

आयकर अपीलीय अधिकरण मुंबई “ई” खंडपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य एवं संदीप गोसाईं, न्यायिक सदस्य

Before S/Shri Rajendra, A.M. and Sandeep Gosain, J.M.

आयकर अपील सं./ITA No. 5674/Mum/2015, निर्धारण वर्ष /Assessment Year: 2011-12

ACIT – Cir. -3 2 nd Floor,Rani Mansion, Murbad Road, Kalyan (W)-421 301 Dist. Thane.	Vs.	M/s. Sagar Sai Enterprises Shop No.6, Venkatesh Darshan, subhash Road, Vishnu Nagar, Dombivili (W)-421 202 PAN: ABFFS 2332 B
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri V. Justin-DR

Assessee by: Shri Sanjiv Brahme & Shri Jayant Bhatt

सुनवाई की तारीख / **Date of Hearing:** 27/09/2017

घोषणा की तारीख / **Date of Pronouncement:**03.11.2017

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य,राजेन्द्र के अनुसार -Per Rajendra,AM:

Challenging the order,dated 28/09/2015 of CIT(A)-1,Thane the Assessing officer(AO) has filed the present appeal.Assessee-firm is an electrical contractor.It filed its return of income on 28/09/2011,declaring total income of Rs.9.21 lakhs.The AO completed the assessment u/s.143(3) of the Act on 28/03/2014, determining its income at Rs.59.66 lakhs.

2.First Ground of appeal is about deleting the disallowance of partners remuneration u/s. 40(b)(v) of the Act.Before us,Representatives of both the sides agreed that the identical issue in case of the assessee for AY.2010-11 was decided against the AO by the Tribunal vide its order dated 01/02/2017(ITA/7671/Mum/2014).We are reproducing relevant portion of the order :

1.“This appeal by Revenue u/s 253 of the Income-tax Act (‘the Act’) is directed against the order of Ld. Commissioner of Income-tax (Appeals) [for short ‘the CIT(A)] –I, Thane dated 12.09.2014 for Assessment Year (AY) 2010-11. The Revenue has raised the following grounds of appeal.

"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the A.O. on account of disallowance of partner's remuneration u/s 40(b)(v) without appreciating the fact that the same has been done by the A.O. on the basis of circular no. 739 dt. 25.03.1996 of the CBDT relating to the allowability of the remuneration to the partners after observing that in the present case the partnership deed did not specify the amount of remuneration payable to the working partners or laid down the manner of quantifying such remuneration" .

2.Brief facts of the case are that the assessee filed return of income for relevant AY on 15.10.2010 declaring total income of Rs. 34,52,822/-. The assessment was completed u/s 143(3) of the Act on 25.03.2013. The Assessing Officer (AO) while making the assessment order disallowed a sum of Rs. 54,04,231/- on account of remuneration paid to its partner. On

appeal before the ld. CIT(A), the disallowance was deleted. Thus, aggrieved by the order of ld. CIT(A), the Revenue has filed the present appeal before us.

3. At the outset of hearing, the Authorized Representative (AR) of the assessee argued that the ground of appeal raised in the present appeal is squarely covered in his favour by the decision of co-ordinate bench of Pune Tribunal in ACIT vs. Suman Construction and a subsequent decision of Hon'ble Rajasthan High Court in CIT vs. Asian Marketing (2012) 254 CTR 0543. The ld. AR of the assessee further drawn our attention to the remuneration clause in the partnership which is reproduced by AO in para 4 of his order. On going through the para 4 of the order of AO and the decision of co-ordinate bench of the Pune Tribunal, the ld. Departmental Representative (DR) for the Revenue fairly agreed that the ground of appeal raised in the present appeal is squarely covered against the Revenue.

4. We have considered the rival contention of the parties and gone through the orders of authorities below and the decision cited by ld. AR of the assessee. The Hon'ble Rajasthan High Court in CIT vs. Asian Marketing (supra) held as under:

“The only dispute by the Revenue is that the amount of remuneration has not been quantified in the partnership deed. It is mentioned in clause 8 of the partnership deed that remuneration will be payable as per norms fixed by the relevant provisions of the Income-tax Act. Thus the quantification of the remuneration is apparent from the clause 8 of the partnership deed. The requirement in law is that remuneration should have been authorized and the amount of remuneration shall not exceed the amount as mentioned in sub-clause (v) of Section 40 (b) of the Act. The relevant provisions has used the word authorised and not the word used quantify. The ITAT Pune Bench in the case of ACIT v. Suman Construction 43 SOT 495 (sic): (2009) 34 SOT 495 (Pune- Trib), held that remuneration is to be deducted in case partnership deed authorizes the payment of salary. We have also considered the decisions which have been mentioned by the Id. CIT (A) in his order. We, therefore, feel that the Ld. CIT (A) was justified in allowing the remuneration payable to the partners. Before parting with this appeal, we would like to state that the remuneration receivable by the partners is taxable in their hands and it is not the case of the Revenue that the assessee has claimed remuneration to the working partners to avoid tax. It is true that tax payable in the hands of the individual may be 30% while interest in the hands of the firm may be 35%. Thus, tax effect is not substantial. Hence, Ground No.1 & 2 of the Revenue are dismissed.

5. Considering the above legal position, we find that the finding of ld. CIT(A) is based on the decision of Hon'ble Rajasthan High Court in CIT vs. Asian Marketing (supra) and the decision of Pune Tribunal in ACIT vs. Suman Construction (supra). After, considering the facts we find that the ground of appeal raised by the AO/Revenue is squarely covered against them. Thus, we do not find any illegality or infirmity in the order passed by ld. CIT(A).

6. In the result, appeal of the Revenue is dismissed.”

Respectfully following the order for earlier year we decide First Ground of appeal against the AO.

3. Second Ground of appeal is about not confirming addition of bogus purchases amounting to Rs.28.56 lakhs. During the course of assessment proceedings the AO noticed that the appellant had shown purchases amounting to Rs. 28,56,275/- from three parties, namely M/s. Mahi Sales Pvt. Ltd. (Rs.13,58,423/-), M/s. Abhilasha Sales Pvt. Ltd. (Rs.14,80,331/-) and Shree Sarasvati Enterprises (Rs.17,521/-). The AO observed that the parties appeared in the list of Hawala operators on the official web site of the Sales Tax Department, that it was a beneficiary of transactions with the above mentioned hawala operators. He asked the assessee to file documentary evidence to show the genuineness of the purchases. It filed a

copy of the ledger account of the parties along with copies of purchase bills. The appellant also filed copy of PAN card of these parties and copy of transport receipts from the above parties. It was further submitted that the register was maintained in respect of the material received along with the details of the site to which the same was dispatched, that payment to the above parties was made through cheques. The AO issued notice to the said parties u/s. 133(6) of the Act, which were received back unserved on the ground "not found". The AO therefore asked the appellant to produce these parties before him for examination, which was not done. The AO therefore, treated the purchases amounting to Rs. 28,56,275/- as unproved purchases and added the same to the income of the assessee.

3.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions. He relied upon certain case laws. After considering the available material, he held that the assessee had shown purchases amounting to Rs. 28,56,275/- from various parties which appeared in the list of Sales-tax Department who had indulged in Hawala transactions i.e. providing only bills without there being any actual purchase or sale transaction, that the AO issued notices u/s 133(6) to the said parties which were received back unserved on the ground "not found", the assessee had not been able to establish the genuineness of the purchases from such parties, that the assessee has carried out electrical contracts for various parties on account of which it received payments which have been offered for taxation, that for carrying out of such contracts obviously required various materials, that can it had made purchases in the open market and had obtained bills from the Hawala operators, that it saved on the sales-tax / V AT and enhanced his profit by inflating the purchases. He referred to the case of Simit P. Sheth, (356 ITR 451) of the Hon'ble Gujarat High Court and held that 12.5% of the amount of unproved purchases was to be disallowed. Consequently, addition amounting to Rs. 3,57,034/- (being 12.5% of Rs. 28,56,275/-) was sustained.

3.2. Before us, the DR supported the order of the AO and stated that the assessee had not produced the parties, that genuineness of the purchase was not proved. The AR left the issue to the discretion of the Bench.

4. We find that the FAA upheld the addition @ 12.5% of the total purchases. There is no doubt that the assessee had carried out contracts and there is no doubt that receipts arising out of such contracts have been offered for taxation. So, consumption of material cannot be doubted. The only question, as rightly pointed out by the FAA, is genuineness of the parties who had supplied the good. The FAA had held that the assessee could not prove that the alleged

suppliers had supplied goods to it. Therefore, he partly allowed the appeal. In our opinion, disallowance sustained by the FAA, to the tune of Rs.3.57 lakhs is proper, considering the peculiar facts and circumstances of the case. So, confirming the same, we decide second ground of appeal against the AO.

As a result, appeal filed by the AO is dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है।

Order pronounced in the open court on 03rd November, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 03 नवंबर, 2017 को की गई।

Sd/-

(संदीप गोसांई /Sandeep Gosain)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated :03.11.2017.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR " E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.