

आयकर अपीलीय अधिकरण, 'एच' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "H" BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Ram Lal Negi, Judicial Member

आयकर अपील सं./ITA No.877/Mum/2012, निर्धारण वर्ष/Assessment Year-2005-06

M/s. H&R Johnson India Ltd.(Now known as a Division of Prism Cement Ltd.), Windsor, 7 th Floor, CST Road, Kalina, Santacruz (East) Mumbai-400 098 PAN:AAACH 3506 P	Vs.	The Asst. CIT Central Circle-34 Room No.104, 1 st Floor Aayakar Bhavan, MK Road Mumbai-400 020.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : None

राजस्व की ओर से/ Revenue by : Shri Vachaspati Tripathi-DR

सुनवाई की तारीख/ Date of Hearing : 27.01.2016

घोषणा की तारीख / Date of Pronouncement : 03.02.2016

आयकर अधिनियम, 1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 08.11.2011 of CIT(A)-36, Mumbai the assessee has filed the present appeal. During the course of hearing before us, an application for adjourning the case was filed. But no one, authorised by the assessee, appeared before us. Here, we would also like to mention that matter was adjourned in June 2013, January 2014, December 2014, March 2015, October 2015, December 2015 at the request of the assessee. It is also found that in June, 2015 the case had to be adjourned as none appeared on behalf of the assessee. In the letters dated 26.6.2013, 20.1.2014, 12.12.2014 and 10.12.2014 adjournments were sought on the ground that partner of the C.A.-firm, handling the case, was out of town. Considering the above, we are deciding the appeal on the basis of available material.

2. Assessee-company, engaged in the business of ceramic tiles and trading in bath accessories filed its return of income on 29.10.2005 declaring total income of Rs.8.89 crores under the normal provisions of the Act and at Rs.44.98 crores u/s.115JB of the Act. Later on, a revised return of income was filed by the assessee on 15.3.2007 declaring book profit at Rs.33.35 crores. The Assessing Officer (AO), completed the assessment on 18.12.2007 assessing the income of the assessee at Rs.20.37 crores and book profit at Rs.56.61 crores. On receipt of an intimation from ITO -3(1)-1, Mumbai the assessment was re-opened, as per the provisions of Section 147 of the Act. After recording the reasons for re-opening the assessment, the AO completed the assessment u/s.143(3) r.w.s 147 of the Act, on 29.11.2010 determining the income of the assessee at Rs.9.32 crores.

3. Effective Ground of appeal is about disallowance of Rs.35.00 lacs under the head 'commission payments'. During the assessment proceedings, the AO found that the assessee had made a payment of Rs.35.00 lacs to M/s. Arihant Tournesol Ltd.(ATL), that ATL had claimed that commission was paid to it for arranging loans from banks, that ATL did not furnish evidence for rendering of services for earning commission from the assessee, that ITO-3(1)-1, Mumbai, had

issued notices u/s.136 of the Act to IDBI bank,that the bank informed the tax authorities that no consultant/any other person other than the employees of the company was involved in the disbursement of loan.

The AO directed the assessee to furnish details with regard to nature of transaction entered into with ATL for the period 1.4.2004 to 31.4.2005 and the postal address of ATL etc. He found that ATL had not rendered any service to the assessee.Therefore, he asked the assessee to show cause as to why the amount of Rs.35.00 lacs should not be disallowed and added to its income. He also asked the assessee to furnish details of loan taken from IDBI Bank through ATL and to explain nature of services rendered by it along with the supporting evidences.After considering the submission of the assessee,dated 16.11.2011,the AO observed that the assessee had furnished copies of invoices only,that the invoices did not prove that the substantive services had been rendered by ATL,that the assessee had made general submissions without any documentary evidences,that furnishing of the copies of sanction letter did not justify the payment of commission, that the assessee itself had admitted that ATL was not authorised by bank for rendering the services such as arrangement of loans.Vide order sheet noting 16.11.2010,the AO directed the assessee to produce ATL for verification of claim of commission payment and to prove the genuineness of the transaction.It was explained by the assessee that one K.C Sethi ex-director of ATL had arranged the loan from IDBI and HSBC.As per the AO,the assessee had not provided the chronology of services rendered by ATL, that ATL was not authorised by any bank in any manner to do liaison work for them.The AO,finally,held that ATL had not been authorised by any bank to do the liaison work of arranging loans, that the assessee or the ex-director of the company had not furnished the details of services rendered chronologically by ATL to justify the claim of commission payment,that all the paper work and follow up had been done by the assessee in respect of the said loans,that no supporting evidence in respect of services rendered by ATL was filed, that ATL had arranged loans only for the assessee and that also for the year under consideration only, that there was no agreement between the assessee and ATL, that as per the information collected from the IDBI no person/consultant other than the employee of the company were involved in sanction/disbursement of financial assistance granted to the assessee, that the assessee and ATL had entered into collusion and that the assessee had paid the money under the guise of commission, that merely giving payment through account payee cheques did not make the transaction genuine.He referred to the case of Precision Finance Pvt. Ltd.(208 ITR 465).The AO also referred to the cases of L.H Sugar Factory and Oil Mills (P) Ltd. (125ITR293), Chandravilas Hotel (164ITR102),Calcutta Agency Ltd.(19 ITR 191), Transport Corporation of India Ltd. (256 ITR701) and Imperial Chemical Industries(I) Pvt. Ltd.(74 ITR 17). The AO disallowed the commission payment amounting to Rs.35 lacs u/s.37(1) of the Act.

