

**IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI  
BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM**

**ITA No. 4472/Mum/2012**

(A.Y. 2005-06)

The Assistant Commissioner of Income Tax-Circle 10(3)(1), Mumbai	Vs.	M/s Neysa Jewellery Ltd. (Earlier Known as M/s. Shreeji Jewellery Ltd.) G-36, G&J Complex III, SEEPZ, Andheri (East), Mumbai-400 096, Maharashtra
<b>Appellant</b>	..	<b>Respondent</b>
<b>PAN No. AAECs1821N</b>		

**Revenue by** : Arju Garodia, DR

**Assessee by** : Vipul Joshi & Ishwar Rathi, ARs'

**Date of hearing:** 07-11-2017 **Date of pronouncement :** 16-11-2017

**ORDER**

**PER MAHAVIR SINGH, JM:**

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-18, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-18/Addl.CIT-8(3)/IT-52/09-10 dated 12-04-2012. The Assessment was framed by the Additional Commissioner of Income Tax, Circle 8(3), Mumbai (in short ACIT) for the assessment year 2005-06 vide order dated 29-10-2007 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A), deleting the disallowance made by AO of commission of Rs. 1.90 crores for the reason that the assessee itself had voluntarily offered the disallowance of commission in the return of income as well as admitted



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during the course of survey under section 133A of the Act. For this Revenue has raised following grounds: -

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to delete the disallowance of Rs. 1.50 crores of Commission without appreciating the fact that the assessee itself had voluntarily offered the disallowance of commission as excessive and unreasonable in the computation of income filed on 13.02.2006 and 31.03.2007.*

*On the facts and in the circumstances of the case and in law, the Id. CIT'(A) erred in directing the Assessing Officer to delete the disallowance of Rs. 1.90 crs of commission without appreciating the vide Circular No 549 dated 31.10.1989, CBDT has clarified that..... Under the new provisions, in an assessment order passed u/s 143(3) in a scrutiny case, neither the income can be assessed at a figure lower than the returned income, nor loss can be assessed at a figure higher than the return loss, nor a further refund can be given except what was due on the basis of the returned income and which would have already been allowed under the provisions of section 143(1)(a)(ii).*

*On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to delete the*



*disallowance of Rs. 1.90 crs of commission without examining the applicability of Sec 195 and Sec 40(a)(i) of the Act"*

3. Briefly stated facts are that the assessee is an importer, exporter and manufacturer of diamond gold and platinum jewellery. It has 100% export sales from its jewellery manufacturing facility at SEEPZ-SEZ, Mumbai. Return of income for AY 2005-06 was filed by the assessee on 30-10-2005 and claim deduction under section 10A of the Act at ₹ 4,82,37,822/-. A survey under section 133A of the Act was conducted on the business premises of the assessee on 19-01-2006. During the course of survey, assessee withdrew claim of deduction under section 10A of the Act amounting to ₹ 4,82,37,822/-, and also offered additional income of ₹ 1.90 crores being excessive payment of commission made to Hitesh trading company. The assessee filed revise return of income on 13-02-2006 and in this return also claim of deduction under section 10A of the Act was withdrawn and also additional income of ₹ 1.90 crore being excessive payment of commission to Hitesh Trading Company was made. This return was processed under section 143(1)(1) of the Act on 01-2006. Subsequently, notice under section 143(2) of the Act was issued by the Revenue on 01-08-2006. After issuance of notice under section 143(2) of the Act, assessee further revised its return of income on 31-03-2007 and the additional income of ₹ 1.90 lakhs was again declared. Subsequently, during the course of assessment proceedings, the assessee filed revised computation of income vide letter dated 28-09-2007 withdrawing an additional offer of ₹ 1.90 crore being excessive commission payment made to Hitesh Trading Company. In such circumstances, the AO even noted that the entire payment was made through various authorized dealers, various banks to Hitesh Trading Company on receipt of approval from Reserve Bank of India but the assessee has admitted, through its director Pravin H. Shah in his



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statement recorded during the survey on 19-01-2006 that commission paid to Hitesh Trading Company for an amount of ₹ 1.90 crores is excessive. The AO went through statement and particularly question No. 18 which reads as under:

*“Question No.18: Do you want to say anything else?”*

*Ans. Yes, we say that we want to withdraw the claim of deduction u/s10A at ₹ 4.82 crores for AY 2005-06 as on factual verification it is found that the claim is made for 11<sup>th</sup> year. Secondly the payment commission during the A.Y. 05-06 is at ₹ 8.62 crores is excessive in comparison to last year's payment AY 05-06 is at ₹ 8.62 crores is excessive in comparison to last year's payment (A.Y. 04-05). I would like to offer ₹ 1.90 crores (₹ one crore ninety lakhs) being excessive payment made to M/s. Hitesh Trading Company, Singapore and pay the taxes accordingly.”*

4. Accordingly, the AO was of the view that the assessee has voluntarily admitted that the commission claimed to the extent of ₹ 1.90 crores was excessive and the same was offered for taxation in the revised returns filed from time to time. The AO added the same as income declared under section 133A of the Act amounting to ₹ 1.90 crores. Aggrieved, assessee preferred the appeal before CIT(A), who allowed the claim of the assessee after considering the submissions of the assessee and remand report of the AO by observing in Para 1.5 as under: -

*“1.5 I have considered the submissions of the learned Counsel, the remand report of the AO and reply of the Ld. Counsel to the remand report of the Assessing Officer. The following facts are*



*undisputed and deserve special consideration, as also stated by the Ld. Counsel:-*

- I) *It is undisputed that on the date of survey i.e. 19-01-2006 when the appellant surrendered the amount of ₹ 1.90 crores the request/application of the appellant for payment of commission exceeding 5% was pending with Reserve Bank of India because as stated by the appellant as per Reserve Bank of India guidelines and regulation whenever payment of commission has to be more than 5% then the permission of Reserve Bank of India is required.*
- II) *On the date of survey i.e. 19-01-2006, the appellant had applied for increase of this commission over the previous year from 5% to 8% date of application being 08-12-2005 and therefore, since, on the date of survey, this permission had not yet been received the appellant was in a confused state of mind and agreed to the surrender of Rs. 1.90 crores as being excessive and therefore, the appellant surrendered the same.*
- III) *However, the appellant received the permission from Reserve Bank of India on 24-01-2006-which then became the basis for the appellant to be in a position to actually pay the commission at 8% to M/s. Hitesh Trading Company – with whom it has only business relation and it is not covered under section 40A(2b) at all.*



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*Hence, this letter of Reserve Bank of India dates 24-01-2006 makes it clear that the appellant is entitled to make the payment to M/s. Hitesh Trading Company @8%.*

- IV) *Since, the original return of was filed on 30-10-2005 and the revised return was filed on 13-02-2006 although the appellant did not retract from his surrender / disclosure made on the date of survey in the revised return but during the course of assessment proceedings, the appellant stated that he has made a surrender under a mistaken belief- of the facts and law and that the same should be disregarded.”*

Aggrieved, now Revenue is in second appeal before Tribunal.

5. Before us, the learned Senior Departmental Representative, Arju Garodia, first of all argued that once, the assessee admitted in the statement under section 133A of the Act and subsequently, admitted the same income in the returns of income either original return or the revised returns, the assessee consistently admitting the same income. According to her, the AO has doubted the assessee's commission and also treated the same as excessive. According to her, in earlier years the assessee's commission to the extent of 5% was allowed, whereas in this year the assessee has claimed 8%, which is higher and due to that reason the assessee himself admitted before the survey party and while filing before AO the returns of income. She stated that the CIT(A) has totally misdirected by placing his judgment on the provisions of section 40A (2b) of the Act. On the other hand, the learned Counsel for the assessee relied on the order of CIT(A).



6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that the assessee in its regular business entered into an agreement with Hitesh Trading Co. which is based at Singapore, to act as sales agent for sale the assessee's products in USA and Canada on 01.01.2000. Vide this agreement the mandate was to promote and market sale of the assessee's products in the said territory. The amount of commission was 5% of FOB value of the sale proceeds. With a view to expand business further, the assessee desired to do penetration in other emerging markets and accordingly, a fresh agreement was entered with Hitesh Trading Co., with expanded scope of services to be rendered. Unlike the earlier agreement, where the scope of the services by the said company was confined to USA and Canada, the scope was increased tremendously in this new agreement so as to cover entire Europe, Australia, Middle East, Asia, Hongkong and Singapore. Apart from the increase in the area of coverage, another additional duty cast was to source right quality of diamonds at competitive price as per the requirement. Since, there was a considerable expansion of the scope, the activities and the responsibilities on the part of the said company the rate of commission was enhanced from 5% to 8%. This can be ascertained from the assessee Paper book Pages 5 to 8. In terms of the prevalent law and regulations, approval of Reserve Bank of India (RBI) was sought for payment of such increased commission, in the prescribed format. As per the procedure laid down, such applications were sent through the bankers of the assessee, seeking permission to pay agency commission at 8% with effect from 01.04.2004. This fact is verified from the paper book of the assessee given at pages 9 to 22. The banks, in turn, requested RBI for permitting payment of agency commission at 8% as per the contract, with effect from 01.04.2004 and relevant communication is enclosed at pages 26 to 28 of the assessee paper



book. The assessee also entered into direct correspondence with RBI, in which it submitted explanation regarding the increased rate of the commission from 01.04.2004 and also attached a copy of the new agreement. The same is enclosed at pages 24 to 25 of assessee paper book. During pendency of such approval, a survey was carried out at the assessee's business premises on 19.01.2006 by the department, in which a statement of Shri Pravin I Shah, Director of the assessee, was recorded. The same is enclosed at pages 32 to 41 of the assessee paper book. The salient features of the statement, so far as the relevant for the present appeal, are as under:

- (i) *The director gave explanation of the business of the assessee, as asked for and moreover initial questions pertained to the period of claim of deduction u/s. 10A of the Act that the 10<sup>th</sup> year of the benefit was AY 2004-2005 and not AY 2005-2006 and, accordingly, the claim for deduction u/s. 10A of the Act for AY 2005-2006 being a mistake, the director agreed to rectify.*
- (ii) *The next question was regarding decrease in the net profit and in response to which it was clarified that such fall was due to the increase in the amount of commission payment. Upon this, the director was asked to give name and address of the persons to whom commission was paid, which was answered. Upon this, a question was asked about the increase in the amount of commission to the said company. In response to this, the director gave detailed explanation, justifying the increase in rate of*



*commission vide Question and Answer 14 of the Statement.*

- (iii) *As such, as is self- evident, the director gave proper explanation regarding the increase in rate of commission and there was absolutely no question about such commission being bogus or inadmissible.*
- (iv) *Further, the director offered Rs. 1.90 crores "being excessive payment made to M/s. Hitesh Trading Company. Before us now, Ld. Counsel argued that the admission - if at all is binding and admissible was regarding the excessive payment and not regarding bogus and inadmissible nature of the expenditure. Most importantly. the word "excess" was in the context of the increase in rate of 8% as compared to the earlier 5%, which increase in rate was yet to be approved by RBI. According to him, considering the entire matter, the RBI was pleased to issue permission to the assessee to pay agency commission at 8% as per the contract. It is not disputed that the said company was no way related to the assessee or its directors or shareholders. It is not even the case of the AO that the payment was not genuine or was unreasonable. Export turnover for AY 2005-2006 had increased to Rs.11,106.86 lacs from Rs.9,655.08 lacs of AY 2004-2005. Commission to the said company was consistently allowed in scrutiny assessments for AY 2000-2001 to AY 2004-2005.*



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7. In, view of the above facts of the case, we find that the AO himself allowed the payment of commission @ 5% by the assessee to Hitesh Trading company and accepted the genuineness of payment & services rendered and this has been consistently allowed earlier years also. Only disallowance made is qua excess of 5% i.e. claimed by the assessee @ 8%. We find that RBI specifically approved the 8% of the commission payment. This was with a view to expand business further, as the assessee desired to do penetration in other emerging markets and accordingly, a fresh agreement was entered with Hitesh Trading Co., with expanded scope of services to be rendered. Unlike the earlier agreement, where the scope of the services by the said company was confined to USA and Canada, the scope was increased tremendously in this new agreement so as to cover entire Europe, Australia, Middle East, Asia, Hongkong and Singapore. Apart from the increase in the area of coverage, another additional duty cast was to source right quality of diamonds at competitive price as per the requirement. Since, there was a considerable expansion of the scope, the activities and the responsibilities on the part of the said company the rate of commission was enhanced from 5% to 8%. Hence, we find no infirmity in the claim of commission @ 8% and we allow the same. The orders of the CIT(A) is confirmed and appeal of the Revenue is dismissed on this issue.

**8. In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 16-11-2017.

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Mumbai, Dated:16-11-2017  
*Sudip Sarkar /Sr.PS*



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**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.  
//True Copy//

BY ORDER,

Assistant Registrar  
**ITAT, MUMBAI**