment year. Per contra, the DR supported the findings of the CIT (A) and relied on the decision of the Hon'ble Apex Court in Ganapathy and Co v CIT (2016) 381 ITR 363SC. We heard the rival submissions. The relevant portion of the CIT (A) order is extracted as under:

*"3. DISALLOWANCE OF COMMISSION PAYMENTS:*

*3.1 The AO noted that the appellant had paid commissions to the following four persons:*

<i>i) Commission paid to PBP Associates</i>	<i>Rs. 12,78,000</i>
<i>ii) Commission paid to Kirit Morzaria</i>	<i>Rs. 4,19,500</i>
<i>iii) Commission paid to Adit Morzaria</i>	<i>Rs. 7,64,500</i>
<i>iv) Commission paid to Smt.Harshida Morzaria</i>	<i>Rs. 4,82,000</i>
<i>Total</i>	<i>Rs. 29,44,000</i>

*3.2 The AO noted that, apart from salaries, the Directors or their relatives received commission from the appellant-company. The AO found that the commissions had been paid by journal entries and not through bank accounts. The appellant submitted before the AO that commission were paid depending on factors like the profit margin earned on each vehicle, model of the vehicle sold and the fitments made to the vehicle. The appellant also explained that, if employees sold vehicles without discount, they were given higher commission; that the commission paid to Directors was based on the turnover, profit and the number of vehicles sold in bulk; that there was no agreement with the Directors or their relatives for payment of commission. The AG also noted that the commission paid to persons other than the Directors and their relatives were much less. Analysing the facts relating to payment of commission to the Directors/their relatives, the AO came to the conclusion that the payments to them were made only through journal entries; that there was no basis for determining the commission paid that commissions paid to the Directors/their relatives exceeded the commissions paid to others; that commissions were paid to employees of the appellant and M/s PBP Associates in which the appellant-company is a partner; that the Directors and their relatives claimed deduction at 30% of commission as expenditure, which is not allowable since the commission paid to them partake the character of salary in terms of section 17 of the Act. In view of these adverse observations, the AG disallowed the commission payments to the Directors and their relatives amounting to Rs.29,44,800/-.*

*3.3 In so far as the payment of rent of Rs.3,15,500/- for the premises at Vadodara, the AO found that, since the same premises were occupied by M/s Morzaria Motors, the claim regarding the payment of rent was sham and, therefore, disallowed the same.*

*3.4 The following are the relevant grounds of appeal:*

*"1.The learned Assistant commissioner of Income Tax erred in disallowing a sum of Rs.37,82,015/- under the provision of Section 40A(2)(a) of Income Tax Act, in respect of commissions paid, Labour charges paid and Rent paid to a Partnership Firm, in which the Appellant is also one of the partner, two of the Directors and the husband of the Director.*

*2.The learned Assessing officer erred in ignoring the fact that, payment of the commission is made in the normal course of Business and it is very reasonable amount considering the business and Net Profit earned by the company.*

*3.The learned Assessing Officer ought to have considered that, without putting efforts in the Nature of the Business carried on by the Appellant, it is difficult to achieve the Turnover, which the company has earned.*

*4.The learned Assessing officer was wrong in considering the payment made as excessive.*

*5. The learned Assessing Officer erred in concluding that, since all the Commission entries have been made through Journal entries, some payment is a Sham Transaction.*

*6. The Appellant submits that, since there is a regular running Account of persons concerned in the Books of Account maintained, Journal entries have been passed for commission dues and there are all genuine Transactions.*

*7. The learned Assessing officer erred in considering the payment of rent to Smt. Harshida Morzaria, Director of the company, has not connected with the business carried on by the Appellant."*

*3.5 The following submissions have been made in writing :*

*A. Commission paid to Directors :*

*Both Harsida Morzaria and Adit Morzaria are working Directors of the company, drawing monthly remuneration which has been allowed by the Learned Assessing Officer. Apart from the salary paid, the Directors have been paid commission for the business supported them to the company. The gross package by remuneration paid to them ever since they were employed was partly by monthly remuneration and partly by ales commission. The gross commission paid including commission paid to PBP Associates, a Partnership Firm,*

*Mr.Kirit Morzaria, relative of a Director as well as other commission paid to some of the employees, works out to hardly 1.40% of the sales as against 1.46% paid during the Asst. Year 2004-05, which is detailed as hereunder:*

	A.Y. 2004-05	A.Y. 2005-06
Gross Revenue	19.12 Crores	33.91 Crores
Commission Paid	28.01 Lac	47.70 Crores
Percentage	1.46%	1.40%

*The trade in which the Appellant company is dealing in, is competitive and in this nature of trade, payment of commission is common. The Appellant company even for other senior employees of the company pay both salary as well as commission which has been allowed as revenue expenses. Details of the commission paid during the year, including their PAN, wherever available are enclosed as Annexure. It may be observed that, all the persons to whom commissions are paid, are regularly assessed to Income Tax. The only reason why the Assessing officer has considered that the payments of commission are not genuine is for the Directors and their relatives, commissions are paid through Journal Entries and the same is not put through the Bank accounts. In this connection, we would like to submit that the above parties to whom commissions are paid, namely, PBP Associates, Directors and their relatives are have running account with the company wherein all their drawings have been debited. There are regular payments by cheques which are debited to their account. The commission entries are finalized only after the end of the Accounting Year, depending on the Turnover and the number of parties introduced by the respective Directors and their relatives, therefore the same is credited through Journal Vouchers. The list of parties who have been introduced by the respective employees, Directors and their relatives is enclosed herewith. The parties who have been introduced by the above persons have purchased bulk number of vehicles. There is no standard percentage of commission, but the payment of commission as already mentioned to the Learned Assessing Officer, depending upon sale of vehicles without discounts. Sometimes, the Appellant company offer discounts to Purchaser of the vehicles. If the employee or Director is able to reduce the discount payable to the purchasers, they are offered higher commission. In the case where higher discounts have been allowed to the Purchasers, the commission given to the Director or employee will be less. This has been already submitted to the Learned Assessing officer.*

B) So far as payment of commission to Mr. Kirit Morzaria is concerned, the Learned Assessing Officer has disallowed 50% of the commission paid to Mr. Kirit Morzaria, amounting to Rs.4,19,500/-. In this connection, we write to submit that Mr. Kirit Morzaria is not an employee of the company, he does not draw any salary. whatever payments are made to him are only in the nature of commission, amounting to Rs.8,67,000/-. He is working for whole day both in the Sales office as well as workshop. He introduces the parties and sits for negotiation for booking the orders along with the Directors as well as other employees of the Company. He is highly experienced person and payment of Rs.8.67 Lacs for the efforts is much less than the market condition. Even for this commission, the Learned Assessing Officer has mentioned that the payments are through Journal vouchers. As stated above, there is a running account for Mr. Kirit Morzaria and the amount drawn have been debited to the account and commission entry is made through Journal Vouchers.

C. Payments made to PBP Associates:

PBP Associates is a Partnership Firm, consisting of the Assessee Company and two Directors Smt. Harsida Morzaria as well as Sri Adit Morzaria as Partners. The Learned Assessing Officer has disallowed the entire commission paid to PBP Associates as not genuine and the commission entries have been made through Journal vouchers. Even this commission is based on certain employees of the PBP Associates booking the orders. Even presuming, but not admitting, that the commission is required to be disallowed the expenses incurred by PBP Associates against earning of the commission which amounts to Rs.11,89,048/-should have been allowed as expenditure of the Appellant Company. But, the Assessing Officer has only disallowed the commission paid ignoring the expenditure incurred by said Firm.

