

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI**

**BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 4268/Del/2014
Assessment Year: 2010-11

Income Tax Officer, Ward -1(3), New Delhi	Vs.	M/s. Alpasso Industries Pvt. Ltd., 4 th Floor, Mahindra Towers, Bhikaji Cama Place, New Delhi
PAN : AAACA2412R		
(Appellant)		(Respondent)

Appellant by	Sh. Sandip Kumar Mishra, Sr.DR
Respondent by	Sh. Venkatesh Chaurasia, Adv.

Date of hearing	12.10.2017
Date of pronouncement	31.10.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the Revenue is directed against order dated 26/05/2014 passed by the Commissioner of Income-tax (Appeals)-IV, New Delhi [in short the CIT-(A)] for assessment year 2010-11, raising following grounds:

- 1. On the facts and in the circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.1,00,00,000/- made by the Assessing Officer by disallowing commission paid by the assessee to M/s. AGR Steels Strips Pvt. Ltd. by ignoring the facts that the assessee had failed to prove the genuineness of the transaction with supporting evidences.*
- 2. The appellant craves leave for reserving the right to amend, alter, modify, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

2. The facts in brief of the case are that the assessee company was engaged in providing various services which includes counsellancy services, commission services and agency services in Power sector. For the year under consideration, the assessee filed return of income on 05/10/2010 declaring total taxable income of Rs.13,79,62,090/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the~~ Act) was issued and complied with. The assessment under section 143(3) of the Act was completed on 12/03/2013 after making certain additions/disallowances and total income was assessed at Rs.14,79,62,090/-. Aggrieved, the assessee filed appeal before the Ld. CIT-(A), who partly allowed the appeal in favour of the assessee. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. The ground No. 2 of the appeal is general in nature, hence, we are not required to adjudicate upon and accordingly dismissed as infructuous.

4. In ground No. 1, the Revenue has challenged deletion of the addition of Rs.1,00,00,000/- made by the Assessing Officer for disallowing commission paid to sub-agent.

4.1 The facts in respect of issue in dispute are that in the year under consideration, the assessee acted as an agent of M/s. Hyosung Corporation Power and Industrial Systems PG Korea (in short ~~M/s~~ Hyosung Corporation, Korea). M/s Hyosung Corporation, Korea was awarded a purchase order worth US dollar 16,73,76,986/- (equivalent to Rs. 803 crores with US dollar exchange rate of Rs. 48 per US dollar) by M/s. Power Grid Corporation of India Ltd. (PGCIL) for supply of transformers. The assessee has shown commission income during the year from M/s. Hyosung Corporation, Korea. The Assessing Officer observed that assessee has also incurred commission expenditure of

Rs.1 crore to M/s. AGR Steel Strips Private Limited. The Assessing Officer issued notice under section 133(6) of the Act calling for information from the said party containing details of services rendered and documentary evidence supporting the services rendered, services rendered to any other parties etc. M/s AGR Steel Strips Private Limited replied to the Assessing Officer that it provided requisite services to procure purchase order for supply of power transformers from BGCIL and incurred necessary expenses of travelling, conveyance, telephone etc. for providing the services, as reflected in the profit and loss account.

4.2 The Assessing Officer was not satisfied with the reply furnished by the said party. The Assessing Officer observed that said party had not provided detail of services rendered to the assessee and no supporting documentary evidence which could prove the fact of having expert technical staff and field experience in providing services in the Power sector by the said party.

4.3 In view of the above observation, the Assessing Officer asked the assessee to justify the allowability of commission paid. The submission of assessee company in respect of technical expertise and services rendered, are summarized as under:

- (i) *said party had knowledge of bidding process and contacted the assessee and offered their services and in view of the past experience the assessee engaged them for rendering coordination and follow-up services in respect of bid submitted by M/s Hyosung Corporation, Korea to the Power Grid Corporation of India Ltd.*
- (ii) *The said company was engaged in manufacturing and counseltancy and commission business and board of directors of the company at the time consisted of Sh. Ram Kumar Aggarwal, Sh. Pradeep Aggarwal and Sh. Vikas*

Aggarwal, who were supported by a team of dedicated qualified technical and commercial professionals.

- (iii) The said company rendered coordination and follow of services and for rendering such services, only communication facility was required as most of the work was done telephonically or verbally and sometimes might have to visit various offices and expenses for which were accounted in the respective head in the profit and loss account of said company. No expenses on purchase of material was required.*
- (iv) The commission expenses incurred by the assessee neither are personal nor are of capital nature and being incurred wholly and exclusive for the purpose of business, same are allowable.*

4.4 The Assessing Officer rejected the submission of the assessee observing that:

- (i) The agreements entered into with subagent "M/s AGR Steels Strips Private Limited" were dated 14/04/2008 and 08/09/2008, whereas the "PGCIL" awarded the contract to M/s Hyosung Corporation, Korea only on 29/12/2008 and 05/03/2009 i.e. much after the date of the agreement with subagent.*
- (ii) In the contract agreement with subagent , there was no mention of a specific services to be provided by the sub-agent and the percentage of commission of payment on the basis of the services was also not provided.*
- (iii) The assessee as well as the subagent failed to give the date wise details of services provided by the sub-agent and*

expenses incurred, person contacted, report submitted by the sub-agent.

4.5 The Assessing Officer concluded that merely deduction of TDS and giving payment by cheque did not prove the genuineness of the transaction and accordingly, disallowed the commission payment of Rs.1 crore to sub-agent M/s AGR steels strips private limited.

4.6 Before the first appellate authority, the assessee elaborated the submissions which were made before the Assessing Officer. On the issue of proof of services rendered, the Ld. CIT-(A) has reproduced the submission of the assessee as under:

“xv) That the AO has alleged in the order that the sub-agent and the assessee has failed to give date wise details of services and person contacted etc. Attention drawn to assessee's letter dated 6/3/2013, whereby it has been clarified that in the present high- tech business environment for rendering such services one need communication facility as most of the work is done telephonically or verbally and sometimes the agent has to visit various offices leaving behind almost no paper work. That in such a business scenario, it is not necessary that always reports are prepared and submitted by the agents to earn income. The business of coordination and follow-up is done through communication channels like telephones/mail/etc., which does not require maintenance of detailed physical documents /demonstrative evidence and date wise details of services etc., except the happening of the end result. This fact was elaborately brought to the notice of the AO and in view of practical position prevailing in the present business environment such an objection is irrelevant and claim of the assessee cannot be rejected on the superficial stand of the AO. There may not be any demonstrative evidence except the happening of end result in certain circumstances but that does not mean that expenditure has not been incurred. The assessee has secured orders with the services of sub-agent which clearly establishes that such business has been carried on.”

4.7 After considering the submission of the assessee, the learned CIT-(A) deleted the addition with following observations:

“4.3 I have carefully considered the submissions of the appellant and perused the order passed by the AO. I find that the appellant has engaged AGR for rendering services in terms of two agreements dated 17.6.2009 & 24.8.2009 and has paid a total commission of Rs.1,00,00,000/- along with due service tax after deducting TDS and the payment was made through banking channels. The appellant has submitted all the relevant details called for by the AO and the AO has got the details of the transaction directly verified from AGR by issuing notice u/s 133(6) of the Act. AGR has filed detailed reply with the required documents and confirmed having rendered services to the appellant. The appellant has sufficiently discharged the onus casted on it in as much as that it has filed the copies of agreements, copies of bills, duly confirmed copies of accounts, copies of ledger accounts for entries for commission payable and paid to AGR, bank statements, copies of agreement between appellant and Hyosung, details of commission earned by it because of services rendered by AGR, copies of bank statement of AGR wherein the cheques for payment of commission were deposited by AGR, copies of service tax challans of AGR whereby the amount of service tax collected by it was deposited in its account with Excise Department, copy of assessment order of AGR for the relevant assessment year wherein no adverse findings are there regarding the receipts of commission income. Further, the assessee has brought on record the fact that AGR is in no way related to the appellant and that the income was duly reflected in the return of AGR and the same was charged to tax. It is seen from the bank statement of AGR that no cash was withdrawn. The fact that AGR has rendered such services to the appellant in the immediately preceding year also is an established fact and is apparent from the order of the AO itself I find that AGR is rendering such services to other parties also established. In view of the detailed evidences submitted by the appellant, it cannot be said that the appellant has failed to establish the genuineness and business need for incurring the expenses. The services provided have also been duly explained.

4.3.1 It is a settled law that revenue authorities cannot sit into the shoe of the businessman to judge whether a particular expenditure was required to be done or not as business expediency is to be decided by the businessman and not by the assessing officer. I find that the Apex Court in the case of CIT, Bombay Vs. Walchand and Co. Private Ltd. 65 ITR 381 (SC) has held that “in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively for the purposes of business, the expenditure has to be adjudged from the point of view of the

business and not of revenue.” Considering the facts and circumstances of the case and judicial pronouncements on the issue, I hold that the appellant has duly established that the services were rendered for the payment of commission involved in this regard. Therefore, the addition made by the AO cannot be sustained and the same is directed to be deleted. Ground No.1 is allowed.”

4.8 Aggrieved by the order of CIT-(A), the Revenue is before us.

5. Before us, the Ld. Sr. DR submitted that assessee has not furnished any documentary evidence in support of the services rendered by the sub-agent. He submitted that assessee has not given specific of the services rendered except the general description of coordination and follow up services. The Ld. Sr. DR submitted that assessee has not given evidence of any interaction of the sub-agent with the authorities of the PCGILQ in the process of coordination and follow-up services, despite specifically being asked for furnishing such evidence. He further submitted that preparing agreements for commission payment, raising of bills by the sub-agent and charging service tax in the bills, deducting TDS by the assessee on such payment etc. are merely paper formalities and cannot justify the factum of the services rendered by the sub-agent. According to him, it cannot be established that the expenditure was incurred wholly and exclusively for the purpose of business of the assessee and therefore, the action of the Assessing Officer in disallowing the commission payment was justified.

6. On the other hand, Ld. counsel submitted a paper book containing pages 1 to 170 and supported the order of the Ld. CIT-(A). The Ld. counsel further submitted that the assessee took services of the sub-agent in immediately preceding year i.e. assessment year 2009-10 and the commission expenses amounting to Rs.1,25,00,000/- has been allowed. According to the learned counsel submitted that in view of the principle of consistency, the commission payment during the year should also be allowed. In support of the contention, he relied on the decision of

the Hon'ble Supreme Court in the case of Radha Swami Satsang Vs. CIT 193 ITR 321 (SC).

7. The Ld. counsel further submitted that it is well settled law that Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. Income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. In support of the contention, the learned counsel relied on following decisions:

1. *SA Builders Ltd. Vs. CIT (2007) 288 ITR1(SC)*
2. *Hero Cycles Private Limited Vs. CIT (2015) 379 ITR 347 (SC)*
3. *CIT Vs. Dalmia Cement (P) Ltd 254 ITR 377 (Delhi).*

8. We have heard the rival submissions and perused the relevant material on record including the paper book filed by the Ld. counsel of the assessee. The Ld. counsel of the assessee has relied on the finding of the Ld. CIT-(A) on the issue in dispute and also emphasized on the rule of consistency. We find that the Ld. CIT-(A) has concluded that the assessee has discharged its onus to establish the fact of rendering services by the sub-agent. In our opinion, this conclusion of the Ld. CIT-(A) is not based on the proper appreciation of the facts on record, due to following reasons:

- (i) The Ld. CIT(A) has recorded that the sub-agent had directly filed reply to the Assessing Officer in response to notice under section 133 (6) of the Act, with required documents and confirmed having rendered services to the assessee. This observation is factually incorrect. The Assessing Officer

has clearly mentioned in assessment order that the sub-agent did not provide detail of type of services provided to the assessee alongwith supporting evidence. He also mentioned that the assessee did not file documentary evidence to prove that sub-agent was having expert technical staff and experience in the field of services rendered. The Assessing Officer concluded that details provided by the sub-agent could not justify genuineness/necessity of allowability of such heavy commission. The learned CIT-(A) has not referred any documents to controvert the finding of the Assessing Officer.

- (ii) The learned CIT-(A) has observed that assessee has filed the documentary evidences like copies of agreements, copies of bills, duly confirmed copies of account, copy of Ledger accounts for entries for commission payable and paid to AGR, bank statements, copies of agreement between assessee and Hyosung, details of commission earned by the assessee, copies of bank statement of AGR, copies of service tax challan of AGR etc. In our opinion, the services would have been rendered subsequent to agreements entered between the parties and thus, merely agreements, cannot prove the fact of services rendered. Similarly, copies of bills or Ledger accounts are documents to record the transactions in the books of accounts for the services rendered but these, in itself, are not documents evidencing the services rendered. Similarly, payment through bank or service tax challan payment by the sub-agent in itself cannot prove that sub-agent actually rendered the services.
- (iii) The Ld. CIT-(A) has further observed that no cash has been withdrawn from the bank account of the AGR i.e. sub-agent.

In our opinion, for discharging the onus that the services were rendered by the sub-agent, it was not relevant to show that cash was not withdrawn from the bank account of the subagent. Assessee was required to produce direct evidences of services rendered.

- (iv) Further, the learned CIT-(A) has observed that in the preceding year also the fact of services rendered has been accepted by the Assessing Officer. In our opinion, the fact of services rendered needs to be examined in each year and by accepting the services rendered in one year, it cannot be established that the assessee might have rendered services in another year also and thus the rule of consistency, cannot be applied in the facts of the case.

9. In our opinion, the learned CIT-(A) has committed error in appreciating the facts of the case. One of the important requirement to examine, whether the expenses were incurred wholly and exclusively for the purpose of business, it was required for the assessee to furnish necessary documentary evidence in support of services rendered by the sub-agent. The Assessing Officer has specifically held that assessee failed in submitting:

- (a) the details of services rendered by the sub-agent;
- (b) the details of expenses incurred in relation to rendering such services;
- (c) the persons contacted in the process of rendering services; and
- (d) the report submitted by the subagent in the process of rendering services etc.

9.1 But neither the assessee nor the sub-agent submitted these crucial evidences in support of their claim of services rendered by the sub-agent before the lower authorities. Before us, also, the learned counsel of the

assessee, failed to submit any evidence in support of services rendered except the claim that services were rendered telephonically. The documents submitted by the assessee are merely in the nature of paperwork. No documentary evidence supporting the expertise of the sub-agent in bidding process was filed either before the lower authorities or before us. No detail of the person(s), who on behalf of the sub-agent company interacted with M/s PCGIL, was given either before the lower authorities or before us. The assessee has not furnished any confirmation either from the principal company M/s Hyosung Corporation, Korea or from M/s PCGIL that the sub-agent provided the services of coordination and follow-up in the process of bidding of tenders for contracts. The assessee has merely submitted that coordination and follow-up services only required use of telephone or email or personal interaction, but it has not provided any documentary evidence before us, which could establish that the sub-agent followed with M/s PCGIL. The assessee has submitted that due to services of the sub-agent, the supplier got contract for supply of transformer, but the assessee has not given any detail what kind of services actually helped the supplier in getting the contract. In our opinion, the Ld. CIT-(A) is not correct in concluding that the assessee established the fact of rendering services by the subagent.

10. The reliance placed by the Ld. counsel of the assessee on the decision in the case of Radha Swami Satsang (supra) citing the rule of consistency, is of no assistance, as the fact of services rendered need to be examined in each year and merely following the rule of consistency it cannot be presumed that the subagent might have rendered the services in the year under consideration also.

11. Further, the reliance placed by the assessee on the decisions in the case of SA Builders Ltd. Vs. CIT (Supra), Hero Cycles Private

Limited Vs. CIT (supra) and CIT vs. Dalmia Cement (P) Ltd. (supra) are also of no assistance as in those decisions, it is held that once nexus is established between the expenditure and the purpose of business, then Revenue cannot justifiably claim to put itself in the armchair of the businessman and disallow the expense. But in the instant case the prerequisite of establishing services rendered by the sub-agent, has not been fulfilled by way of producing relevant documentary evidences. Accordingly, the ratio of the decisions in those cases, cannot be applied over the facts of the instant case.

12. In view of above discussion, we set aside the order of the Ld. CIT-(A) on the issue in dispute and restore that of the Assessing Officer. Accordingly, the ground of appeal of the Revenue is allowed.

13. In the result, appeal of the Revenue is allowed.

The decision is pronounced in the open court on 31st Oct., 2017.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 31st October, 2017.

RK/-(D.T.D)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi