

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA**  
[Before Shri Mahavir Singh, JM & Shri M. Balaganesh, AM]

**I.T.A No. 1701/Kol/2014**  
**Assessment Year: 2010-11**

Ashok Kumar Agarwal  
(PAN: ACUPA3153G)  
(Appellant)

Vs. Assistant Commissioner of Income-tax,  
Circle-3, Asansol  
(Respondent)

Date of hearing: 22.09.2015

Date of pronouncement: 09.10.2015

For the Appellant: Shri Soumitra Chowdhury, Advocate

For the Respondent: Shri Sanjay Mukherjee, JCIT

**ORDER**

**Per Shri Mahavir Singh, JM:**

This appeal by assessee is arising out of order of CIT(A)-Asansol in Appeal No. 224/CIT(A)/Asl/Cir-3/Asl/12-13 dated 17.06.2014. Assessment was framed by ACIT, Cir-3, Asansol u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2010-11 vide its order dated 18.01.2013.

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming/restricting the addition made by AO at Rs.64,35,828/- out of total addition of Rs.74,35,828/-. For this, assessee has raised following two grounds:

*“1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) erred in restricting the addition to the extent of Rs.64,35,828/- out of the total addition of Rs.74,35,828/- made by the AO on account of commission on sale.*

*2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have deleted the total addition of rs.74,35,828/- made on account of commission on sales.”*

3. Briefly stated facts of the case are that the assessee is engaged in trading in electrical switchgear items since many years under the name and style of M/s. Deep Enterprises and M/s. Vijay Enterprises. The assessee produced complete books of account along with bills and vouchers. The AO during the course of assessment proceedings, noticed from the Trading & P & L Account of M/s. Vijay Enterprises and M/s. Deep Enterprises that these two proprietary concerns of the assessee has debited expenses on account of commission on sales amounting to Rs.8,75,000/- and Rs.65,60,828/- respectively. The assessee was required to file details of date-wise commission paid to the parties. The assessee furnished the reply along with names and addresses of the parties to whom he had paid commission during the year and also nature of services rendered and business made, which is reproduced in the order of AO at page

2. Subsequently, the AO issued summons u/s. 131 of the Act on the commission agents but in respect of the following the summons were returned unserved:

“Progressive Tech Com Pvt. Ltd.	Move/Not known
Ranisati Vinimay Pvt. Ltd.	Not Known
Nakshatra Commercial Pvt. Ltd.	Not Known
Rohit Goods Pvt. Ltd.	Not Known
Reliable Comtrade Pvt. Ltd.	Not Known”

Accordingly, he disallowed commission relating to the aforesaid five parties amounting to Rs.35,38,823/-. Similarly, in respect to one commission agent Smt. Vinita Kumari Agarwal the daughter of the assessee, a commission of Rs.5 lacs was also disallowed. Similarly, commission paid to one commission agent Smt. Saroj Devi Agarwal, who is wife of the Shri Ashok Kumar Agarwal was also disallowed amounting to Rs. 7 lacs. Similarly, commission paid to Puja Sales Corporation, Proprietor Shri Ashok Kumar Agarwal, HUF amounting to Rs. 9 lacs, to Vikash Kr. Agarwal Rs.5 lacs and Vinay Kr. Agarwal Rs.5 lacs were disallowed. The AO noted that commission is paid usually for transactions with new parties whereas in this case the commission is paid for procuring order from old parties or existing clients. According to him, there is no logic and it is completely against practice of the market. According to AO, there is no fixed formula or standard rule to pay commission because the commission is paid to family members. The AO brought out the percentage of commission in respect to Smt. Vinita Kumar Agarwal @ 14.06%, Smt. Saroj Devi Agarwal @ 12.07%, Puja Sales Corporation @ 15.10%, Vikash Kumar Agarwal @ 14.38%, Vinay Kumar Agarwal @ 13.74% and to Vivek Kumar Agarwal @ 13.74%. Accordingly, he disallowed total commission of Rs.74,35,828/- by holding the same as bogus by observing as under:

*“The circumstantial evidences discussed in the forging paragraphs establish the fact that the commission expenditure is a bogus expenditure and not incurred wholly and exclusively for the purpose of assessee’s business. So total commission of Rs.74,35,828.00 debited to profit & loss account is hereby disallowed and added to total income of the assessee.”*

4. Aggrieved, assessee preferred appeal before CIT(A), who also confirmed the action of AO that the nature of services rendered is not proved and once the services are not proved, the commission cannot be allowed and for this he observed in para 11 to 16 as under:

*“11. In regard to payment to relatives the detailed enquiry and circumstantial evidence built up which included lack of expertise, lack of expertise, lack of resources to carry out work, non response to notice under section 131 etc. makes it a case for total disallowance. This is due to fact that it is not established that payments was wholly and exclusively for*

*business. Further the payment made to individuals/HUF are in round sum like Rs.5,00,000/- (4 cases), Rs.7,00,000/-, Rs.9,00,000/-. There must be some link between the sum and intended work/work generated. This is also not established in this case. That makes a case of total disallowance of commission paid to individuals/HUF, all relatives of assessee.*

*12. In the context of payment to individuals/HUF who are relatives the decision in C.I.T. vs. Indo Saudi Service (Travel) P Ltd. 2009 310 ITR 306 (Bom.), Modi Revlon P Ltd. vs. ACIT 2 ITR (Trib) 632 Del are relevant. It was held that where commission paid to sister concern and sister concern is paying tax at higher rate, there cannot be vasion of taxes and hence section 40A(2) cannot be invoked. Here the Assessing Officer has made disallowance under section 37 and not section 40A(2). Section 40A(2) is a specific section to handle payment to relatives. Hence the case decisions can be considered in the context of this case. These decision come to rescue of assessee only in respect of payment to Shri Vikash Kumar Agarwal and Shri Vinay Kumar Agarwal of Rs.5,00,000/- each.*

*13. In two of the 6 cases out payment aggregating to Rs.36,00,000/- the case decision in paragraph 11 comes to rescue of assessee. Accordingly I direct Assessing Officer to not to disallow the sum of Rs.5,00,000/- each paid to Shri Vikash Kumar Agarwal and Vinay Kumar Agarwal. It is made explicitly clear that the allowance of Rs.10,00,000/- does not make it a genuine payment and the allowance is based on existing case decisions in which decision is taken on tax impact angle. Hence this reasoning cannot be stretched to other four cases where commission is debited tax impact is tilting in favour of assessee.*

*14. Notices issued to six companies to whom commission is stated to be paid aggregating to Rs.38,35,828/- were returned unserved. The claim of appellant is that payment was made by cheque/RTGS, they are income tax assesses and filing returns of income. Their financial statements were produced before me.*

*15. The Assessing Officer wrote to all 5 cases asking for details. 4 were returned by postal authorities as 'Not Known' and one 'Move/Not Known'. This was intimated to assessee by Assessing Officer. The onus was as assessee to prove that payment was wholly and exclusively for business purpose. The nature of service rendered is still not proven. Unless nature of service is not proved, it cannot be said that the debited as commission expense is wholly and exclusively for business. As a matter of fact, the payment is made without TDS since these companies obtained certificate under section 197 of Income Tax Act, 1961.*

*16. Going by detailed reasons recorded by Assessing Officer, I find that the genuineness of payment and purpose of payment is not established to satisfaction of Assessing Officer. Accordingly I uphold the disallowance made in respect of claimed payments to the five companies.”*

Aggrieved, now assessee is in appeal before us.

5. We have heard rival submissions and gone through facts and circumstances of the case. First, in respect to Progressive Vinimay Pvt. Ltd., Rani Sati Vinimay Pvt. Ltd., Nakshatra Commercial Pvt. Ltd., Rohit Goods Pvt. Ltd. and Reliable Commotrade Pvt. Ltd., the AO issued summons u/s. 131 of the Act but returned unserved with the postal remark “Move/Not known”. But the assessee before AO filed evidences that all the payments were made through account payee cheques and also furnished complete names and addresses of the parties along with PAN. The assessee has also deducted TDS on commission payments to the above stated commission agents and TDS certificates were also issued. The assessee also furnished the copies of certificates issued by AO of the concerned AO’s of these parties u/s. 197(1) of the Act in favour of commission agents for

lower deduction of TDS. The assessee also claimed that all these companies are registered companies and complete information is available in public domain i.e. the site of Ministry of Corporate Affairs and the same is maintained by Govt. of India. It was argued by assessee before the AO and before the CIT(A) and even now before us that these companies have incorporated the commissions received from assessee as income in their returns of income for the relevant assessment year . The assessee also filed copies of audited accounts of these parties before the AO wherein commission is disclosed as income in their accounts. The assessee also produced bills of commission and in these bills of commission, the nature of services rendered by these parties are clearly mentioned because these parties have procured the orders from the respective clients in respect to trading of electrical switchgear items. The assessee submitted the documents in respect of each of the companies i.e. bills of commission, bills of sales and purchases, copy of ledger account, audited accounts of these parties, computation of income and ITR acknowledgement for AY 2010-11. All these parties are engaged in various business activities as is evidence from the audited accounts filed before lower authorities and even now before us. These activities have been accepted by the department from year to year basis i.e. procuring of orders and rendering of allied services for fulfillment of the orders.

6. In respect to commission paid to (i) Smt. Vinita Kumari Agarwal, who is the daughter of the assessee. She has been paid a commission of Rs. 5 lac for procuring orders and she has particularly obtained orders from Bokaro Steel and other parties situated at Orissa on behalf of assessee. (ii) Smt. Saroj Devi Agarwal, who is wife of the assessee and she has been paid a commission of Rs. 7 lac for procurement of orders. (iii) Ashok Kumar Agarwal, HUF, whose proprietorship business is run under the name and style of M/s. Puja Sales Corporation and he deals in same items in which assessee deals. He has been paid commission of Rs. 9 lacs against procurement of sale and supply of order of electrical items. (iv) Shri Vikash Kr. Agarwal is son of the assessee and he has been paid commission of Rs.5 lacs for procuring sale orders from the parties situated at Orissa on behalf of the assessee. (v) Shri Vinay Kr. Agarwal, again who is son of the assessee has been paid commission for procurement of orders on behalf of assessee. He was paid a commission of Rs.5 lacs. (vi) similarly, Shri Viveka Kr. Agarwal, who is son of the assessee runs a proprietary concern under the name and style of Priti Sales Corporation and earns income from his own business of sale of stickle and also

commission income from assessee's concern. He has been paid a commission of Rs. 5 lacs.

7. We find that the assessee is in the business of electrical switchgear items and the turnover of the assessee from two proprietary concerns is at Rs.4,92,47,042/-. All these parties have procured orders for the assessee in respect to sales effected and this can be verified from the sale bills and also commission bills. The services rendered by them on account of commission is towards enquiry regarding the items, their implementation into orders, arrangement of supplies, collection of payments and also collection of statutory forms etc. The assessee has produced complete details before the AO in respect to the commission paid to the above two parties like obtaining of sale orders, commission bills, payment through account payee cheques and deduction of TDS from the commission. We further find that assessee has been claiming this commission payment all along and revenue has disallowed this commission in AY 2009-10, eventually, the same was directed to be deleted by CIT(A) in appeal no. 411/CIT(A)/Asl/W-32/PUR/2011-12 vide order dated 01.07.2013 wherein after considering the submissions of the assessee, he deleted the addition by observing as under:

*"5. The ground of appeal reproduced below explains assessee's stand:*

*"Disallowance of Commission paid amounting to Rs.13,56,630/-. Sir, during the course of scrutiny proceedings the Ld. Assessing Officer has asked for details of commission as shown in the P&L A/c. of the Audit Report filed complete details towards the said expenses were being produced before the Assessing Officer. Complete explanation under this head was being given to the Ld. Assessing Officer. But on receiving the order, the assessee and his AR were astonished to find out that Rs.13,56,630/- was added back to the total income of the assessee which is not correct. It was clearly mentioned in the Audit Report & explanation submitted at the time of hearing that Rs.2,63,200/-, Rs.5,98,900/- and Rs.4,94,530/- were paid on account of commission to Puja Sales Corporation, Smt. Vinita Agarwal & Smt. Saroj Devi Agarwal for arranging order & collection of payment respectively. The TDS provision u/s. 194H towards payment of commission was duly applied & the details of commission paid and TDS challan is fully disclosed in the TDS return filed. All these persons are working in favour of the firm and very efficiently effect the growth of firms business turnover. Again the commission paid to these persons are according to market rate & nothing more is paid than market rate. But on showing and submitting the reference of the Act and other supporting papers, the Ld. Assessing Officer was very harsh and on one man rule behaviour has ignored the fact and disallowed the commission paid to the above parties. The Ld. Assessing Officer was totally wrong on disallowing the commission paid to the aforesaid persons.*

*As such the proportionate disallowance of commission paid of Rs.13,56,630/- by the Ld. Assessing Officer is totally absurd and bad in eyes of law. The assessee seeks natural justice from your honour as the provision of section 38(1) does not apply here. Thus the assessee seeks natural justice from your honour for which he shall be obliged."*

6. *Before me, full details of Income Tax payment by the recipients was filed. I find that they had disclosed the same and the sum has nearly suffered tax at maximum marginal rate.*

7. *I had considered all aspects brought to record. I find that disallowance is unwarranted firstly on the reason on that no case has been made by Assessing Officer in his satisfaction to effect disallowance u/s. 37(1) and secondly the whole transaction is arranged by appellant with transparency and in proper compliance to statutory provisions. Hence, I delete the addition. No circumstances exist to deny the claim of deduction of commission. Ground no.1 is accordingly allowed."*

This order of CIT(A) is accepted by revenue and no further appeal is filed against this order.

8. In view of the above facts and circumstances, we are of the view that when the payments are made through account payee cheques and also furnished PAN of recipients commission, the same could have been verified by the AO from the assessment records of the respective recipients. Further, this commission is subject to TDS and assessee has either deducted TDS or furnished certificate issued u/s. 197(1) of the Act by the ITO, TDS in favour of the commission agents for lower deduction or nil deduction of TDS. The assessee has also filed complete particulars of commission recipients i.e. names and addresses along with confirmations. The complete sale bills and commission bills mentioning the nature of services rendered by these parties are filed and the services rendered includes enquiry for orders, translating enquiry in to orders, arrangement of supplies, collection for payment and also collection for statutory forms i.e. sales tax, excise duty etc. In terms of the above facts and circumstances, we are of the considered view that the CIT(A) has erred in confirming the addition made by AO and accordingly, we delete the disallowance of commission paid to above mentioned parties. Accordingly, this issue of assessee's appeal is allowed.

9. In the result, the appeal of assessee is allowed.

10. Order is pronounced in the open court on 09.10.2015.

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(Mahavir Singh)  
Judicial Member

Dated : 09th October, 2015

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT – Shri Ashok Kumar Agarwal, C/o, Puja Sales Corporation, Mansarovar Bypass Road, R. K. Chatterjee Lane, Chas, Bokaro, Jharkhand-827013.
2. Respondent – ACIT, Cir-3, Asansol
3. The CIT(A), Asansol
4. CIT Asansol
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.