आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं /I.TA No. 5743 /Mum/2014

(**निर्धारण वर्ष** / Assessment Year:2010-11

M/s. SHCIL Services Ltd., C/o Kalyaniwalla & Mistry, Army & Navy Bldg., 3rd Floor, 148, M.G. Road, Fort, Mumbai-400 01	**बनाम**/ Vs.	The ACIT-4(2), Aayakar Bhavan, Mumbai-400 020

आयकर अपील सं /I.TA No. 6019 /Mum/2014

(**निर्धारण वर्ष** / Assessment Year:2010-11

The ACIT-4(2), Aayakar Bhavan, Mumbai-400 020	**बनाम**/ Vs.	M/s. SHCIL Services Ltd., C/o Kalyaniwalla & Mistry, Army & Navy Bldg., 148, M.G. Road, Fort, Mumbai-400 01
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAJCS 5661H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Assessee by:**	Shri F.V. Irani & Shri Zareer N. Mehta
प्रत्यर्थी की ओर से/**Revenue by:**	Shri Manjunatha Swamy

सुनवाई की तारीख / **Date of Hearing : 07.07.2016**

घोषणा की तारीख /**Date of Pronouncement : 27.07.2016**

आदेश / O R D E R

PER C.N. PRASAD, JM:

These two appeals are filed by the assessee and the Revenue against the order of the Ld. CIT(A)-8, Mumbai dated 14.7.2014 pertaining to assessment year 2010-11.

2. The assessee has raised following grounds of appeal:

> *"1. The Ld. CIT(A) erred in restricting the allowance of sub-brokerage expenditure incurred to 50% of the brokerage earned.*
>
> *2. The Ld. CIT(A) erred in ho0lding that the sub-brokerage expenditure incurred and claimed by the appellant was excessive and unreasonable within the meaning of Sec. 40A(2) of the Act.*
>
> *3. The Ld. CIT(A) failed to appreciate the evidence led by the appellant in its proper perspective.*
>
> *4. Having regard to the facts and circumstances of the case and the provisions of law, the appellant submits that the Assessing Officer be directed to allow deduction for sub-brokerage incurred – Rs. 26,20,0,780/- as claimed by the appellant in its return of income."*

3. At the outset, the Ld. Counsel for the assessee submits that all the issues in assessee's appeal have been decided in assessee's own case for the Assessment Year 2011-12 in ITA No. 1777/M/2015 dated 5.2.2016 wherein the findings of the Ld. CIT(A) that the provisions of Sec. 194H are attracted to the payments made by the assessee to the sub-brokerage and since there is a specific provision dealing with commission and brokerage, the provision u/s. 194H are attracted to such payments and not the provisions of Sec. 194J. The Ld. Counsel for the assessee further submits that in respect of the findings of the Ld. CIT(A) that the provisions of Sec. 40A(2)(b) are attracted and the sub-brokerage paid is in excess, the Tribunal did not agree with the Ld. CIT(A) and set aside the order on this issue.

He submits that facts and circumstances being similar this year also, the order for the Assessment Year 2011-12 may be followed.

4. The Ld. Departmental Representative vehemently supported the orders of the Assessing Officer.

5. On a perusal of the Tribunal's order in assessee's own case, we find that the issue in the appeal of the assessee is squarely covered in its favour wherein the Tribunal observed and held as under:

> *"7. We have heard both parties and perused the orders of lower authorities, case laws relied on and the material evidence placed before us. The assessee is a stock broker and a member of Stock Exchange carrying on the business of sale and purchase of share and securities in the name and style of SHCIL Services Ltd. The assessee entered into agreement with Stock Holding Corporation of India Ltd. for conducting business as sub-broker in shares and securities on behalf of its clients with the stock broker. The assessee during this assessment year has paid sub-brokerage to Stock Holding Corporation of India Ltd., a holding company. The AO was of the view that such commission is attracted the provisions of Sec. 194J of the Act as the assessee paid amounts to holding company and these amounts would fall under fees for technical services within the meaning of Sec. 194J of the Act. .*
>
> *7.1. It was the contention of the assessee that the sub-brokerage paid to the sub-broker will fall u/s. 194H which is a specific provision for commission and brokerage but not under the provisions of Sec. 194J of the Act. Further it was submitted that the provisions of Section 194H are not attracted for the sub-brokerage paid on dealing with securities in view of the proviso which exempts such brokerage. However, the AO rejecting the contentions and on securities treated the said amount of sub-brokerage paid by the assessee as fees for technical services within the provisions of Sec. 194J of the Act. The Ld. CIT(A) accepted the contention of the assessee that the payment*

made by the assessee would fall under the provisions of Sec. 194H and since the securities are exempt, provisions of Sec. 194H have no application. However, he invoked the provisions of Sec. 40A(2) of the Act and restricted the disallowance to 50% of brokerage. According to him there is excess payment of sub-brokerage by the assessee. He held that it is for the assessee to prove beyond all doubt that the payment made constituted the fair market value of the services received. As far as the findings of the Ld. CIT(A) that the payments are attracted the provisions of Sec. 194H is concerned, we completely agree with the Ld. CIT(A) that since there is a specific provision dealing with commission and brokerage, the same would attract to the payments made by the assessee and not the provisions of Section 194J of the Act. We also find that Sec. 194H carves out an exception in respect of transactions in securities and therefore no tax is deductible in respect of sub-brokerage paid. The decisions of the Mumbai Bench and Kolkata Bench in the case of S.J. Investment Agencies Pvt. Ltd. (supra) and Noble Enclave & Towers (P) Ltd (supra) are to this effect.

7.2. However, in respect of the finding that the provisions of Sec. 40A(2)(b) are attracted and the sub-brokerage paid is in excess, we do not agree with the findings of the conclusions of the Ld. CIT(A).

7.3. In the course of the assessment proceedings as well as the appellate proceedings, the assessee very much contested that the payment of sub-brokerage is not unusual that it ranges more than 50%. The assessee also furnished list of sub-broking companies who paid sub-brokerage in the ratio of 60:40 and 80:20. The assessee also given an instance in the case of a broker name Kaonain Securities Pvt. Ltd. where 70% of its brokerage was paid by way of sub-brokerage. It is also submitted by the assessee as under:

a) "That the genuineness of the expenditure was not in doubt.

b) A list of entities who in the understanding of the appellant pay sub-brokerage in excess of 60% of

the total brokerage earned, going progressively upwards to 80%

c) *Copy of an article from Economic Times dated 26th December, 2008 to the effect that several brokers have agreed for a 30-70 arrangement favouring the sub-broker.*

d) *A advertisement giving particulars of an entity, namely Kaonain Securities Pvt. Ltd., appearing on the internet, showing that they are willing to part with 70% by way of commission to a franchisee partner.*

e) *Balance sheet of Interconnected Stock Exchange of India Ltd. to show that the said entity is paying sub-brokerage to the tune approximately 80%*

f) *That the sub-brokerage is paid to Stock Holding Corporation of India Ltd. which is a highly profitable entity and has offered the said income to tax, as is confirmed by the Assessing Officer himself in the assessment order-and that the entire arrangement is driven by commercial considerations and not with any intention to avoid tax.*

g) *That even as per databases, the profitability of the appellant, even after payment of sub-brokerage, is better than the comparables."*

7.4. None of these submissions of the assessee have been rebutted by the lower authorities. Thus, the observation of the Ld. CIT(A) that "it is for the appellant to prove beyond all doubt that the payment made constituted the fair market value of the services received" is not justified since assessee has given instances where the sub-brokerage was paid at 70% of the commission received. Further a list of parties were submitted to show that the sub-brokerage paid was in the ratio of 60:40 and 80:20 depending on the market conditions. The lower authorities have not made any enquiries to disprove the submissions of the assessee.

8. In the case of Orchard Advertising (P) Ltd. (supra), the Mumbai Bench of the Tribunal held as under:

> *" We see merits in the plea of the assessee. The impugned disallowance under section 40A(2)(b) viz provides that where the assessee incurs any expenditure in respect of which payment has been made to specified person, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the services for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction. The scheme requires the Assessing Officer to establish the fair market value of the services for which payment is made and any amount that he finds to have been paid by the assessee in excess of such fair market value of the services alone can be disallowed under the said section. It is, therefore, condition precedent without resorting to the disallowance under section 40A(2)(b). So far as the expenditure being excessive or unreasonable having regard to the fair market services is concerned, that the fair market value of such services is to be determined first. Unless this benchmark is set, there cannot be any question of resorting to disallowance under section 40A(2)(b) for excessive payment vis-à-vis fair market value of services. In the case of Batlivala & Karanai Vs ACIT (2 SOT 379), a coordinate bench of this Tribunal has observed as follows*
>
> *Section 40A(2) provides that where the Assessing Officer is of the view that expenditure incurred by the assessee, in respect of which payment is made to the specified persons, is excessive or unreasonable having regard to the market value of goods, services or facilities for which the payment is made, or the legitimate needs of the business of the assessee or the benefit derived by or accruing to him therefrom, so*

much of the expenditure as is considered to be excessive or unreasonable shall not be allowed as deduction. The emphasis is on the market value of the goods or services ……………………….. The CIT(A) has also dealt with the matter at an equally superficial level by only modifying the quantum and without giving any cogent finding about the conditions of applicability of section 40A(2) being satisfied. Unless there is a clear finding that the market value of the services taken from the sister concern is less than the price at which the services are obtained, there cannot be an occasion to apply the disabling provisions of section 40A(2). This exercise, therefore, necessitates a finding about the fair market value of such services. For this reason alone, the disallowance under section 40A(2) is inherently unsustainable in law on the facts of this case.'

9. In the case of Aradhana Beverages & Foods Co. (P) Ltd VS DCIT 51 SOT 426, the Delhi Bench held as under:

"The opening words of Section 40A(1) indicate that the provisions of this Section shall have effect notwithstanding anything to the contrary contained in any other provisions of this Act relating to the computation of income under the head "profits and gains of business or profession". In other words, Section 40A is an overriding provision which operates inspite of anything to the contrary contained in any other provisions of the Act relating to the computation of income under the had profits and gains of business or profession. Sub-Section 2(a) of Section 40A provides that where the assessee incurs any expenditure in respect of which payment has been made or is to be made to the persons specified in that Section and the AO is of opinion that such expenditure is excessive or unreasonable having regard to the market value of the goods, services or facilities for which the payment is made or the legitimate needs of business or profession of the assessee or the benefit derived by or accruing to the assessee therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as

a deduction. In other words, if the expenditure incurred by the assessee is considered by the AO to be of excessive or unreasonable, having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the assesee for business or profession or the benefit derived by the asessee or accruing to the assessee for payment, then so much of the expenditure as is so considered by the AO to be excessive or unreasonable shall not be allowed as a deduction. If the above conditions are fulfilled, the AO can disallow the expenditure to the extent he considers it excessive or unreasonable by the above objective standards or otherwise. The object, scope and effect of the introduction of Section 40A(2)(a) was explained by the Board in its Circular No.6P of 1968 dated 6.7.1968 and in that Circular at para 74, the Board has stated that where payment for any expenditure is found to have been made of a relative or associate concern falling within the specified categories, it will be necessary for the AO to scrutinize the reasonableness of the expenditure with reference to the criteria mentioned in the Section. It was further stated that the AO is expected to exercise his judgemnet in a reasonable and fair manner, and it should be borne in mind that this provisions is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate concerns and should not be applied in a manner, which will cause hardship in bonafide cases".

10. In the case of Edwise Consultants Pvt. Ltd Vs DCIT (supra), the Co-ordinate Bench of this Tribunal held as under:

"We have earlier noticed that all the directors are in charge of the entire operations of the assessee company and the financial/operational results of the company are growing every year. Hence, on that count alone, the salary and incentive paid to the directors could be justified and could not be found fault with, without bringing the fair market value of services. In our view, the financial and operational results, justify the payments made to the directors. At this

juncture, it is pertinent to refer to the binding decision rendered by the Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Indo Saudi Services (Travel) (P) Ltd (2009)(310 ITR 306), wherein the Hon'ble Bombay High Court referred to the Circular issued by CBDT with regard to sec. 40A(2)(a) as under:-

> *"Under the CBDT Circular No. 6-P, dated 6th July, 1968 it is stated that no disallowance is to be made under section 40A(2) in respect of payments made to relatives and sister concerns where there is no attempt to evade tax."*

In the case before the Bombay High Court, the revenue was not in a position to show as to how the assessee therein evaded payment of tax by alleged payment made to its sister concern, since the sister concern was also paying tax at higher rate and hence the disallowance made u/s 40A(2)(a) was deleted. We further notice that the Hon'ble Bombay High Court has expressed identical view in the case of V.S. Dempo & Co. (P) Ltd (336 ITR 209) also. The Hon'ble Punjab & Haryana High Court has also expressed similar view in the case of CIT Vs. Siya Ram Garg (HUF) (2011)(237 CTR 321)".

Respectfully following the said order, we hold that the provisions of Sec. 194H are attracted to the payments made towards sub-brokerage but not the provisions of Sec. 194J and we reverse the order of the Ld. CIT(A) in holding that provisions of Sec. 40A(2) are attracted. The grounds raised by the assessee are allowed.

6. Coming to the Revenue's appeal in ground No. 1,2 & 3 relating to the action of the Ld. CIT(A) in not accepting that the payment made to the assessee false within the purview of Sec. 194J of the Act and in restricting sub-brokerage to 50% of the total brokerage incurred by the assessee .

6.1. Since we have already held in assessee's appeal that the provisions of Sec. 194J are not attracted and sub-brokerage paid would fall under the provisions of Sec. 194H, provisions of Sec. 40A(2) have no application in the facts and circumstances of the case. Therefore, ground Nos. 1,2 & 3 raised by the Revenue are dismissed.

7. The next issue in the appeal of the Revenue is that the Ld. CIT(A) erred in not giving opportunity to the Assessing Officer to examine sundry creditors in violation of Rule 46A of the I.T. Rules for which additional evidence was given by the assessee.

8. The Ld. Departmental Representative submits that the assessee has filed additional evidence before the Ld. CIT(A) without giving an opportunity to the Assessing Officer. He has decided the issue in violation of Rule 46A therefore he pleads for setting aside the matter to the file of the Assessing Officer for fresh examination.

9. The Ld. Counsel for the assessee referring to para-4.3.1 to 4.3.3 of the Ld. CIT(A)'s order submits that the information in respect of three creditors was filed as additional evidences before the Ld. CIT(A) and the Ld. CIT(A) forwarded the same to the Assessing Officer for his comments on admission of additional evidences. The Assessing Officer in his remand report while giving comments he has not made any comments at all on the additional evidences filed by the assessee. Therefore the Revenue now cannot contend that no opportunity was given to the Assessing Officer and there is violation of Rule 46A.

9. We have heard the rival contentions and perused the orders of the authorities below. Admittedly, the assessee filed additional evidences before the Ld. CIT(A) in respect of 3 creditors and Ld. CIT(A) called for comments of the Assessing Officer and the Assessing Officer forwarded the remand report on other issue without commenting anything on the creditors. In such circumstances, the ground of the revenue that no opportunity was given to the Assessing Officer and therefore there is a violation of Rule 46A is wrong and cannot be sustained. This ground of the revenue is rejected.

10. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 27th July, 2016.

Sd/-	Sd/-
(RAJENDRA)	**(C.N. PRASAD)**
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 27th July, 2016

व.नि.स./ *Rj* , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
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**