

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA

[Before Shri Mahavir Singh, JM & Shri Waseem Ahmed, AM]

I.T.A No.106/Kol/2010
Assessment Year: 2003-04

Shri Debasis Sanyal, Durgapur Vs. Income-tax Officer, Wd-1(4), Durgapur
(PAN: ARQPS2414P)
(Appellant) (Respondent)

Date of hearing: 15.09.2015
Date of pronouncement: 22.09.2015

For the Appellant: Shri S. M. Surana, Advocate
For the Respondent: Shri Sanjit Kr. Das, JCIT, Sr. DR

ORDER

Per Shri Mahavir Singh, JM:

This appeal by assessee is arising out of order of CIT(A)-Durgapur in appeal No. 87/CIT(A)/DGP/08-09 dated 12.11.2009. Assessment was framed by ITO, Ward-1(4), Durgapur u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the Act) for AY 2003-04 vide its order dated 31.12.2008.

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming the action of AO in making disallowance of expenses claimed by assessee by invoking the provisions of section 40A(3) of the Act being cash payment made against purchases. For this, assessee has raised following ground no.3:

“3(i). That the Ld. CIT(A) has for the facts and under the circumstances of the case and in law further erred in holding that assessee was not a commission agent of M/s. Manish & Co., Distributor of I.T.C. Brands of cigarette and hence cash payments to said M/s. Manish & Co. were against purchases of cigarettes as principle and not as an agent to collect sale proceeds on behalf of said Manish & Co. and hence confirming addition of Rs.48,40,557/- u/s. 40A(3).

(ii) That on the facts and circumstances the CIT(A) ought to have held that assessee was only earning commission on supplies made to retailers on behalf of Manish & Co. as agent.”

3. Briefly stated facts are that the original assessment was completed u/s. 143(3) of the Act by making disallowance of purchases at 20% being made in cash payment in violation of provision of section 40A(3) of the Act. The total purchase was to the tune of Rs.3,34,10,161/-. Aggrieved, assessee preferred appeal before CIT(A) and finally, the matter reached to Tribunal. Tribunal in ITA No.1518/Kol/2006 vide order dated 05.10.2007 set aside the issue to the file of the AO for re-examination of the issue afresh

by giving direction that *“Since the assessee has contended that he was only acting upon as an agent of M/s. Manish & Co., which has also not been verified by the AO. On the other hand, the observation of Ld. CIT(A) that the assessee was not doing any business at all, is also on mere acceptance of assessee’s submission, whereas the assessee has himself accepted to have work as a commission agent. We, therefore, by considering the facts and circumstances involved in this case and in view of above discussion, are of the opinion that the matter needs re-examination by the AO. We, therefore, restore the matter back to the file of AO to decide the same afresh after giving proper and adequate opportunity to the assessee of being heard. The AO is also directed to verify the claim of the assessee by calling information from the so-called dealer M/s. Manish & Co. and to conduct other enquiries while deciding the case. We hold accordingly.”* In term of the above directions of the Tribunal, the AO re-framed the assessment.

4. The assessee during the re-framed assessment stated that he is commission agent of one Manish & Co., who was distributor of ITC Ltd. for selling of cigarettes. According to assessee, he was appointed by Manish & Co. as commission agent as mentioned in the audit report filed along with return of income. He explained that he carried cigarettes produced by ITC Ltd. to different shops for a commission @ 0.3% of the sale price. However, the assessee has not maintained any books of account regarding this commission income. The assessee namely, Debasis Sanyal is proprietor of M/s. Majenta & Co. The AO here was confused that the assessee Debasis Sanyal and Majenta & Co. are two entities, whereas Debasis Sanyal is the proprietor of M/s. Majenta & Co. However, the assessee in its audited accounts admitted the transaction of commission from M/s. Manish & Co. To verify this aspect whether the assessee is trader or commission agent for M/s. Manish & Co., a Departmental Inspector was deputed to verify this fact, and report from him is enclosed at pages 63 to 65 of assessee’s paper book, which reads as under:

“REPORT

*Shri Debasish Sanyal
P/o Majenta & Co
2/6, Uday Sankar Bithi, City Centre
Durgapur-16*

As directed by Income Tax Officer, Ward-1(4), Durgapur, I enquired about the case of Sri Debasish Sanyal P/o Majenta & Co. on 26.12.2008 relating to assessment year 2003-04.

