

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, D, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

श्री संजय गर्ग, न्यायिक सदस्य एवं

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Sanjay Garg, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.6319/Mum/2012
Assessment Year: 2005-06**

&

**ITA NO.4345/Mum/2013
Assessment Year: 2005-06**

M/s. Regenerative Medical Services Pvt. Ltd., 2, ABC ACME Plaza, 2 nd Floor, Hemukulani Road No.4, Kandivali -West, Mumbai-400067	बनाम/Vs.	ITO 8(3)-1 Mumbai-
(Appellant)		(Revenue)
P.A. No. AADCS4917N		

**ITA NO.6318/Mum/2012
Assessment Year: 2005-06**

&

**ITA NO.4344/Mum/2013
Assessment Year: 2005-06**

M/s. Satyan Pharmaceuticals P. Ltd., 2, ABC ACME Plaza, 2 nd Floor, Hemukulani Road No.4, Kandivali -West, Mumbai-400067	बनाम/Vs.	ITO 8(3)-1 Mumbai-
(Appellant)		(Revenue)
P.A. No. AAGCS9818R		

Appellant by	Shri Paresh Vakharia (AR)
Revenue by	Shri B.S. Bist (Sr. DR)
सुनवाई की तारीख/ Date of Hearing :	19/10/2016
आदेश की तारीख / Date of Order:	19/10/2016

आदेश / O R D E R

Per Bench:

These appeals involve common issues, therefore these were heard together and being disposed by this common order.

2. During the course of hearing, arguments were made by Shri Paresh Vakharia, Authorised Representative (AR) on behalf of the Assessee and by Shri B.S. Bist, Departmental Representative (Sr. DR) on behalf of the Revenue.

We shall first take up appeal in the case of Regenerative Medical Services Pvt. Ltd. in ITA No.6319/Mum/2012:

3. This appeal has been filed by the assessee against the order of Ld. CIT(A) dated 18.07.2012 passed against the assessment order u/s 147 r.w.s. 143(3) of the Act, dated 24.12.2008 for A.Y. 2005-06 on following grounds:

“1.The learned CIT(A) erred in confirming addition of aggregate commission payment of Rs.12,00,000 made to M/s. Moira Steels Ltd. in the course and for the purposes of business of your Appellant.

1.1 The learned CIT(A) failed to appreciate that the disallowance of commission was unsustainable merely on the basis of statement of Mr. Vimal Todi (Director of M/s. Moira Steels Ltd.) in the course of survey of that company, ignoring the contradictory statement given by the accountant of the company Mr. Sandeep Jain, who on record

has been stated to be more conversant with day to day business affairs.

1.2 The learned CIT(A) failed to appreciate that statement made under section 133 in the course of survey proceedings does not have evidence value in law and hence it could not have been the sole basis of confirming disallowance of the commission.

1.3 The learned CIT(A) failed to appreciate that the commission payment was a necessary expenditure of the business of your appellant as per the trade practices, the amounts were reasonable and paid to unrelated person such that disallowance was unsustainable.

1.4 Without prejudice, the learned CIT(A) failed to appreciate that in the absence of reason to believe that the income has escaped assessment pursuant to section 147 of the Income Tax Act, the reassessment proceedings were invalid and hence the additions made were unsustainable.

1.5 Without prejudice, the learned CIT(A) failed to appreciate that your Appellant case was picked up for reassessment arbitrarily ignoring the principles of equality in as much as several other parties who made commission payments to M/s. Moira Steels Ltd. were not subjected to the reassessment.

2. Without prejudice, your appellant submits alternative ground of appeal as follows:

The learned CIT(A) failed to appreciate that even if it is assumed that M/s. Moira Steels Ltd. were not the beneficiary of the commission payment, nevertheless, in the absence of any evidence that the expenditure was reversed by compensatory payment in favor of your Appellant and in absence of any evidence that expenditure has not been incurred, the commission payment was allowable as expenditure incurred in favor of undisclosed recipient pursuant to trade practice.”

4. In this case, the brief background is that the case was reopened after recording the Reasons on the basis of statement recorded during the survey u/s 133A of Shri Vimal

Todi, Director of M/s. Moira Steels Ltd., wherein he allegedly stated that no services were rendered by him and thus commission paid by the assessee company to the said company was bogus. In the reassessment order passed by the AO, impugned commission of Rs. 12 lacs was disallowed, and this disallowance was confirmed by Ld. CIT(A) in the first appeal.

4.1. During the course of hearing before us, Ld. Counsel vehemently submitted that in this case the assessment order is bad in law in as much as it has been passed by the AO without assuming jurisdiction as per law and in violation of principles of natural justice. It was submitted that statement of Mr. Vimal Todi dated 20th February 2007, has never been provided by the assessee despite specific request of the assessee. Further, the AO did not provide certified copy to the Reasons nor invited objection of the assessee. The assessee, during the course of reassessment proceedings, raised objection about the illegality of the Reasons, but the AO without disposing of the objections of the assessee framed the reassessment order.

4.2. Per contra, Ld. DR submitted that copy of statement of Mr. Vimal Todi dated 23.03.2007 has been provided to the assessee. It was further submitted no proper objection has been raised by the assessee during the course of assessment proceedings.

4.3. We have gone through the orders passed by the lower authorities as well as submissions made by both the sides before us. It is noted from the perusal of the assessment order

that Reasons recorded by the AO have been reproduced therein. Though, the Reasons were stated to have been provided by AO by reproducing its extract in the letter dated 05.12.2008 issued by the AO, but verbatim certified copy of the Reasons recorded has not been provided by the AO to the assessee. It is further noted that statement of Mr. Vimal Todi dated 20th February, 2007, which has been mentioned in the Reasons recorded has not been provided to the assessee. Though, one statement of Mr. Vimal Todi dated 1st March, 2007 had been provided, but that seems to be different one. It is further noted from the perusal of the order of Ld. CIT(A) that there was a reference to the statement dated 20th February, 2007, but that was stated to have been given by one Shri Sandeep Jain and not by Shri Vimal Todi. Thus, there seems to be some confusion in this regard. Under these circumstances, neither the assessee made proper objections before the AO nor the AO disposed whatever objections were filed by the assessee, in accordance with law and facts. Thus, taking into account totality of facts and circumstances of the case, we find it appropriate in the interest of justice that this matter should be sent back to the file of the AO along with all the grounds raised by the assessee before us. The AO shall provide certified copy of the Reasons and also copy of the statement which has been relied upon by the AO in the Reasons recorded i.e. statement of Shri Vimal Todi dated 20th February 2007. The Assessee shall raise objections in writing before the AO, if so desired. The AO shall dispose of the objection in accordance with law and shall follow the

procedure as per mandate given by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd (2003) 259 ITR 19. The AO shall provide to the assessee entire adverse material to be used against assessee by the AO. The assessee shall submit requisite details and documentary evidences as may be required by the AO time to time as per law and shall extend full cooperation to the AO. The assessee shall be free to raise all legal and factual issues before the AO with regard to jurisdictional aspect of reopening as well as merits of the proposed additions/disallowances. The AO shall give adequate opportunity of hearing to the assessee before framing fresh assessment order. Thus, with these directions, all the grounds raised by the assessee are sent back to the file of the AO.

5. As a result, this appeal may be treated as allowed for statistical purposes.

We shall now take up appeal in the case of Regenerative Medical Services Pvt. Ltd. in ITA No.4345/Mum/2013:

This appeal has been filed against the order of Ld. CIT(A) dated 22.03.2013 passed against the penalty order of the AO u/s 271(1)(c) dated 20.12.2012 for A.Y. 2005-06.

6. It is noted by us that quantum order of the AO has been set aside by way of our order in ITA No.6319/Mum/2012 therefore, the penalty order does not survive any more as on date. Under these circumstances, penalty order is set aside. The AO shall be free to initiate penalty proceedings afresh, if required as per law.

Now, we shall take appeal in the case of M/s. Satyan Pharmaceuticals Pvt. Ltd. in ITA No.6318/Mum/2012:

This appeal has been filed against the order of Ld. CIT(A) dated 18.07.2012 passed against assessment order u/s 147 r.w.s. 143(3) of the Act, dated 24.12.2008 for A.Y. 2005-06.

7. It is noted that ground raised and issue involved in this appeal are identical to the appeal in the case of M/s. Regenerative Medical Services P. Ltd. in ITA No.6319/Mum/2012. Both the parties agreed that the facts involved in this appeal are identical to aforesaid appeal, therefore, this appeal along with all the grounds are sent back to the file of the AO with all the directions as contained in the aforesaid appeal. The AO is directed to follow our order as given in ITA No.6319/Mum/2012.

8. As a result, this appeal may be treated as allowed for statistical purposes.

Now, we shall take appeals in the case of M/s. Satyan Pharmaceuticals Pvt. Ltd. in ITA No.4344/Mum/2013.

This appeal has been filed against the order of Ld. CIT(A) dated 22.03.2013 against the penalty order of the AO u/s 271(1)(c) dated 20.12.2012.

9. Since quantum appeal has already been sent back to the AO, therefore, penalty order does not survive any more as on date. Therefore, penalty order is set aside. The AO shall be free to initiate the penalty proceedings afresh, if and as & when required as per law.

10. As a result, these appeals may be treated as partly allowed for statistical purposes.

Order was pronounced in the open court at the conclusion of hearing.

Sd/- (Sanjay Garg)	Sd/- (Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :19/10/2016

Patel, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai