

आयकर अपीलिय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
INDORE BENCH, INDORE**

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्यके समक्ष  
**BEFORE SHRI C.M. GARG, JUDICIAL MEMBER  
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./ <b>I.T.A. No.372/Ind/2016</b>
निर्धारणवर्ष / <b>Assessment Year: 2011-12</b>

<b>M/s. Parag Fans &amp; Cooling Systems Ltd, ½ B Industrial Area No.1 , A.B. Road, Dewas</b>	<b>v.</b>	<b>Income Tax Officer, 1(3), Indor ACIT-1(1), Ujjain</b>
अपीलार्थी / <b>Appellant</b>		प्रत्यर्थी / <b>Respondent</b>
स्था.ले.सं./ <b>PAN: AACCP1895K</b>		

अपीलार्थीकीओरसे/ <b>Appellant by</b>	<b>Shri S.S. Deshpande, CA</b>
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	<b>Shri R.P. Mourya, Sr. DR</b>

सुनवाईकीतारीख/ <b>Date of hearing</b>	<b>8.08.2017</b>
उद्घोषणाकीतारीख/ <b>Date of pronouncement</b>	<b>11.08.2017</b>

**ORDER**

**PER O.P. MEENA, AM.**

1. This appeal filed by the Assessee is directed against the order of Ld. Commissioner of Income-tax (Appeals) Ujjain [in short referred

to as the CIT (A)] dated 16.02.2015 pertaining to Assessment Year 2011-12.

**2.** Ground No.1 & 2 relates to addition of Rs.59,90,620/- being the sales commission payment to sister concern even though complete details were filed before the lower authorities and it was proved before the CIT(A) that the selling agents have rendered the services for effecting the sale of the assessee company.

**3.** Succinctly, the facts brought out to from the orders of lower authorities are that the assessee has deducted commission of Rs.64,16,013/- paid to the sister concern i.e. M/s. B3 Projects and Consultants Private Limited, 102, Oms shri Apartment, 264, Dharm peth Extension, Shivaji Nagar, Nagpur which is also a share holder of the company having 399035 shares. It was noticed by the AO that there was no trend to pay commission in earlier years. This expenditure incurred by the assessee only in the year under consideration whereas the assessee company is doing this business since long where such practice was not in existence, therefore, the assessee company was asked to justify the payment of commission made to its sister concern in which Shri Sandeep Barjatya is a Director and also he is Director in the assessee company. The reply

was received through e-mail dated 20.03.2014. It was stated that M/s. B3 Projects & Consultants Pvt. Ltd was taken sole and exclusive distributor of the products of the assessee in the Asia including whole of India for sale and promotion of products vide agreement dated 9<sup>th</sup> February, 2008. Therefore the expenditure incurred for the purpose of marketing and business promotion is liable as deduction u/s 37 of the Income Tax Act, 1961. However this submission of the assessee was not found acceptable by the AO on the ground that there was no such practice to pay the commission in earlier years, therefore, the assessee company failed to establish the commercial expediency and the expenditure was incurred wholly and exclusively for business purposes is terms of ratio laid down in the case of Goodlas Nerolac Paints Ltd. V/s CIT (Bom)s 137 ITR 53 and Assam Pesticides & Agro Chemicals Vs. CIT (Gau) 227 ITR 846 and from mere making an agreement and debiting an expenditure on which the assessee has failed to establish the business compulsion, hence, expenditure is not allowable. Therefore the AO concluded that the assessee has adopted a modus operandi to reduce its profitability by way of making an agreement with the Director's company in which no

business completion is found and the expenditure shown to be incurred is coming back in the hands of the company as Director Shri Sandeep Badjatia being the owner of M/s B3 Projects and Consultants Pvt. Ltd, Nagpur. Therefore the entire commission of Rs.64,16,013/- was disallowed.

**4.** Aggrieved with the assessment order the assessee filed an appeal before CIT(A) wherein it was claimed that M/s B3 Projects and Consultants Pvt. Ltd. company was incorporated on 6<sup>th</sup> August, 2007 the details of the turnover from second year and the Income tax returns for the Assessment Year 2009-10 to 2013-14 were filed. It was claimed that the commission was paid to increase the turnover of the company in the earlier years and the appellant himself was doing marketing and not incurred any expenditure in this regard. The turnover for the preceding year was Rs. 5.11 crores which has increased in the year under consideration to Rs.7.23 crores, thus the turnover has been increased to Rs.2.12 crores. However, the CIT(A) did not convince with the explanation of the assessee and observed that the payment of commission vis-à-vis also increased in turnover @32% which is exorbitantly higher whereas normal payment of commission is about 2%. Further the

assessee failed to establish the commercial expediency for justification for payment of very high commission. In the earlier years the appellant has not engaged any outside agency and no such commission was paid in earlier years, considering these facts the CIT(A) considered allowable commission at 2% on the increased turnover of Rs.2,12,69,656/- and computed the relief of Rs.4,25,393/- and confirmed the balance addition of Rs.59,90,620/- i.e. (64,16,013 - 4,25,393).

**5.** Still not satisfied with the appellate order, the assessee filed this appeal before us. The Ld. Counsel for the assessee submitted that the assessee company was started in the year 1991. However, there was huge losses because of the market constraint in the sales. The company entered into a sale agreement dated 09.02.2008 with M/s. B3 Projects & Consultants, Nagpur and appointed them as sole and exclusive distributor in Asia (Page 30 of PB). As per the terms of the agreement the distributor have to achieve a minimum target of sale of Rs.550 lakhs exclusive of taxes. It was also stipulated that as per para 3.4 that the assessee shall obtain orders in the name of the distributor. Clause at 4.1 provided that the orders would be booked at the list price of the Principal which may

be revised after every six months and the distributor was required to furnish weekly reports and not indulge in the sale promotion of similar items and deposit Rs.20 lakhs with the company. It was submitted that Shri Sandeep Barjatya joined the principal company as Director from 10.12.2008 putting up with the financial holding of 15% shares. However, since in the initial period the minimum guaranteed sale of Rs. 5.5 crores was not achieved, therefore, no commission was paid upto the Financial Year 2009-10. It is only during the financial year 2010-11 relevant to the assessment year under consideration sales went to the tune of Rs.7.23 crores and from this year the assessee started paying the commission to the distributor. However, the AO disregarded these submissions on the ground that no commission was paid in earlier years which is not correct as the distributor has not achieved the target of Rs. 5.5 crores in the earlier years, hence no commission was paid to them. Further the assessee company accumulated huge loss of Rs.3.07 crores and it is only because of the efforts of the sole distributor the sale has increased and the assessee started making profit from this year. It was also pointed out that at the time of entering the agreement, the distributor was altogether a different entity and was

no way connected with the assessee. It was only because of the need of the assessee, the distributor joined hands and invested the money and took active participation in the management of the company which improved the results of the assessee company. Therefore the contention of the AO that it is a sister concern and no business activity is provided is contrary to the facts on the record and without any basis. The distributors have rendered the services to the assessee and because of their efforts, the sales have increased nearly 50% and as such, the appointment was a business expediency, therefore, no disallowance should have been made. In support of this contention Ld. Counsel also placed reliance in the case of CIT v/s Pure Pharma Pvt. Ltd 270 ITR 382 (MP), 144 Taxman 364 MP, M/s. Prochem Laboratories Pvt. Ltd, Indore V/s ACIT 3(1), Indore ITA No.86/Ind/2010 dated 28.4.2011 of Indore Tribunal. ITO V/s New Era Switch Gears, Ujjain 2 ITJ 418 , Bharat Medical Stores V/s CIT 308 ITR 373 (P&H), CIT V/s Goodlass Nerolac Paints Ltd. 188 ITR, M/s. Kriti Industries India Ltd, Indore V/s ACIT 4(1), Indore ITA No.268/Ind/2016 dated 27.10.2016.

**6.** On the other hand, the Ld. DR has relied on the orders of the lower authorities and pointed out that the contention of CIT(A) on

para 4.2 finding that the payment of commission vis-à-vis increase in turnover is above 32% which is very high on which the CIT(A) has allowed commission @2% on enhanced rates is reasonable. Therefore, the order of the lower authority may be sustained.

7. We have considered the facts and circumstances of the case and find that the assessee company is doing manufacturing of various kinds of industrial products such as FRP Axial Flow Fans, FRP Seal Disc, FRP Fan Stacks, FRE Fill Hangers which are being used in various power plants, steel plant, coal mines and other heavy industries. The company has started in the year 1991 however it has been incurring heavy loss during the earlier years. It is seen that the company entered into sale agreement on February, 9, 2008 with M/s B-3 Projects & Consultants, Nagpur with the condition that if the sales/turnover of the assessee company is achieved the minimum target of 5.50 crores, then the sole distributor shall be eligible for commission. Since, during the assessment year under consideration, sales have increased to Rs.7.23 crores, therefore the assessee company had paid the commission of Rs.64,16,013/- during the year to M/s B-3 Projects & Consultants, Nagpur. It is also noticed that Shri Sandeep

Barjatya, Director of the distributor company M/s B-3 Projects & Consultants, Nagpur has appointed as Director from 10.12.2008 of the assessee company with share holding of 15%. After appointment of the sole distributor the sales of the assessee company were increased from 5.11 crores to 7.23 crores during the current year giving rise to 41% and in terms of amount of 2.12 crores. This is because of the services entered by M/s B-3 Projects & Consultants, Nagpur the turnover of the company raised to 2.12 crores as compared to preceding year. Therefore, commission of Rs.64.16 lakhs paid on total turnover which comes to 8.8% cannot be treated as excessive. The disallowance the payment of commission on the ground that no such commission was paid in earlier years, cannot be considered as valid basis, as we find from the details submitted and agreement dated 9.2.2008 that the sales target assigned to the distributor of Rs.5.5 crores was not achieved in earlier years in terms of agreement, therefore there was no payment of commission in the earlier years. The AO has overlooked this aspect of the agreement, therefore the disallowance of commission made by the AO is not justified. It is also not the case of the AO that the commission payment was not genuine and there

was diversion of profit. As we find from the paper book page No.42 to 43 which are the copies of the profit and loss account and income tax computation of income of M/s B3 Projects and Consultants Pvt. Ltd, according to which the agent company had shown income of Rs. 20,60,850/-. Therefore it is clear that the commission agent is assessed to tax and shown such business income, therefore the identity of the commission agent is also proved. In such circumstances as stated above, the increase in turnover of the assessee company and the agreement was existed from 2008, we are of the considered view that the payment of commission on account of sales promotion of business is allowable as held by the Hon'ble Rajasthan High Court in the case of ITO V/s Laxmi Engineering Industries 298 ITC 203 (Raj.). The Ld. Counsel also placed reliance in the case of DCIT V/s Microtex Separators Ltd. 293 ITR 451(Kar.) wherein the tribunal found that the sister company was the sole distributor agent for several years and had sole selling agent of the assessee company provided for payment of commission at 10% not on the net entire amount after giving deductions. Taking into consideration of these aspects of the matter allowed entire 10% of bill the appeal before Hon'ble High

Court while dismissing the appeal that taking into consideration the long standing relationship and also taking into consideration the reputation of the assessee and the agent also in consideration there was no intention to evade the tax rightly allowed to taken of entire commission. Seeing to the facts of the present case, we are of the view that even though it was not a sister concern at the time of entering in to the agreement, has paid commission for rendering services which has resulted in increase of turnover by 2.12 crores. Similarly in the case of Pure Pharma Pvt. Ltd V/s CIT (supra) wherein the commission was paid to government and its agencies and all the payment were made to the various parties through cheques/demand draft and the expenditure was found incurred for business purposes it was held that such expenditure were allowable and consequently the addition was deleted. Thus on the facts and circumstances and the tribunal pronouncements as cited by the assessee, we did not find any justification for disallowance of commission which was wholly and exclusively for business purposes is allowed as deduction of Rs.59,90,620/- towards commission payment. Accordingly the ground of appeal is **allowed**.

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

The order pronounced in the open Court on 11.08.2017

Sd/-

Sd/-

**( C.M. GARG )  
JUDICIAL MEMBER**

**(O.P. MEENA)  
ACCOUNTANT MEMBER**

दिनांक /**Dated : 11<sup>th</sup> August, 2017**

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Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Assistant Registrar, Indore**