

**IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA
BEFORE SHRI N.V.VASUDEVAN, JM & DR. A.L.SAINI, AM**

आयकर अपील सं./ITA No.1932/Kol/2012

(निर्धारण वर्ष /Assessment Year:2009-2010)

JCIT, Range-56, 3, Govt Place (W), 2 nd Floor, Kolkata-700001	Vs.	M/s Arti & Sons, 167/4, Lenin Sarani, 2 nd Floor, Kolkata-700072
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: AAEFA 6622 J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by : Shri G.Mallikarjuna, CIT DR
Revenue by : Shri V.N.Purohit, AR

सुनवाई की तारीख / **Date of Hearing** : **09/03/2017**

घोषणा की तारीख/**Date of Pronouncement** **19/04/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the revenue pertaining to the Assessment Year 2009-2010, is directed against the order passed by Id. CIT(A)-XXXVI, Kolkata in Appeal No.357/CIT(A)-XXXVI/Kol/R-56/10-11, dated 29.10.2012, which in turn arises out of an order passed by the Assessing Officer (AO) Under Section 143(3) of the Income Tax Act 1961, (hereinafter referred to as the 'Act'), dated 30.12.2010.

2. Brief facts of the case qua the assessee are that the assessee filed its e-return of income, disclosing total income of Rs.99,12,640/- on 22.09.2008. The assessee's case was selected for scrutiny u/s.143(3) of the Act and the AO has completed the assessment by making addition on account of gross receipts from C&F commission at Rs.5,33,81,892/- and on account of undisclosed liabilities paid through credits in the books of Tiger Associates at Rs.7,12,32,585/-.

3. Aggrieved from the order of AO, the assessee filed an appeal before the Id. CIT(A), who has partly allowed the appeal of the assessee. Ld CIT(A) observed that the commission received by the assessee as per ITS details AS-26 is Rs.5,71,57,871/- as against disclosure of gross commission of Rs.5,56,17,577 /- only, which led to underreporting of commission by Rs.15,40,294/-. The matter was also pointed out to the Ld. A/R of the assessee and was requested to explain the reasons for such underreporting of Commission. The Ld. AR however could not through any light as to why the Gross Commission was declared at Rs.5,56,17,577/- as against Rs.5,71,57,871/- actually received/receivable by the assessee. Therefore, the following facts emerged before the Id CIT(A):

(i). That the gross commission has been underreported by the assessee by Rs.15,40,294/-.

(ii) That the assessee has not been able to substantiate the genuineness of payment of Commission made to the Sub Distributors and Agents totaling to Rs.4,18,41,598/-. And did not deduct the TDS thereon U/s 194G(1).

Regarding under reporting of commission by Rs.15,40,294/-, the assessee could not explain this difference during the remand report to A.O. and also during appellate proceedings, therefore the Id CIT(A) enhanced the income of the assessee by Rs.15,40,294/-.

4. Regarding disallowance of commission payment of Rs.4,18,41,598/-, the Id CIT(A) observed that the assessee received commission on lottery, part of which is passed to dealers. The Id CIT(A) noted that on perusal of balance sheet, it was found that appellant has paid this amount and nothing is payable. Hence, keeping in view of the judgment of Hon'ble ITAT, in the case of Merylyn Shipping & Transport vs. Addl.CIT, Range-1, ITA No.477/Vizag/2008 (Visakhapatnam Special Bench)(20 Taxmann.com 244), decided on 29-03-2012, pronounced on 09-04-

2012, and jurisdictional ITAT, Kolkata in case of Maha Laxmi Rice Mills Vs. Addl CIT, ITA No. 172/K01/2012, the disallowance u/s. 40(a)(ia) can be made in respect of expenses payable (liability) only. No disallowance can be made in respect of amounts actually paid. Section 40(a)(ia) would apply only to amounts outstanding as on 31st March of every year on which TDS not deducted and not to amounts paid during previous year without deduction of TDS. Hence, income of assessee is enhanced by Rs.4,18,41,598/- U/S 40a(ia) and the same disallowance of Rs.4,18,41,598/- made u/s. 40(a)(ia) is deleted. Assessee got relief of Rs. 4,18,41,598/-. Also, addition made by A.O. of Rs.5,33,81,892/- on account of difference commission receipt is deleted by Id CIT(A) as no such difference was found. Assessing Officer in the remand report has reported difference of Rs.15,40,294/- only.

