

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4891/MUM/2012
Assessment Year: 2009-10**

ACIT 25(2)
C-11, Pratyakshakar Bhavan
R. No. 108, Bandra Kurla Complex
Bandra (E),
Mumbai - 400051

Vs. M/s. Shri Kantilal P Shah
(Prop. M/s. Prince Discover Industries)
701, Bhavik Darshan, Raikadia Lane,
Mandpeshwar Road, Borivali (W),
Mumbai - 400092

PAN No. : ACJPS8637G

(Appellant)

(Respondent)

| | |
|--------------|-------------------------|
| Assessee by: | Shri B.S. Bist, DR |
| Revenue by: | Shri Sanjiv M. Shah, AR |

Date of Hearing : 12/01/2017
Date of pronouncement: 12/01/2017

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the revenue. The relevant assessment year 2009-10. The appeal is directed against the order of the Commissioner (Appeals) - 35, Mumbai and arises out of the order under section 143(3) of the Income Tax Act, 1961 (the "Act").

2. The grounds of appeal filed by the revenue read as under:

i. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 29,92,009/- to the Gross Profit made by the A.O. without appreciating the fact that the assessee failed to maintain any stock register and that the A.O. was correct in rejecting the books of account for them being incomplete.

ii. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 7,42,521/- made on the ground of excess commission paid, without appreciating the fact that the increase in such commission paid in comparison to earlier years was without any genuine and justifiable reason.

iii. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,50,502/- on account of non deduction of TDS and no submission of Form 15G/15H to the department within the stipulated time.

3. Briefly stated, the facts are that during the course of assessment proceedings, the AO asked the assessee to file working of item-wise closing stock and produce all the books of accounts and stock register. The assessee produced bills for purchase and sells of few months under the plea that it was not possible to produce all the books and bills files due to heavy volume. The AO asked the assessee to produce at least the stock register to verify the stock quantity and basis of valuation of closing stock declared. The AR of the assessee stated before the AO that the stock register was maintained but the same was not traceable now. As the assessee could not produce all the bills and stock register for verification, in spite being specifically asked to do so, the AO rejected the books of accounts u/s 145 of the Act and estimated gross profit @22% on the total turnover. The same comes to Rs. 1,60,21,172/-. As the assessee had declared gross profit of Rs. 1,30,29,163/-, the AO brought to tax the difference of Rs. 29,92,009/-

3.1 The AO noticed from the P&L account that the assessee had shown commission payment of Rs. 29,70,083/-. The assessee was asked to file party-wise details of commission paid along with details of services rendered by the payees and the basis for the quantification of such commission paid. The assessee filed the party-wise details of commission paid and the details of TDS made thereon. The AO observed that in the immediate preceding year, the assessee had claimed commission payment of Rs. 15,71,986/- @3% and in the F.Y. 2005-06, the assessee had shown commission payment of Rs. 6,38,059/- which was @2.5% of the sales made through salesmen. In the F.Y. 2006-07, the assessee had shown commission payment @3.25% and reduced the same to 3% in F.Y. 2007-08 and then substantially increased the rate of commission to 4%. The AO took into consideration the fact that the nature of business of assessee has remained the same and payment commission has been made to persons closely related to the assessee and some portion of such commission is outstanding on the last day of the financial year. The

AO disallowed the excess commission paid @1% in comparison to F.Y. 2005-06 and thereby added Rs. 7,42,521/-.

3.2 On perusal of the P&L account, the AO noticed that the assessee had debited interest payment of Rs. 29,65,253/-. After going through the details filed by the assessee, the AO noticed that the assessee had shown payment of interest to number of parties but had not made TDS on the interest paid of Rs. 3,87,384/-. In response to a query raised by the AO, the assessee submitted that it has not made TDS as the parties have furnished declaration in Form No. 15G/15H. The AO, then asked the assessee to furnish the details of persons for whom he is not made TDS along with the copy of return of income. The AO noticed that the assessee has not filed any details regarding the following parties:

| | | |
|----|-----------------------|----------------|
| 1. | Shri Ajay K Sanghvi | Rs. 24,000/- |
| 2. | Ms. Alpa Anay Sanghvi | Rs. 24,000/- |
| 3. | Shri Bipin P Shah | Rs.1,36,882/- |
| 4. | Ms. Julie Vimal Shah | Rs. 14,528/- |
| 5. | K.C. Sanghvi | Rs. 24,000/- |
| 6. | Popatial K Shah | Rs. 1,26,000/- |
| 7. | Prabhudas K Shah | Rs. 37,874/- |

The AO further noticed that Form No. 15G were not filed before the department. Also in some cases the interest was more than the maximum amount not chargeable to tax and such parties had also filed Form No. 15G. In view of the above, the AO disallowed Rs. 3,87,384/- u/s 40(a)(ia) and added back to the total income of the assessee.

4. The assessee preferred an appeal before the learned CIT(A). The assessee submitted before him that his books of accounts are audited u/s 44AB of the Act and the AO was not justified in rejecting the books of accounts as he had not pointed out any defects. The assessee also submitted before the learned CIT(A) that he had not maintained any stock register and only the closing stock inventory was taken. He further submitted that the estimate of GP @22% is nothing but mere guess work. Having considered the submission of the assessee, the learned CIT(A) observed that if the AO wanted to reject the books of accounts, he ought to have compared the purchase bills and sales bills with the ledger account and established that there

was either inflation of purchase or suppression of sales which was not done. Further the net profit admitted by the assessee is higher when compared to last year. In view of the above, the learned CIT(A) directed the AO to delete the addition of Rs. 29,92,009/- made on account of alleged lower GP.

4.1 The learned CIT(A) observed that the assessee had paid commission by means of account payee cheques and the cheques were cleared in the name of commission agents as seen from the bank statements of the assessee. The AO has not conducted any enquiry with commission agents to prove that the assessee paid commission at a less rate and the AO made only adhoc disallowance by comparing the commission rate with the earlier years. Even though, the major portion of the commission was remaining unpaid at the end of the year, the assessee paid the same in the subsequent year. Therefore, the learned CIT(A) directed the AO to delete the addition of Rs. 7,42,521/- made on account of excess commission.

4.2 The learned CIT(A) observed that the assessee obtained Form No. 15G/15H from the depositors. When the assessee obtained Form No. 15G/15H from the depositors, there is not liability to make TDS as per section 197A. If there is any default regarding submission of Form No. 15G/15H with the department, the AO can initiate penalty proceedings u/s 272A, but no disallowance u/s 40(a)(ia) can be made. The learned CIT(A) further observed that the assessee has wrongly accepted Form No. 15G/15H in respect of interest payment of Rs. 1,36,882/- paid to Shri Bipin P. Shah. Therefore, he directed the AO to delete the addition of Rs. 2,50,502/- (Rs. 3,87,384/- *minus* Rs. 1,36,882/-) made on account of interest without TDS.

5. Before us, the learned DR supported the order passed by the AO. The learned counsel of the assessee supported the order passed by the learned CIT(A) and also relied on the order of the ITAT "Á" Bench, Mumbai in the case of the assessee for the A.Y. 2007-08 (ITA No. 3737/Mum/2010) and A.Y. 2008-09 (ITA No. 4389/Mum/2011)

6. We have heard the rival submissions and perused the relevant material on record. We find that similar issues arose before the Coordinate Bench in the case of the assessee during the A.Y. 2007-08

and A.Y. 2008-09. In respect of ground of appeal similar to 1st ground in the instant case, the Tribunal held as under:

“After hearing both the parties and on perusal of the impugned order and material placed on record, we find that the main basis for rejecting the trading result of the assessee by the AO was that, the assessee has not maintained stock register and the entire purchase and sale bills were not produced. The assessee’s contention had been that, it has maintained detailed ledger account of purchase and sale and on sample basis sale and purchase bills for few months were filed. It was submitted that due to huge volume it was practically not possible to produce the entire bills, but if the AO would have insisted, the same would have been filed/ produced before him. We agree with such a contention of the assessee, because, firstly, the AO looking to the huge volume of bills and details could have asked for purchase and sale bills on test check basis i.e., on sample basis to tally as per the entries in the books of accounts, which he has not done; secondly, the AO has applied the Gross Profit Rate of 25% without considering the assessee’s past history or any other material or comparability; before the CIT(A) and before us, it has been submitted that the gross profit ratio was 19.99% as compared to 18% in the earlier years and overall net profit has also increased. Thus, there may not be any prima facie inference that assessee’s profit is not in commensurate with the earlier years’ so as to doubt the correctness of the profit shown by the assessee; and lastly, the manner in which the AO has worked out the gross profit on the basis of selected samples is also not a correct approach and if going by the trading result and gross profit of various items, it can be very well held that assessee’s profit and trading results are much better this year, hence, the observation and the finding of the CIT(A) cannot be deviated from and accordingly, the same is affirmed. Thus, ground no. 1 as raised by the revenue is dismissed.”

6.1 In respect of ground of appeal similar to 2nd ground in the instant case, the Tribunal has held as under:

“After considering the rival contention of the parties and on perusal of the impugned material on record, we find that AO has made an ad-hoc disallowance on this score on the ground that firstly, there is enhancement of rate of commission from 2.5% to the rate of 3.25%; secondly, some of the commission agents are also the relatives of the assessee. Such a basis drawn by the AO for making the disallowance cannot be sustained for the reason that, the Ld. CIT(A) has clarified that overall rate of commission paid is @ 3% on the total turnover and not 3.25% and the commission has been paid uniformly to all the parties including the relatives. Out of 11 party, only 2 are relatives, therefore, it cannot be held that any unreasonable payment have been made to the relatives as compared to the outsiders. Such an ad-hoc disallowance of payment of commission made by the AO cannot be sustained and finding of the CIT(A) is thus, affirmed. Accordingly, ground no. 2 of the revenue is dismissed.”

6.2 In respect of ground of appeal similar to the 3rd ground in the instant case, the Tribunal held as under:

“After considering the rival contention and on perusal of the record, we find that out of disallowance of Rs. 21,95,605/- the same has been reduced to Rs. 9,43,446/- on the ground that in the case, five such party’s the income was above taxable limit. Before us, the Ld. Counsel made a statement that these recipient have included the said amount on interest in the return of income, therefore, such a disallowance cannot be made in view of the newly inserted Proviso to section 40(a)(ia) w.e.f. 1.4.2013. The Hon’ble Delhi High Court in the case of Landmark Townships Pvt Ltd. (supra) has held that such a Proviso has to be given retrospective effect. Thus, respectfully following the decision of Delhi High Court, we hold that in case recipients have included ‘interest income’ in their return of income then ‘no disallowance should be made’. Accordingly, we direct the AO to verify the contention of the assessee and give consequential relief. Accordingly, ground raised by the assessee is treated as partly allowed.”-

6.3 Facts being similar, we follow the order of the Co-ordinate Bench as delineated at para 6, 6.1 & 6.2 and uphold the order of the learned CIT(A) in respect of 1st and 2nd ground of the instant appeal. Thus the 1st and 2nd ground of appeal filed by the revenue are dismissed. In respect of the 3rd ground of appeal, following the decisions of the Hon'ble Delhi High Court in *Landmark Townships Pvt. Ltd.* 377 ITR 635, we hold that in case the recipients have included “interest income” in their return of income, then no disallowance should be made. Accordingly the AO is directed to verify the same and take remedial measures after giving a reasonable opportunity of being heard to the assessee. The assessee is also directed to produce the relevant documents before the AO.

7. In the result, the appeal is partly allowed.

Order pronounced in the open court on 12/01/2017

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 12/01/2017

Biswajit, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai