

IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN (AM)

I.T.A. NO. 821/MUM/2015
(Assessment Years 2007-2008)

M/s. Sea Shell Estate Development Pvt. Ltd., Kalpak House, 128 Turner Road, Bandra (W), Mumbai 400 050.	Vs.	ITO-9(3)(1), Mumbai
(Appellant)	..	(Respondent)

PAN No. AAGCS9997K

Assessee by :	Ms. Aarti Sathe
Department by :	Shri Mohammed Rizwan
Date of Hearing :	23.06.2016
Date of Pronouncement :	23.06.2016

ORDER

The appeal filed by the assessee is directed against the order dt. 19.12.2014 passed by Ld. CIT(A)-21, Mumbai and it relates to Assessment Year 2007-08. The assessee is aggrieved by the decision of Ld. CIT(A) in confirming the disallowance of brokerage expenditure of Rs.2,99,100/- paid to two persons.

2. This is the second round of proceedings. Assessee is engaged in the business of financing and real estate. The assessee had claimed brokerage expenses of Rs.2,99,100/-, which was claimed to have been paid to Hemant Sakhale (HUF) (Rs.1,49,550/-) and Smt. Hemangi

Sakhale (Rs.1,49,550/-) towards financing arrangement made with M/s. Ahuja Properties. In the first round of proceedings, the Assessing Officer disallowed the same and hence the matter was carried to the level of Tribunal. The division bench of the Tribunal, vide its order dt. 13.3.2013 passed in ITA No. 8951/Mum/2010, restored the matter to the file of Assessing Officer for fresh examination with the following directions:

"6. We have heard the rival contentions and perused the relevant findings of the Assessing Officer as well as the CIT(A). The Assessing Officer has made the addition on the ground that, firstly, in the earlier year, similar payment of brokerage has been found to be bogus by the Assessing Officer and secondly, there was no justification for paying the brokerage each and every year when the loan and loanee party remains the same. So far as the finding of the Assessing Officer in the assessment year 2006-07, the same has been set aside by the CIT(A) and assessee's claim on account of payment of brokerage has been allowed. Regarding the second contention of the Assessing Officer, we find that the reason given by the Assessing Officer is not appropriate and he has to examine the nature of services rendered by the brokerage and whether the payment made to them was genuine or not. In this case he has failed to examine these aspects. Therefore, in the interest of justice, we feel that this issue needs to be restored back to the file of the Assessing Officer to examine the nature of services rendered by the brokers and what was the terms and conditions for making the payment for the services rendered by them. Thus this matter is set aside and restored back to the file of the Assessing Officer to examine this issue afresh, in view of the above observation and after giving proper opportunity to the assessee for presenting its case."

In the set-aside proceedings, the Assessing Officer again made the disallowance, and it was also confirmed by the Ld. CIT(A). Aggrieved, the assessee has filed this appeal before the Tribunal.

3. The Ld. Counsel for the assessee submitted that the assessee had furnished all the details relating to brokerage expenses paid, viz., cheque details, bank account copy evidencing encashment of the cheque, receipts issued by the payees, details of Tax Deducted at source from the brokerage payments. She submitted that the Ld. CIT(A) has confirmed the disallowance by placing reliance on the sworn statement taken from Shri Hemant Sakhale on 2.1.2014 wherein, he had expressed ignorance about the financial arrangement in the replies given to some of the questions. The Ld. Counsel invited my attention to the answer given by Shri Hemant Sakhale to question nos. 6, 9, 19 and 20. The Ld. Counsel submitted that Shri Hemant Sakhale was very much inconsistent in giving replies to various questions. Though he had stated that he or his wife did not know about M/s. Ahuja Properties, yet he has confirmed that he has received commission from the assessee herein in respect of services rendered by him in the answer given to question no. 9. Further, he has stated that he has not provided any service to the assessee in the answer given to question no. 19 and, at the same time, he has stated that he has offered the brokerage received from the assessee for taxation. Since Shri Hemant Sakhale was giving contradictory statements, Ld. CIT(A) was not justified in placing reliance on the statement given by Shri Hemant Sakhale on pick and choose basis. The Ld. Counsel submitted that the statements in which contradictory replies were given cannot be relied upon. In this regard, she placed reliance on the decision rendered by the Tribunal in the case of *DCIT vs. Nahar Spinning Mills, 8 SOT 6* and *CIT V P.V. Kalyanasundaram, 282 ITR 259 (Mad)*. The Ld. Counsel submitted that identical addition made in Assessment Year 2006-07 has been deleted by the Ld. CIT(A) and the Revenue has accepted the decision rendered by Ld. CIT(A). The Ld.

Counsel further submitted that the impugned addition is liable to be deleted in view of various evidences furnished by the assessee and also in order to maintain consistency in the matter.

4. On the contrary, the Ld. DR submitted that the Tribunal had restored the matter to the file of the Assessing Officer in the first round of proceedings with the direction to examine the nature of services rendered by the brokers, terms and conditions for making payment of brokerage, etc. However, the assessee did not furnish the details of services rendered by the brokers and hence there was no occasion for the AO to examine them as per the direction of the Tribunal. Hence the AO was constrained to disallow the expenditure claimed by the assessee, since it was not proved to be incurred for the purposes of business.

5. In the rejoinder, the Ld. Counsel submitted that the finance arrangements made with Ahuja Developers was continuing during the year under consideration also and hence the assessee was constrained to pay the brokerage amount out of business expediency.

6. I have heard rival contentions and perused the record. We have earlier noticed that the co-ordinate bench of the Tribunal has restored the matter to the file of the assessing officer with the direction to examine the nature of services and the terms and conditions relating to the same. I notice that the assessee did not furnish those details and instead, relied upon the evidences available with it relating to payment and TDS deduction. I find merit in the submissions of Ld D.R that the assessing officer could not examine the nature of services and terms and conditions relating to the same, since the assessee did not provide

those details. I notice that the division bench of Tribunal had restored the matter with specific direction and hence the assessee was not placing reliance on payment details and TDS deduction details to substantiate the payment of brokerage. I notice that the Ld CIT(A) has placed reliance on the sworn statement taken from one of the payees. But the Ld A.R herself has pointed out that the statement given by Shri Hemant Sakhale is full of contradictions and could not be placed reliance. Hence his statement that he had received commission in respect of services rendered by him could not be relied upon. In the statement, he did not describe the nature of services and the terms and conditions of brokerage payment.

7. The Ld A.R submitted that the financial arrangement made with Ahuja Properties continued during the year under consideration also and hence the brokerage was paid. I notice that the assessee had paid the brokerage in the immediately preceding year in respect of financial arrangement made in that year. The said loan continued during the year also and hence again the brokerage was paid in respect of the same financial arrangement. When a specific question was asked as to whether the assessee has given any fresh loan to M/s Ahuja Properties during the year under consideration, the Ld A.R submitted that the old loan has continued during the year under consideration. In my view, the normal trade practice is to give brokerage in respect of first financial arrangement and it is doubtful whether a prudent business man will give brokerage again for continuing the loan. The Ld A.R submitted that the identical payment made in the earlier year was allowed by Ld CIT(A). However, on a perusal of the order passed by Ld CIT(A) in that year, I notice that the disallowance was made by the AO on noticing contradictions in the

claim of payment and when the assessee clarified the position before Ld CIT(A), the first appellate authority allowed the same. Accordingly, I am of the view that the assessee cannot place reliance on the order passed by Ld CIT(A) in the immediately preceding year.

8. In view of the foregoing discussions, I am of the view that the assessee has failed to prove the nature of services rendered by brokers and the terms and conditions of brokerage, as directed by the division bench of Tribunal. Hence I am of the view that the Ld CIT(A) was justified in confirming the disallowance of brokerage expenditure.

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 23rd June, 2016.

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 23rd June, 2016

SSL

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