5. Regarding undisclosed liabilities of Rs.7,12,32,585/-, the Id CIT(A) observed that in the remand report, AO has mentioned that book entries of Rs.7,12,32,585/- has been made without any corroboratory evidence from M/s. Best & Company or M/s. Tiger Associates. But while sending remand report, the AO has enclosed the confirmation letter from Best & Company and M/s. Tiger Associates. Both of them have confirmed the transaction and book entries when transaction has been confirmed by both parties there is no point of denying the transaction which is neither unexplained nor outside the books. Therefore, addition made of Rs.7,12,32,585/- on account of undisclosed liabilities was deleted by the Id CIT(A).

6. Not being satisfied with the order of Id. CIT(A), the Revenue is in appeal before us and has taken the following grounds of appeal :-

GROUND'S of APPEAL

1. That on the facts and circumstances of the case the Ld CIT(A) -XXXVI, Kolkata erred in facts by not sustaining the addition of Rs. 4,18,41,598, out of aggregate addition of Rs. 5,33,81,892, representing commission

payments, genuineness and source of which was found to be unexplained even in the course of the remand proceedings.

2. That on the facts and in the circumstances of the case the L'd CIT(A) - XXXVI, Kolkata, erred in facts and in Law by allowing the assessee's appeal, on the basis of confirmations of third parties whereas ignoring the findings of the AO's Remand Report regarding their genuineness, and deleting additions on account undisclosed liabilities amounting to Rs. 7,12,32,585.

3. That on the facts and in circumstances of the case the L'd CIT(A) - XXXVI, Kolkata, erred in law and in fact by suo moto deleting the addition made by himself, in view of provisions of Section 251(1) &(2), for non-deduction of tax on commission payments in accordance with Section 194G, thereby violating the provision of Section 40(a)(ia).

4. That on the facts and in the circumstances of the case the Ld CIT(A) - XXXVI, Kolkata, erred in allowing the deductions claimed by the assessee, relying on the Judgment of a different jurisdictional Appellate Tribunal (ITAT Vizag), without considering the Order passed by The High Court of Punjab & Haryana in the case of Milk Special ties Ltd Vs CIT, 21 Taxmann 327 [2012], favoring revenue.

5. That the Appellant craves leave to add, alter/or amend any of the grounds of appeal during the course of hearing.

7. Ground No. 1 relates to addition of Rs. 4,18,41,598/- deleted by Id CIT(A), out of aggregate addition of Rs. 5,33,81,892/- representing commission payments.

7.1 Ld. DR for the Revenue has submitted before us as that the deletion of addition pertaining to difference in C&F commission received is not accepted as the genuineness and source of the same was found to be unexplained even in the course of the remand proceedings and the Ld CIT(A) did not take cognizance of this fact.

7.2 On the other hand, Id AR for the assessee has submitted before us that to make this addition - the Learned Assessing Officer mentioned so many aspects that the main reason for the addition has become illegible. However, from the order of the Assessing Officer it is understood that.

I. Tax audit report - Gross receipt - Rs.1 ,37,75,979.00

2. Details filed by the Assessee:-

Gross Receipt Rs.5,56,17,577.00

Paid by assessee Rs.4,18,41 ,598.00

Net Income Rs.1 ,37,75,979.00

The Learned Assessing officer did not consider the payments of C & F commission which amounts to Rs.4,18,41,598.00. All documents were presented before the Ld AO but for reasons best known to him, he ignored the payment aspect of C & F Commission. He never discussed such payment in his report. The payments were made in the following manner.

Different small parties - Rs.3, 18,41 ,598.00

Vira Agency- Rs.1,00,00,000.00

Total Rs.4,18,41,598.00

Assessee received Rs.5,56,17,577.00 as C & F commission against tax deducted at source and assessee is duty bound to distribute part of the said amount. It is, therefore, submitted that our net income from C & F commission is as follows.

Gross receipts- Rs.5,56,17,577.00

Less: paid- Rs.4,18,41 ,598.00

Net receipts- Rs.1,37,75,979.00

Therefore, Id CIT(A) rightly deleted addition of Rs. 4,18,41,598/- and assessee has relied on the order of Id CIT(A).

7.3 Having heard the rival submissions, perused the material available on records, we noticed that as far as sum of Rs.4,18,41,598/- is concerned, the CIT(A) has held that expenditure is genuine and it related to the business of assessee. Therefore, the same was held to be deductible expenses while computing income from business. The AO also invoked Section 40(a) (ia) of the Act, and disallowed the said sum for non-deduction of tax at source. The AO has not spelt out, the nature of payment as to whether, it is commission or any other payment on which TDS has to be made. The CIT(A) deleted the addition U/s 40 (a) (ia) by applying *Merilyn Shipping & Transport*, ITA No. 477/Vizag/2008 (*Visakhapatnam Special Bench*) 20 Taxmann.com 244.

It is not in dispute before us, that the decision in the case of *Merilyn Shipping & Transport* (supra) has been overruled by Hon`ble Kolkata High court in the case of *Crescent Exports Syndicate* 216 Taxmann 258. Therefore, the nature of payment by the assessee to the sub-distributor has not been explained by the Revenue Authorities. Without giving a finding on the nature of payment in question, it is not possible to decide, whether provisions of section 40(a) (ia) attracted or not. Therefore, it is a fit case for remand to the AO for adjudication on this aspect.

Apart from the above, the Id AR for the assessee also submitted before us that the recipient of payment from the assessee have filed returns of income for the relevant assessment years and have shown the receipts from the assessee, in such return of income. Based on the decision of Hon`ble Supreme Court in the case of *M/S. Hindustan Coca Cola Beverage vs. Commissioner Of Income Tax*, on 16 August, 2007 Appeal (civil) 3765 of 2007, the Id AR for the assessee prayed the AO should also be directed to verify this aspect and if the claim of the assessee is found to be true then no disallowance U/s 40(a) (ia) can be made.

We find force in the submission made above and direct the AO to examine this aspect also in the set aside proceedings. Hence the ground of the assessee is treated as allowed for statistical purposes.

7.4 In the result, the appeal filed by the Revenue on ground No.1, is allowed for statistical purposes.

8. Ground No.2 raised by the Revenue relates to undisclosed liabilities amounting to Rs.7,12,32,585/-

8.1 Ld DR for the Revenue has submitted before us that deletion of the addition of undisclosed liabilities of the assessee is arbitrary as the Ld CIT(A) did not give credence to the fact that AO had doubted the genuineness of the confirmations received from third parties. The AO, in the remand report had given cogent reasoning as regards the genuineness of the confirmations which was totally ignored.

8.2 On the other hand, Id AR for the Assessee has submitted that about undisclosed liabilities of Rs.7,12,32,585/-, the AO in the remand report has mentioned that book entries of Rs.7,12,32,585/- has been made without any corroboratory evidence from M/s. Best & Company or M/s. Tiger Associates. But while sending remand report, the AO has enclosed the confirmation letter from Best & Company and M/s. Tiger Associates. Both of them have confirmed the transaction and book entries when transaction has been confirmed by both parties, there is no point of denying the transaction which is neither unexplained nor outside the books.

8.3 Having heard the rival submissions, perused the material on record, we are of the view that there is merit in the submissions of the assessee,

as the proposition canvassed by Id. AR for the assessee are supported by the facts narrated by him. We noticed that the confirmation letter from Best & Company and M/s. Tiger Associates, both of them have confirmed the transaction and book entries. When transaction has been confirmed by both parties, there is no point of denying the transaction which is neither unexplained nor outside the books, therefore, we do not find any infirmity in the order passed by the Id CIT(A).

8.4 In the result, the appeal filed by the Revenue on ground No.2, is dismissed.

9. Ground No. 3 and 4 raised by the Revenue are supporting grounds for ground No. 1 and 2. Since we have already adjudicated the ground no. 1 and 2 therefore, ground No. 3 and 4 do not require adjudication.

Order pronounced in the open court on this 19/04/2017.

Sd/-
(N.V.VASUDEVAN)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 19/04/2017

प्रकाश मिश्रा/Prakash Mishra,Sr.PS.

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-JCIT, Range-56, Kolkata
2. प्रत्यर्थी / The Respondent.- M/s Arti & Sons
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/
BY ORDER,

सत्यापित प्रति //True Copy//

सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, कोलकाता / ITAT, Kolkata