In the assessment year 2003-2004 relating to financial Year 2002-03 Sri Debsish Sanyal P/o. Majenta & Co. was engaged in the commission basis ITC brand cigarettes with the Distributor of M/s. Manish & Co. Benachity, Durgapur-13 through challan/invoice and then he sells on different shops in Durgapur. On verification of the said business, I went some of the following Stall/Shops on 26.12.2008.

1. *Heavy Trading, Mamra Bazar, Durgapur : The proprietor of the Shop informed that both Cigarettes supplied and payment collected by Shri Debasis Sanyal on behalf of M/s. Manish & Co.*
2. *Moti Stores, Gammon Bridge, Durgapur : ITC brand cigerates were taken on behalf of M/s. Manish & Co. The payments were made to Sri Debasish Sanyal by cash.*
3. *Polly Variety, Sagarbhanga, Durgapur : As per information of the owner of the shop, the cigarettes were taken from Sri Debasish Sanyal on behalf of the distributor of M/s. Manish & Co. Benachity and all payments were made by cash. cash.*
4. *Shyam Variety, Muchipara, Durgapur 12: Cigerates were taken from Sri Debasish Sanyal on behalf of M/s. Manish & Co, Benachity, and payments were made in cash.*

Submitted.

*Sd/- 26/12/2008
(Karunamoy Hazra)
Inspector of Income Tax, Durgapur*

Reports.

*Sri Debasish Sanyal
P/o Majenta & Co.
2/6, U4ay Sankar Bithy , City Centre, Durgapur-16.*

Assessment Year 2003-04

As directed by the I.T.O., Ward-1(4), Durgapur, I had been at the residence of Sri Debasish Sanyal at Uday Sankar Bithy, City Centre, Durgapur-16 and the following information have been collected :-

Sri Debasish Sanyal P/o Majenta & Co. stated that he was only the commission agent of Manish & Co., authorised dealer of ITC brand cigarette. During the year 2002-03 he took goods (cigarette of IIC brand) from Manish & Co. and sold, it in different shops at Durgapur Market like Muchipara, Mamra Bazar, Durgapur Station Bazar, Sagarbhanga Market etc. For this purpose Manish & Co. provided three wheeler Auto Van for transportation of goods. However no documents were furnished by Shri Sanyal in this regard. After selling goods he collected money from different shops at Durgapur and deposited it to Manish & Co. He further stated that he only earned Commission from Manish & Co. @ 0.3% on sale. He also stated that he was not engaged in the business activities of ITC brand cigarette. He could not also furnish any agreement with Manish & Co. regarding his commission agency business.

At present Sri Sanyal stated that he worked as a 'Lunch packet carrier'. He collect the Lunch packets from Asish Market and despatch to D.S.P.(CHRD), Durgapur. He further stated that his monthly income is around Rs.2500/-. He also maintain a bank account with Canara Bank, Benachity, bearing account no. 0186101006071.

*Manish & Co,
P/o Manish Agarwal
Benachity, Durgapur-13*

I also went to the business premises of Manish Agarwal p/o Manish & Co on 22.07.2009 at Benachity. In absence of Manish Agarwal I met Sri Hukum chand Agarwal, his father.

Mr. Hukum chand Agarwal only stated that his son presently live in Delhi but he avoid to give any address of his son.

Hukum chand Agarwal also stated that Manish & Co Prop. Manish Agarwal, was dealer of ITC Co. Ltd. during the period 2002-03. He further stated Debasish Sanyal P/o Majenta & Co purchases ITC Brand cigarettes from this concern and sells in different shops in and around Durgapur as per direction of Manish & Co. and he also stated that some cash memos and other paper were submitted during original assessment. Manish & Co. only gave discount @ 0.3% on purchase to Mejenta & Co. No more information is available from the father of Manish Agarwal.

*I.T.C Co. Ltd .
2nd Lee Road, 3rd floor,
Marketing Branch,
Kolkata-700 020*

I also visited ITC Co Ltd., Marketing Branch, 2nd Lee Road, Kolkata 700020 on 05.08.2009 and collects the following information from Mr. Debol Bose, Finance Manager, ITC Ltd.

Manish & Co. Prop. Manish Agarwal was the authorised dealer of ITC Co. during the period in question and the business transaction were made up to the month of January, 2007 with them. Afterwards no business transaction was made with Manish & Co. There was no agreement with Majenta & Co and as such there was no identity with Sri Debasish Sanyal. The ITC Co. has no provision to appoint any Agent/Sub agent for selling cigarettes.

Submitted.

*Sd/- 11.09.2009
(Karunamoy Hazra)
Income Tax Inspector”*

5. But the AO, even going through this report of the Departmental inspector, in the set aside assessment treated the assessee as trader dealing in sale and purchase of cigarettes. Accordingly, the AO made disallowance of cash payment made by the assessee by invoking the provisions of section 40A(3) of the Act at Rs.48,40,557/-(in original assessment the disallowance was made at Rs.6,68,203/- by mistaken

calculation). Aggrieved, assessee preferred appeal before CIT(A), who also confirmed the action of AO by observing in para 8 as under:

“8. I have considered the matter. It is true that the assessee does not seem to have the financial capacity to trade in cigarettes on his own account. The opening capital in the assessee’s balance sheet for the year was Rs.1,67,671/- and the closing capital was Rs.2,03,846/- whereas on some of the days the cash purchase itself was more than the capital available. For example on 2.2.2003, the cash purchase was Rs.2,28,797/-. There are other similar instances. There is no borrowed capital. Further, it also true that the assessee did not have a bank account as is evident from the balance sheet. The only bank account that the balance sheet shows is a daily deposit accounting UCO Bank with a closing balance of Rs.43,385/-. This bank account is a daily deposit account and cannot be used for the purpose of trading. However, the fact remain that the assessee himself has shown purchase and sale of cigarettes in his P&L Account and has filed a Tax Audit Report accordingly, I am therefore constrained to hold that the assessee was trading in cigarettes and that the AO rightly disallowed 20% of the cash purchases u/s. 40A(3).”

6. We have heard rival submissions and gone through facts and circumstance of the case. We find that the assessee in Tax Audit Report has clearly stated that his business is that of commission agent of M/s. Manish & Co. He was collecting cigarettes from M/s. Manish & Co. and delivering the same to various retailers and collecting proceeds from these supplies and depositing the same cash so collected in the bank account of M/s. Manish & Co. maintained with Bank of Baroda. The complete details of deposits with Manish & Co. in Bank of Baroda are enclosed in assessee’s paper book. On the basis of above supply the assessee used to get commission @ 0.3%, which is verifiable from the accounts of the assessee. The assessee in his deposition before AO in the original assessment proceeding stated that he was acting as commission agent of M/s. Manish & Co. Even from the above reports of Departmental Inspector clearly proves that all the four parties to whom he was supplying cigarettes on behalf of M/s. Manish & Co. proves that the assessee is a commission agent. From the above report it is clear that each one of the suppliers admitted before the Departmental Inspector that the assessee is delivering cigarettes on behalf of M/s. Manish & Co. We find that the complete evidences were filed by the assessee before AO as well as before CIT(A), but CIT(A) even after admitting the evidences, simply confirmed the action of AO for the reason that the Accountant has shown sales and purchases in the books of account. But the evidences show otherwise that the assessee is simply a commission agent on behalf of M/s. Manish & Co. and receiving commission @ 0.3%. Accordingly, factually the assessee is not a trader of cigarettes to whom the provisions of section 40A(3) applies

but he is only a commission agent. Hence, the orders of the lower authorities are reversed and this issue of assessee's appeal is allowed.

7. The other issues are not pressed by assessee, hence the same are dismissed as not pressed.

8. In the result, appeal of assessee is partly allowed.

9. Order is pronounced in the open court on 22.09.2015

Sd/-
(Waseem Ahmed)
Accountant Member

Sd/-
(Mahavir Singh)
Judicial Member

Dated : 22nd September, 2015

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT óShri Debasis Sanyal, C/o, V. N Purohit & Co., Chartered Accountants, 32B, Ganesh Chandra Avenue, 2nd floor, Kolkata-700013.
2. Respondent ó ITO, Ward-1(4), Durgapur.
3. The CIT(A), Durgapur
4. CIT Durgapur
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.