4.Aggrrieved by the order of the AO the assessee preferred an appeal before the FAA.After considering the submission of the assessee and the assessment order,the FAA held that the assessee had merely stated that ALT had rendered the services, that there was no evidence to prove the claim,that there was a difference between making submissions and adducing evidences to prove a statement, that there was no record of any visit made by the staff/officers of ALT to the banks or to the assessee's office,that the IDBI Bank had stated that there was no consultant or any other person involved in sanction/disbursement of the loan, that the assessee had emphasized the services rendered by K.C. Sethi an ex-director of ALT to arrange the loan, that it was not clear as to why an ex-director of ALT would help the assessee in personal capacity and issue the invoices of ALT so that assessee could claim the expenditure,that the process by which the

assessee had approached ALT/K.C. Sethi was not on record, that nothing was available on record to prove that assessee had issued an advertisement for appointment of agent, that the assessee did not have long term contract with ALT to organize such finance, that there were no details of services rendered by ALT, there was no third party confirmation of any arrangement between assessee and ALT. Referring to the case of Schneider Electrical India (304ITR360), the FAA upheld the order of the AO.

5.As stated above, except filing an application for adjournment in tapal the assessee did not send any authorised person to represent it. The DR supported the order of the FAA.

5.1.We have perused the material before us. We find that the assessee had claimed incurring of expenditure of Rs.35.00 lacs under the head commission payment, that it had claimed that ALT through its ex-director had arranged loan from IDBI and HSBC, that AO had made enquiries about services rendered by ALT for the said payment, that the assessee did not produce chronology of events which could firmly establish the genuineness of the transaction, that the FAA confirmed the order of the AO and upheld the disallowance. We further find that IDBI bank had specifically mentioned that there was no middle-man/liaison officer for sanctioning/disbursing of loans. The bank has verified that employee of the assessee had participated in loan sanctioning process. It is not known as to why the ex-director of ALT should approach the bank for alleged loan sanctioning/disbursement for an entity with whom his ex employee had no business relation-it was the sole transaction between ALT and assessee company. It is also strange that a retired person hands over the money to his ex-employer instead of taking it to home for the so called loan disbursement that was result of his personal relations. The assessee has simply said that loan was arranged, but, it has not produced any reliable documentary evidence in its favour.

5.2.As per the established principles of taxation jurisprudence onus is always on the assessee to prove that expenditure was incurred wholly and exclusively for the purposes of business for a particular year. If the assessee furnishes documentary evidences about incurring of expenditure for its business, the AO has to allow it. But, if it fails to lead such evidences then expenditure cannot be allowed, as it will be a case of spending of certain amount. It is said that every outgoing or spending of money cannot be termed an expenditure incurred for business purposes. Every incoming amount cannot be taxed as income, similarly each and every outgoing cannot be termed business expenditure. For claiming a deduction u/s. 37 of the Act, the assessee has to produce evidence that expenditure was incurred wholly and exclusively for the purpose of carrying on business. Wholly and exclusively, the two adverbs used in the section 37 of the Act, signify quantum of expenditure and the motive /object/ purpose of the expenditure respectively. Neither before the AO nor before the FAA the appellant had produced any evidence establishing the facts that the said expenditure was directly incurred for the purposes of the business carried on by the assessee. Even after the disallowance was made by the AO, the assessee choose not to produce any positive evidence before the FAA to establish the fact of incurring of expenditure and rendering of services by ALT. Before us also, no such evidence was furnished. It is said that no structure can be made without a foundation. In the case before us, the foundation itself is missing. Both the authorities have given a finding of fact that proof of rendering of services by the assessee in the year under appeal is not existing. In our opinion, mere making a claim is not sufficient-it has to be backed by documents and evidences. The assessee has failed in discharging the onus cast upon it by the provisions of the Act. Hon'ble jurisdictional High Court, in the matter of

Ramanand Sagar (256ITR134),has held that Section 37 of the Act deals with the question relating to the allowability of the expenditure incurred for the purposes of business,that the onus of proof is upon the assessee to prove each of the following ingredients before the expenditure can be allowed as deduction : (a) the item of expenditure must not be of the nature described under sections 30 to 36 of the Act ; (b) the item of expenditure must not be in the nature of capital or personal expenses of the assessee ; (c) the expenditure must be laid out wholly and exclusively for the purpose of business or profession, that if the assessee fails to satisfy any of these tests, the expenditure claimed is not allowable.In our opinion,in the case under consideration the assessee has failed to discharge the initial onus to prove that the expenditure incurred under the heads rendering of services by ALT.Mere payment of a sum by accounting paying cheque is not sufficient.

If we consider all the surrounding circumstances mentioned at paragraph 5.1.of our order,it becomes clear that the commission payment to ALT cannot be accepted to have been incurred for business purposes.Therefore,we are of the opinion that the order of the FAA has to be endorsed,as it is not suffering from any legal or factual infirmity.Confirming his order,we decide the effective Ground of appeal against the assessee.

In the result,appeal filed by the assessee stands dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 3rd February, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 3 फरवरी, 2016 को की गई ।

Sd/-

(राम लाल नेगी /Ram Lal Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai,दिनांक/Date: 03.02.2016

व.नि.स./Jv.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.