The Hon'ble High Court of Delhi in the case of CIT Vs Dr. R.N. Goel (177 Taxman, Page 374) has held that The Tribunal had come to the conclusion that having regard to the nature and scope of the service rendered by CIL, it was bound to have favourable effect on the overall sales of the assessee, as was evident from the turnover and figures referred to by the assessee. The Tribunal had concluded that the service charges paid to CIL at the rate of 8 percent were neither excessive nor unreasonable. The Tribunal also noted that the income earned by CIL in the form of service charges

*and commission was duly reflected in the profit and loss account and return of income filed by CIL (Para 6).*

*whether or not an expenditure is unreasonable and merits disallowance under the provisions of section 40A, is essentially a question of fact. There was no perversity in the findings returned by the Tribunal in the impugned judgment. No substantial question of law arose. Therefore, the appeal was to be dismissed'.*

*Further the Hon'ble High Court of Delhi has held in the case of CIT Vs Devayhi Beverages Ltd. (296 ITR, Page 41) that 'Reasonableness of expenses could be gone into for the purpose of determining whether in fact the amount was spent. But, if there is a nexus between the expenditure and the purpose of the business, the Revenue cannot be allowed to substitute its opinion for that of the assessee, as if the Revenue were itself the businessman'.*

*Further, Hon'ble High Court of Madras, in the case of CIT Vs Print Systems & Products (285 ITR 337) has held that 'Held, dismissing the appeal, (i) that the Tribunal after considering the relevant materials came to the conclusion that the commission payment was not found to be unreasonable and further that the commission payment when compared with the commission offered by other assesses in similar business at 5 percent, could not be said to be excessive. No further evidence or material was produced by the Revenue to show that the order of the Tribunal was unreasonable and unjust. The Tribunal was right in law in deleting the addition in respect of commission paid to the sister concern under section 40A(2) of the Income Tax Act, 1961'.*

*Taking support from the above decision, the Appellant Company submits that payment of commission to the above persons are reasonable, considering the efforts put in by them in increasing the sales Turnover, we respectfully submit the Hon'ble Commissioner to allow the entire commission paid as Revenue Expenditure.*

*D. Disallowance of Rent Paid:*

*As stated earlier, the Appellant Company runs a Workshop for carrying out repairs and maintenance of swaraj Mazda vehicles in Baroda. The Learned Assessing Officer has observed in Para 7, Pg.5 of the order that ' the Assessee Company is the only Authorized Dealer for Swaraj Mazda in*

Bangalore'. For repair & maintenance of Swaraj Mazda vehicles, the Appellant Company hired one workshop at A-1, 987/12, GIDC Shed, Makarpura, vadodara, which is owned by Smt.Harsida Morzaria, who had taken the Workshop building off 30,000 sft.for 99 years lease from Govt. of Gujarat. Part of this, approx.15000 sft. was rented out by Smt. Harsida Morzaria to the Assessee Company on a monthly rent of Rs.26,500/-, which approx. works out to Rs1.77 Ps per sft. In an Industrial town, hiring workshop at such a small amount of rent cannot be considered as unreasonable. The Learned Assessing officer's view that the Appellant Company is only Authorised Dealer for Bangalore cannot be the reason for disallowance of rent. The Appellant company is not prevented from opening Branches anywhere in India since a vacant shed was available at Baroda for a reasonable rent, a service unit was opened in Baroda. Copy of Lease Agreement entered between Appellant and Smt. Harsida is enclosed herewith.

3.6 I have carefully considered the appellant's submissions, perused the assessment order and other materials available on record and from it reveals that the appellant company claimed Rs.47,70,145/- towards commission payment to the Directors, employees, and the sister concern. Out of Rs.29,44,000/- disallowed by the Assessing Officer as not genuine. At the time of appeal hearing before the Hon'ble ITAT, Bangalore, the AR of the appellant company furnished details of number of buses and trucks sold by the directors and other employees for whom the commission have been paid, the same is reproduced below :-

TRUCK			BUS		
Name	No	Commission	Name	No	Commission
Adit K Morzaria	141	372750	Adit K Morzaria	292	391750
Anand A	38	19650	Anand P	27	4000
Anand P	3	13000	Dinesh R	15	50000
Ananth Kumar Gaurav	4	8835	Fund Point	3	9000
Anantha Padmanabha	15	15000	Harshida K Morzaria	285	241250
Anantha Padmanabha	16	15750	Jawahar Kapila	57	210000
Anantha Padmanabha J r	2	6000	Kirit Morzaria cut a/c	285	419500
Arunachalam	1	1000	Lingaraj	84	113550
Harshida K Morzaria	141	241250	Mr. Mir Noor Ahmed	74	85100
Ignatius D' Mello	95	110000	Mr. Narayan	4	40000
Kirit Morzaria Cur a/c	141	419500	Mrs. Poonam Kapila	56	210000
Manjesh	53	18340	Mrs. Venkatesan S	27	37000
Nagashree	1	2000	P.B.P Associates	285	639000
P.B.P. Associates	141	639000	Roopakala. P.N	55	13550
Parasa Madhav	19	12390	Srinivas	31	10000
Pavan Kumar	90	109650	Srinivas Murthy	33	28750
Raj Gopal	1	2500	Venkatesan	6	21000
Roopakala P N	1	3000	Venkatesan S	106	177250
Shridhar	4	10500			
Shridhar Babu	25	7530			
Somshekar	1	5000			
Sridhar	10	7350			
Sridhar Babu	15	4950			
Srinivas Katti	5	14500			
Srinivas Murthy	1	5000			
Srinivas Raju	1	2500			
Suresh	1	2500			
	966	2069445		1725	2,700,700

3.7 From the details given above, it is observed that number of trucks and buses were sold and commission claimed against directors, employees other parties and associates concerned which is summarized as under :

Sl. No.	Name	No. of Truck	Commission paid Rs.	No. of Bus	Commission paid Rs.	Total	Total Commission paid Rs.
1	Mr. Adit K. Mozaria	141	3,72,750	292	3,91,750	433	7,64,500
2	Mrs. Harshid K Mozaria, Director	141	2,41,250	285	2,41,250	426	4,82,500
3	Mr. Kirit Mozaria Husband of Mrs. Harshida Mozaria	141	4,19,500	285	4,19,500	426	8,39,000
4	M/s PBP Associates Partner:- i) M/s KHT Agency Pvt. Ltd. ii) Mrs. Harshid Mozaria iii) Mr. Adit K. Mozaria, Director	141	6,39,000	285	6,39,000	426	12,78,000
5	Employees For Trucks, 7 Employees For Buses - 8 Employees	131	1,61,750	449	7,67,100	580	9,28,850
6	Other party	271	2,35,195	129	2,42,100	400	4,77,295
	Total	966	20,69,445	1,725	27,80,700	2,691	47,70,145

3.8 As per auditor's report opening stock (vehicles) purchases during the year, sale made during the year and closing stock (vehicles) reported as below :-

Particulars	Quantity	Value (in Rs.)
Opening stock (Vehicles) as on 01/04/2004	37	2,11,28,017
Add - Purchase made during the year	461	31,62,73,025
	498	
Less - Vehicles sold during the year	416	28,90,70,291
Closing stock(vehicles) as on 31/03/2005	82	4,83,30,751

3.9 It may be seen that the total 416 vehicles (Truck - 141 + Buses - 275) were sold during the year, however as quantative details furnished before the Hon'ble ITAT the total vehicles sold shown 426 i.e. 10 vehicles more. Further, it is also observed that commission claim on 416 vehicles uniformly by all directors, relative of directors, associated concerned of diréfôI, employees of the company and also by outside parties. In other words commission on each vehicle claimed against 6 claimants which indicated in given tabular form above. It means all these claimants have procured the sale of order entire truck and buses, sold during the year, accordingly provided commissions against them. There is no stretch of imagination that 6 parties have procured the purchase order for the trucks as well as buses sold during the year. In this connection, it is relevant to mention the decision of the Hon'ble High Court of Gujarat in the case of Coronation Flour Mills Vs. ACIT (2009) 314 ITR 1 (Guj) wherein it was held that: -

"In relation to the disallowance under the provisions of section 40A(2) of the Act, a plain reading of the provision reveals that where an assessee -incurs only expenditure in respect of which payment is required to be made or has been made to any person referred to in Clause (b) of section 40A(2) of the Act and the Assessing officer is of the opinion that such expenditure is excessive or unreasonable having regard to (a) fair market value of the goods, services or facilities for which they payment is made or (b) the legitimate needs of the business of the assessee or (c) the benefit derived by or accruing to the assessee on receipt of such goods, services or facilities, then the Assessing officer shall not allow as a deduction so much of the expenditure as is so

*considered by the Assessing Officer to be excessive or unreasonable. Therefore, it becomes apparent that the Assessing officer is required to record a finding as to whether the expenditure is excessive or unreasonable in relation to any one of the three requirements prescribed, which are independent and alternative to each other. All the three requirements need not exist simultaneously. In a given case, if any one can be invoked and applied if the facts so warrant. The contention raised on behalf of the appellant-assessee that the fair market value having not been ascertained by the Assessing officer no disallowance could have been made. Therefore, does not merit acceptance. As already noted here in before, the Assessing Officer has held a part of the expenditure to be excessive having regard to the legitimate needs of the business and for recording such findings cogent reasons are assigned by the Assessing Officer."*

*ii) In the case of CIT Vs. Paarel Import & Export (P) Ltd (2008) 171 Taxman 209 (KER), the Hon'ble High Court held that -*

*"The managing director and other directors had received remuneration from the Company and they had rendered services in general administration, marketing etc., to the Company. For the very same functions service charges had been paid to the firm. It really showed that the persons concerned were the same and the remuneration actually received from the Company reflected the service rendered by them to the company and it was not due to any extra service rendered by them as partners."*

*3.10 Thus it was a case where real nature of the payment showed that the very same person who were managing the company, had been shown as in receipt of remuneration being the partners of the firm. In the light of the dictum laid down in Mc Dowell & Co., Ltd. Vs. CTD (1985) 154 ITR 148 (SC) 22 Taxman 11(SC), the transaction in question was clearly a device to avoid tax and the same was not convincing. Further held that :*

*"The Commissioner of Income-tax (Appeals) reversed the order passed by the Assessing officer only on the ground that to have the application of section 40A(2)(b) of the Act, it should have been established that the fair market value of services for which the payment is made is less than the amount paid by the assessee. The real issue was not at all considered by the Commissioner of Income-tax (Appeals). The approach made is totally erroneous. The Tribunal after noticing that the*

*managing director or some of the directors of the assessee-company are related to the partners of the firm, referred to the claim of the assessee that specialised services rendered by them are those which the assessee-company could not do and they helped to increase the export market. The Tribunal assumed that they also introduced some innovation in the working of the company to boost production and it was presumed that the payment of service charges paid by the assessee was not business expediency and hence an allowable deduction. We are of the view that none of the aspects relevant have been considered by the Tribunal and the import of section 40A(2)(b) has not been discussed. The fact that there was no business increase actually, because of the services rendered by them, was also not considered and the fact that the company has been paying salary and commission to them for some service was also not considered. The approach made is totally perverse and there is no rationale in it.*

*We, therefore, answer the questions in favour of the revenue and against the assessee and consequently allow the appeal by setting aside the orders of the Commissioner of Income-tax (Appeals) and the Tribunal and restore the order passed by the Assessing Officer."*

*3.11 In the case of CIT Vs. Sulaikha Clay Mines (2010) 325 ITR 410 (Ker) discussed business disallowance excessive or unreasonable payments as under*

*"So far as the second -issue is concerned it is not in dispute that the entire payments of around Rs.54 lakhs out of Rs.63,23,282 spent by the firm as having been paid to various partners or to their relatives. Since payments are made by the firm to related persons the officer was perfectly justified in scrutinizing the eligibility of the claim. It is the finding of the Assessing Officer that the payments are exorbitant. The details of payments made to partners or relatives are discussed in the assessment order. Neither the first appellate authority nor the Tribunal examined the reasonableness of the expenditure in comparison to the expenditure incurred in similar cases. The first appellate authority as well as the Tribunal allowed the claim by holding that the expenditure is required in the nature of the business. We are of the view that this finding is not sufficient to reverse the finding of the Assessing Officer because he himself allowed 75 per cent, of the expenditure and only 25 per cent, was found to be inflated for the purpose of helping the related persons. We do not find any material or*

*justification for the first appellate authority or the Tribunal to allow the claim. At the maximum they could have remanded the case to the Assessing Officer to examine each and every bill and voucher pertaining to the payments made to partners and relatives to compare with market rates and to disallow the excess over actual payments. We do not think at this distance, of time we should remand the case for more than one reason. In the first place, if we remand, the Assessing Officer will have to examine each and every bill and voucher and the excess over market rates for lorry charges, for tipper for earth moving equipment, etc., should be disallowed which may exceed more than 25 per cent estimated by the officer. Further, there is likelihood of excess payment for the simple reason that the assessee - firm though regularly engaged in mining has not chosen to acquire any mining equipment like earth moving equipment, tippers, trucks etc., which are acquired by the partners and relatives and taken on hire by the firm and the payments made are apparently huge amounts aborting most of the receipts in business in the circumstances and for the sake of finality we decline to remand the case but confirm the disallowance of 25 per cent, made by the Assessing Officer under section 40A(2)(a) of the Act. The appeal is consequently, allowed on this issue by reversing the order of the Tribunal and that of the first appellate authority and by restoring disallowance in assessment."*

3.12 *The Hon'ble High Court of Rajasthan in the case of Shanti Lal Jain Vs. CIT (212) 21 [Taxman.com](http://Taxman.com) 261 (Raj) wherein it was held that :-*

*"It is apparent that the Assessing Officer has examined various statements of the brokerage which were furnished by the assessee before him and in the case of investor, the assessee has not shown any payment of brokerage to the investor concerned and it has only shown payment of brokerage to his family members. It has been found by the Assessing officer that it has been done to divert his income to his family members which would otherwise become taxable in his own hands. Shri Uttam Chand Jain and Smt. Sunita Jain having huge brought forwarded loss. The income was also diverted as against the huge loss. Provisions of section 40A(2)(b) of the Act has been attracted."*

Section 40A(2)(a) and (2)(b) is the following terms :-

(2)(a) where the assessee incurs any expenditure in

*respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the (Assessing) Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made of the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.*

(b) The person referred to in clause (a) are following namely :-

(i) where the assessee is an individual	any relative of the assessee;
(ii) where the assessee is a company, firm, association of persons or Hindu undivided family	any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;

*(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;*

*(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member [or any other company carrying on business or profession in which the first mentioned company has substantial interest];*

*(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;*

*(iv) any person who carries on a business or profession,*

*(A) Where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or*

*(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.*

*Explanation - For the purposes of this subsection, a person shall be deemed to have a substantial interest in a business or profession, if,--*

*(a) In a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and*

*(b) In any other case, such person is, at any time during the previous year beneficially entitled to not less than twenty per cent of the profits of such business or profession.*

*3.13 In the instant case the Assessing Officer has considered the payments made to persons as mentioned in Clause(a) of Sec.40A(2) of the Act expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facility are the legitimate needs of the business or profession of the appellant. Herein the facts show that the company consist of two directors Viz., (1) Mrs. Harshida K Morzaria and (2) Mr. Adit K. Morzaria. Mr. Kirit Morzaria is the husband of Mrs. Harshida Morzaria (Director) and employee of the appellant company. They also floated a partnership firm Viz., M/s P. B. P. Associates wherein three partners Viz., (i) KHT Agency Pvt. Ltd (the appellant) (ii) Mrs. Harshida K Morzaria (Director) & (iii) Mr. Adit K. Morzaria (Director). The appellant company claimed expenses against the persons mentioned above as under:-*

Name	Salary	Commission	Rent	Labour Charges
i)Mrs.Harshida K Morzaria	7,20,000	4,82,500	3,15,500	-
ii)Shri Adit K Morzaria	3,60,000	7,64,500	-	-
iii)Shri Kirit Morzaria	-	8,67,000	-	-
iv)M/s P.B.P.Associates	-	12,78,800	-	-
v)M/s Morzaria Motors Prop. Adit K. Morzaria	-	-	-	4,30,845

3.14 The details given above shows that directors have received salary and commission from the appellant company as they have rendered services in general administration, marketing etc to the company. For the very function, commission have been paid to the firm M/s P.B.P. Associates, the employees of the appellant company and even outside parties also reflects the services rendered by them to the company then it was not due to any extra service rendered by them as director and as partners of M/s P.B.P. Associates. It is significant to note that the directors and its associates had made their claim through journal entry only. On the contrary the employees and other parties payments were made through cheques and demand drafts. For instance, Shri S.Venkatesa, Shri Jawahar Kapila, Mr. Mir Noor Ahmed, Mrs.Poonam Kapila, Mr. Ignatius D Mello payments were made through cheques. Findings of my predecessor were also that such transactions were non genuine, intended to reduce the pro-Fit and evade tax thereon seems correct because the appellant has not disputed the fact -that such payments are - only journal entries even though hastily it has also been pleaded that the credits are to be the running accounts of these payees. The AR of the appellant produced a certificate from N/s Inderson Motors Pvt. Ltd. its registered office in New Delhi, that they are giving commission to the marketing personal/agents/brokers etc ranging from 0.25% to 2%

*depending on number and type of vehicles. From the certificate it transpires that the said company paying commission / brokerage to Marketing personnels / agents / brokers, however certificate does not speak about the payment of commission to directors or their relatives. Secondly, payment of commission ranged between 0.25% to 2% may be prevailing in and around Delhi and it will vary city to city, region to region, whereas business of the appellant company is in southern region of India, thus the said certificate held not applicable in the appellant's case. The appellant failed to satisfy three requirements as prescribed by the Hon'ble High Court of Gujarat (supra) and the Assessing Officer rightly held that a part of the expenditure to be excessive having regard to the legitimate needs of the business.*

*3.15 At the time of appeal hearing the AR of the appellant furnished the copies of assessment order dated 23/11/2012 in respect of Mr. Kirit Morzaria and Shri Adit K. Morzaria for the assessment year 200506, wherein commission received has been considered as salary in the respective hands. In view of this facts, the appellant contended that since commission paid to them are assessed in their hands, hence same cannot be assessed in the hands of the Appellant Company, otherwise it tantamount to double taxation.*

*3.16 In this regard, I would like to mention that the Assessing Officer jurisdiction over the aforesaid persons, have no occasion to know the actual facts of the Appellant Company, since the commission payments are considered in the hands of the Appellant Company. Substantively, correspondingly so much income assessed in the hands of the directors, relatives of the director and associates concern required to be excluded.*

*3.17 The appellant's further contention is that the assessment for earlier years, even subsequent years have been completed u/s 143(3) of the Act and commission payment has been accepted in toto, hence for this year also be accepted as payments were made reasonable and business requirement. This contention also not acceptable as per Income- Tax, each year having self contained unit and the same cannot be equated either for earlier years or for subsequent year/years.*

3.18 In view of the detailed discussions made above, I am agreement with the findings of the Assessing Officer and disallowance made on account of commission of Rs.29,44,000/- is confirmed.

4.0 As regard the disallowance of rent of Rs.3,15,500/- is concerned the findings of the Assessing Officer is that premises at Vododara is occupied by M/s Morzaria Motors, hence payment as rent is not genuine. In written submission, the AR of the appellant submitted that Smt. Harshida K. Morzaria, W/o Kirit C. Morzaria is the owner of A-I, 987/12, GIDC Shed Makarpura, Vadodara, taken the work shop building about 30,000 Sq. Ft. for 99 years lease form Government of Gujurat. Part of this approximately 15,000 Sq. Ft. was rented out by Smt. Harsha K Morzaria to the appellant company to Rs. 1.77 per Sq. Ft., a copy of lease agreement entered into between the appellant and Smt. Harshida K Morzaria also enclosed. A perusal of the said lease agreement shows that the lease agreement was executed on 01/04/2004 and relevant content of the agreement is reproduced below:-

"WHEREAS the LESSOR is in possession of the A-I, 987/12, G.I.D.C., Makarpura, Vadodara - 390 010 described here below:-

'I AND, WHEREAS, THE LESSEE herein requested the LESSOR to grant the said 3500 Square Feet approx, Workshop shed a part of A-I, 987/12, G.I.D.C. shed on lease and the LESSOR has agreed to grant the said premises on lease subject to certain terms and conditions which terms being agreeable to the LESSEE and accordingly the LESSEE has taken the said premises on lease on 01/04/2004 for a period of 60 months and the Terms and Conditions of lease agreed to between the parties are required to be recorded into writing:

NOW, THEREFORE, this agreement confirming grant of lease is executed and WITNESSTH AS FOLLOWS:

1. In consideration of the Lessee paying to the Lessor monthly rental payable as set out herebelow and of the covenants of the Lease contained herein, the Lessor does hereby confirm having already granted a part of 3500 sq. feet at A-I,

*987/12, G.I.D.C., Makarpura, vadodare - 390 010 to the Lessee on lease for a period of 60 months commencing from 01/04/2004 to 31/03/2009 and accordingly the Lessee who has already been in possession of the said premises on 01/04/2004 shall hereafter hold and enjoy the same for the said period subject to their terms and conditions hereinafter set out."*

*4.1 A close verification of the copy of aforesaid lease agreement facts emerged as follows :-*

*i) Stamp paper purchased in the name of M/s Morzaria from the State Bank of Mysore, Bangalore, Karnataka, the authorised vendor not from the vendor stationed in Gujarat.*

*ii) That stamp paper was purchased on 28/10/2004, however, lease agreement executed on 01/04/2004 (specially mentioned in first line of the agreement) thus it created doubt being a genuine agreement.*

*iii) As per lease agreement workshop shed A-I 987/12 GIDC shed is only 3,500 Sq. Ft, whereas as per the appellant's submission workshop shed is 30,000 Sq.Ft, submitting contradictory facts.*

*iv) In column 1 of the said lease agreement purported lease would be part of 3,500 Sq.Ft. however contention of the appellant 15,000 Sq.Ft. i.e. 50% of 30,000 Sq. Ft based on which rate per Sq.Ft worked out to Rs. 1.77.*

*v) Monthly rent for the aforesaid shed would be Rs.26,500/- and such rate for 1,750 Sq Ft. would be Rs.15 per Sq.Ft which is much higher.*

*vi) From the information furnished by the appellant shows that Mrs. Harshida K Morzaria owns single shed, admeasuring 3,500 Sq. Ft. not 30,000 Sq.ft as claimed. As such accomodatable only one work shop or service centre and M/s. Morzaria Motors must have occupied the same.*

*4.2 The facts narrated above, the lease agreement proved to be only a paper work, hence the payment of rent is also not genuine.*

*4.3 Therefore, disallowance of Rs.3,15,500/- is confirmed."*

07. From the above, it is clear that the CIT (A) found that the quantitative details furnished did not match in para 3.9, supra, tested the transactions in the light of the requirements specified by the Hon'ble High Court of Gujarat reported in 314 ITR 1 in para 3.13 & 3.14, supra, and confirmed the disallowances . The assessee could not lay any material to assail such findings and hence we confirm the order of the CIT (A). Since the issues are decided on the facts and circumstances of this assessee , we do not find any merit in the additional grounds and hence dismiss it. Since the issue on rent disallowance is not pressed it is not addressed.

08. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on 25<sup>th</sup> day of January, 2017.

Sd/-

(SUNIL KUMAR YADAV)

JUDICIAL MEMBER

Sd/-

(S. JAYARAMAN)

ACCOUNTANT MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar