

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री भागचंद, लेखा सदस्य, के समक्ष
BEFORE: SHRI BHAGCHAND, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 853/JP/2016
निर्धारण वर्ष/Assessment Year : 2010-11

Shri Raj Kumar Baid, 21, Sardar Bhawan, Mangal Marg, Bapu Nagar, Jaipur (Raj)	बनाम Vs.	I.T.O., Ward 6(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AHDPB 1623 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Satish Gupta (CA)
राजस्व की ओर से / Revenue by : Smt. Poonam Roy (DCIT)

सुनवाई की तारीख / Date of Hearing : 07/11/2017
उदघोषणा की तारीख / Date of Pronouncement : 12/12/2017

आदेश / ORDER

PER: BHAGCHAND, A.M.

This is an appeal filed by the assessee emanates from the order of the Id. CIT(A)-5, Jaipur dated 29/07/2016 for the A.Y. 2010-11, wherein the assessee has following grounds of appeal:

1. *On the facts and circumstances of the case and in law also Id. Lower authorities grossly erred in making and confirming addition of Rs. 22,90,000/- on account of disallowance of commission paid. The addition and comments made in the appeal order are unjust, illegal and contrary to the facts of the case.*
2. *On the facts and circumstances of the case and in law also Id. Lower authorities grossly erred in disallowing the TDS credit of Rs. 6799/-."*

2. The assessee is running an advertising agency in the name of M/s Rishabh Advertising Agency and deriving income from this business activity. Return of income declaring total income of Rs. 6,14,820/- was filed on 13/10/2010. The case was selected for scrutiny. The assessee also filed a revised return of income declaring total income of Rs. 5,82,620/-. In the revised return of income, the assessee claimed loss under the head income from house property.

3. Ground No. 1 of the appeal is against confirming the addition of Rs. 22,90,000/- on account of disallowance of commission paid. The facts in this regard are that the assessee had debited Rs. 22,90,000/- in the P&L account as commission expenses. Commission was paid to the following persons:

1.	Samridhi Furniture Prop Anita Gupta	Rs. 10,00,000/-
2.	Sarveshwari Enterprises (Partnership firm of Sunita Mishra)	Rs. 2,90,000/-
3.	Sunita Mishra	Rs. 3,00,000/-
4.	Sunita Gupta	Rs. 2,00,000/-
5.	Alok Gupta HUF	Rs. 3,00,000/-
6.	Pankaj Gupta & Sons HUF	Rs. 2,00,000/-

The Assessing Officer observed that the commission payment made in the year consideration was very huge. No such commission was paid in the preceding year. Statement of these persons were recorded and show cause was issued. The assessee filed his reply. After considering the entire facts and circumstances as well as the evidences submitted by the assessee, the

Assessing Officer was not satisfied and he disallowed Rs. 22,90,000/- as commission payment and added to the total income of the assessee.

4. The Id. CIT(A) has confirmed the addition made by the Assessing Officer by holding as under:

2.3 *I have considered the facts of the case, the assessment order and the submissions of the appellant. The brief facts of the case are that the assessee is proprietor of M/s Risnabh Advertising Agency, engaged in advertising business. During the year the assessee has debited commission payment of Rs. 22,90,000/- in the P& L account. The said commission was paid to 6 persons being 3 ladies viz. Smt. Anita Gupta, Smt. Sunita Gupta and Smt. Sunita Mishra, 2 HUFs viz. Alok Gupta (HUF) and Pankaj Gupta (HUF) and one firm viz Sarveshwari Enterprises whose partners are Smt Sunita Mishra and her two minor daughters. The commission was claimed to be paid to these 6 persons for obtaining advertisements from National Highway Authority of India (NHAI). The AO recorded the statements of the said payees and found that all the recipients did not have any knowledge of the field of advertising. None of them had obtained any contract from anybody before or after this particular advertising contract of NHAI. All the recipients claimed to have worked only for one person i.e. the assessee and obtained orders only from NHAI and that too only in this particular year viz. A.Y. 2010-11. They did no such work before or after this year. Moreover, none of them was able to produce any evidence of the efforts put in or correspondences entered into by them for obtaining the said contract. In fact, except for Smt. Sunita Gupta, none of the recipients could not even state as to with whom they were in touch at NHAI for obtaining the said contract. Even Smt. Sunita Gupta, while answering Q.N. 10 and 11 of her statement, stated that she did not visit the office of NHAI but was in*

touch telephonically with Sh. Rakesh Gupta (wrongly mentioned as Sh. Rajesh Gupta) for obtaining the contract. She further stated in response to Q. No. 8 that it was her husband, Sh. Alok Gupta who was also working for the said contract and she came in touch with the assessee through him. On perusal of the sanction letters for the said advertisement contracts, it is seen that the above named person viz. Sh. Rakesh Gupta is Project Director of NHAI, Jaipur. It is further seen that 4 the commission payees viz. Smt. Anita Gupta, Smt. Sunita Gupta, Sh. Alok Gupta (Karta of Alok Gupta, HUF) and Sh. Pankaj Gupta (Karta of Pankaj Gupta, HUF) are close relatives of Sh. Rakesh Gupta of NHAI. Sh. Naresh Gupta is real brother of Sh. Rakesh Gupta and is also husband of Smt. Anita Gupta (Proprietor of Samridhhi Furniture), who is the biggest payee of commission viz. Rs. 10,00,000/-. Similarly, Sh. Alok Gupta and Sh. Pankaj Gupta are cousin brothers/ close relatives of Sh. Rakesh Gupta as stated in the assessee's submissions quoted above. It is further seen that the fifth payee, Smt. Sunita Mishra is wife of Shri Opendra Mishra, who was working in NHAI at a leading position at the time when the said contracts were given. Similarly, the sixth payee, M/s Sarveshwari Enterprises is a firm whose partners are Smt. Sunita Mishra and her two minor children. The important point that emerges from the entire web of facts, is that both Sh. Opendra Mishra and Sh. Rakesh Gupta held important positions in NHAI, Jaipur, when the contracts were given to the assessee. Therefore, it is not a coincidence that all the commission payees are intimately related to these two public servants, and hence the said payees did not at all need to make any effort or render any services in order to obtain the contracts from NHAI. In fact, it is quite clear that all the payees are simply fronts or facades and the real beneficiaries of the impugned commission payments are the above named public servants. This being the case, the said commission payments amount to nothing but bribes paid to public servants. Such payments, which are in contravention of law, are expressly

disallowable under Explanation to section 37(1). This view is supported by the decision of Hon'ble ITAT, Jaipur Bench in the case of ACIT vs. Raiendra Kumar Dangayach & Co. (1993) 45 ITD 109 (JP.), wherein the assessee transporter had debited speed money payments to public servants (policemen) and the issue was decided as follows:-

"Making payments to the police personnel on the routes would be an act in contravention of the provisions of the Indian Penal Code and would accordingly amount to infraction of law besides being opposed to public policy. That would not be a normal incident of business. It would, therefore, be disqualified as an allowable business expenditure. Therefore, the allowability of the expenditure in question for various years could not be accorded judicial recognition. The Deputy Commissioner (Appeal)'s orders were accordingly vacated, and those of the ITO restored.

2.4 Further, the Hon'ble Madras High Court, in the case of *Pranam Foundations Vs ACIT (2009) 185 Taxman 6(Mad.)* has held as follows regarding illegal gratification paid to public servants:

"Section 37(l)of the Income tax Act, 1961- Business expenditure-Allowability of - Block period from 01-04-1990 to 26-09-2000 - assessee was engaged in construction of residential flats- A search conducted at its business premises revealed that it had made certain illegal payments such as bribes which had been debited in its books of account as 'construction expenses '- In block assessment, Assessing Officer made addition of amount of said illegal expenses as undisclosed income of assessee- On appeal, Tribunal confirmed addition- Whether Tribunal had taken correct decision in view of Explanation to Sec. 37 (1)- Held, yes.

2.5 Further, several Courts have held payments of illegal gratification not to be allowable as deduction. In the case of **CIT vs. Pt. Vishwanath Sharma (2009) 182 Taxman 63 (All.)**, the Allahabad High Court has held that payment of commission to Government doctors for obtaining a favour therefrom by prescribing medicines in which the assessee is dealing, will come within the category of illegal gratification of bribe and therefore cannot be allowed as business expenditure.

- 2.6 *The Hon'ble Karnataka High Court, in the case of **J.K. Panthaki & Co. Vs ITO (2012) 22 taxmann.com 49 (Kar.)**, has held that commission paid to MD etc. Of a company awarding civil contract being a bribe could not be construed as an expenditure at all. In the present appellant's case, the facts are quite similar since commission has indirectly been paid to the public servants who were in a position to influence the award of contracts to the appellant. In fact, the Karnataka High Court dealt with the issue of commission payment to private persons in a company, whereas in the case of the appellant, the payment is made to public servants, indirectly through their close relations. Such unholy nexus has led to a loss of Rs. 22,90,000/- to the Government, since contract amount paid to the assessee has naturally been inflated to that extent to enable payment of the said amount of commission.*
- 2.7 *The other argument of the appellant is that all commission payments were by cheque, with TDS being deducted thereon and returns being filed by all payees. In this regard also it is observed that the entire exercise is a well designed hogwash since commission payments have been received in the hands of ladies and HUF, and a firm, all of whom have practically no other income. Thus effectively, after taking advantage of the basic exemption limit as well as after debiting certain expenditures, the taxes paid by all payees is negligible.*
- 2.8 *The further fact that none of the payees could produce any evidence of rendering any genuine services so as to earn the said commission and also the fact that none of the payees had any experience of the advertising field either before or after the impugned transaction, coupled with the fact that they are all closely associated to influential officers of NHAI, sufficiently proves that no actual services were rendered by the payees. Further, as discussed earlier, the commission payments amount to illegal gratification or bribe paid to public servants, which stands in clear contravention of law.*

Accordingly, the commission payments amounting to Rs. 22,90,000/- are disallowable not only under Explanation to Sec. 37(1), but are also disallowable on the grounds of non rendering of actual services by the payees. The impugned addition is accordingly upheld. Ground no. 1 is therefore dismissed.”

5. Now the assessee is in appeal before the ITAT. The Id AR of the assessee has submitted as under:

The Learned assessing officer himself has accepted at Para 3 page 5 of the assessment order that all the recipients of commission are assessed to income tax. They have shown the commission income received from the assessee in their respective return of income. They personally appeared before the Learned assessing officer in response to summons issued under section 131 of the income tax act 1961. All of them accepted the transaction and receipt of payment of commission from the assessee. Payment of commission was made through banking channel. Tax was deducted at source and was deposited in government treasury.

It is not the case of the learned assessing officer that the payment received by the recipients through cheque was returned back to the assessee in cash. The business of the assessee has increased substantially during the year under consideration and it was only due to new business of NHAI. This fact has been agreed by Ld A.O.

The assessee submitted the books of accounts along with the vouchers for examination and learned assessing officer could not point out any mistake there in and therefore accepted the books of accounts.

It is also not the case of Ld A.O. that recipients are relatives of assessee.

Assessee also submitted before learned assessing officer: -

1. A chart showing total business receipt from NHAI through above referred 6 recipients of commission along with total commission received by the assessee from the respective news paper agency and the details of the commission paid to respective recipients on their work. In this chart it was also mentioned that on which bill no. and for which work the commission was paid to whom copy of chart is also submitted herewith.(APB-29&30)

Apart from this copy of ledger account of NHAI in the books of assessee(APB-31), copy of MOU with M/s Samridhi Furnitures (APB-28) and copy of credit notes issued by the assessee to the recipients of the commission were also submitted before learned assessing officer and are again submitted herewith(APB 32-42).

Your honour we would like you kind attention on the copies of statements u/s 131 taken by learned assessing officer.

- A. M/s Samridhi Furniture, proprietor Smt Anita Gupta W/o Shri Naresh Gupta PAN No. ABYPG1735FIAPB 01- 06):

Statements of above referred recipient of commission M/s Samridhi Furniture through proprietor Anita Gupta was taken on 15 Feb.2013. In the statements Smt. Anita Gupta while answering question no. 7 specifically stated that the commission was received by me from M/s Rishabh Advertising Agency for bringing the advertisement proposal. It was also stated while answering question no. 10 that for the above referred commission the written agreement was made in between her and M/s Rishabh Advertising Agency. It is also on the record that she submitted her copy of audited financial statement before the learned assessing officer. It was also stated by her that in future she did not do commission business because she did not receive the orders and opportunity for the same. Smt Anita Gupta is M.COM and doing business since 1995.

- B. Smt. Sunita Misra W/o Shri Qendra Misra PAN No. ACKPM8677M (APB 07-13) :-while answering question no.7 & 5 Smt. Sunita Misra stated that she received commission of Rs. 300000/- from M/s Rishabh Advertising Agency on account of procuring advertisement orders for them. Sunita Mishra is MA and doing business since last 4-5 years.
- C. M/s Surveyshree Enterprises PAN No. ABRFS8202I (APB 07-13):- while answering question no. 5 Smt. Sunita Misra working partner of the firm stated that her firm has received commission income of Rs. 2,90,000/- from M/s Rishabh Advertising Agency for procurement of work. Firm is doing business since last 3 years.
- D. Alok Gupta HUF PAN No. AACHA9729E(APB 14-17) :- while answering question no.5 Alok Gupta karta of HUF stated that they have received commission of Rs. 3,00,000/- from M/s Rishabh Advertising Agency for procuring advertising work for them. HUF is filing return of income since last 6 years. It has also been stated that the work was done with the help of son Sidharth.
- E. Smt. Sunita Gupta PAN No. AEHPG6494F(APB 18-22):- while answering question no.7 she stated that she received commission from M/s Rishabh Advertising Agency for procuring advertising work for them. While answering question no. 17 it was also stated that the commission was received for Rs. 2,00,000/- vide cheque no. 911405 which was deposited in bank account. She is M.Com and doing shares investment business since 7 years.
- F. Pankai Gupta HUF PAN No. AAHHP6397QR APB 23- 27) :-while answering question no.7, 8 & 9 it was specifically stated that his HUF had business relationship during A.Y.. 2010-11 with M/s Rishabh Advertising Agency and worked on commission for the owner of M/s Rishabh Advertising Agency Mr. Raj Kumar Baid.

It is also on record that all the recipients have filed their return of income and have shown the commission receipts in their respective return and have paid due taxes.

It is also on record that all the payments were made through account payee cheque after deducting TDS.

It is also submitted that Ld A.O. has made the disallowance simply on the basis of assumptions & presumptions and on the basis of incorrect facts.

Ld A.O. has stated that the payees withdrawn the cash from the bank accounts. At the very outset it is the right of payees to use their money in their own way. However Smt Sunita Gupta in her statement has stated that she deposited the money in her husband's firm & getting interest thereon. Ld A.O. has also mentioned only one case of Sh. Pankaj Gupta HUF where the cash has been withdrawn immediately after the deposit. Surprisingly no enquiry was made from Sh. Pankaj Gupta Karta even no specific question was asked from him during the course of recording of statements. Similar type of questions were not asked from Alok Gupta, Sunita Gupta & Sunita Misra. There were valid reasons for withdrawn of money. Moreover these are simply assumptions & presumptions which should not be made basis for disallowance.

It is further submitted that the assessee has incurred the expenditure wholly & exclusively for the purpose of business as required by section 37 of the Act. This fact is established as the receipts from advertising has increased this year substantially from Rs 2.66 crore to Rs 4.08 Crore. Therefore it is clear that the assessee has incurred this expenditure wholly and exclusively for the purpose of business. Mere making of payment or making of payment through cheque may or may not be sole acceptable evidence for allowing or disallowing expenditure but if the payment made through banking channel is linked with increase in business receipts and

acceptance of payment & work by the payees the expenditure is not only genuine but has been incurred wholly and exclusively for the business.

Ld A.O. relied upon certain case laws which are different on facts. The facts of the case of Siddho Mai & Sons V/s ITO 122 ITR 839 are different from the facts of the case of assessee. In this case commission was paid to minor sons for taking deposits from them only.

Likewise the facts of the case of CIT V/s Premier Breweries Ltd 279 ITR 51 (Kerala) are also different from the facts of the case of assessee as in the case of assessee all the payees of commission has accepted that they have worked for the assessee and have procured the business for the assessee and have received the payment from the assessee. In this case in enquires the facts were different & it was proved that the payee had not done any liaison work. In our case the facts are totally different.

Since the assessee has incurred the expenditure genuinely wholly & exclusively for the purpose of business. Payments have been made through banking channel after deducting ITDS.

All the payees have filed their returns of income declaring the commission income. All the payees have accepted in statement u/s 131 before the assessing officer that they have worked for the assessee and have received the payments, the ratio of decision of MC Dowell & Co. Ltd case 154ITR148 is not applicable on the facts of the case of the assessee .Assessee has not adopted any colourable device or dubious methods. Assessee has not avoided the payment of tax.

Reliance is placed on the decision of CIT V/s Noshira Dara Mody (2014) 50 Taxman.Com (Bombay) where it has been held that “where the recipients of commission payment has accepted the same and has disclosed the said receipt in their ROI, no disallowance u/s 37 can be made”.

Reliance is also placed in the case of CIT V/s Nanglia Fabrics (P) Ltd 220 Taxman 17 (Guj) where it has been held that “if the commission payment has been made through a/c payee cheque, no disallowance can be made”.

In CIT Vs Shree Rama Multi Tech Ltd. 220 Taxman 76 (Guj) has been held that simply more expenses on commission has been incurred during the year, the disallowance cannot be made.

In CIT V/s E. Ram Chandran 359 ITR 671 (Madras) it has been held that where business has been procured, genuineness of payment is established.

In Maruti Ins distribution services v/s CIT 225 Taxman 63(Delhi) it has been held that it is exclusive domain of parties to decide rate of commission.

6. On the other hand, the Id DR has relied on the orders of the authorities below.

7. Both the sides were heard on this issue. The assessee was engaged in the advertising business. The turnover of the assessee for the year under consideration increased substantially from Rs. 2.66 crores to 4.08 crores. The persons to whom the commissions paid were assessed to income tax. The receipt of the commission has been declared in their return of income by these persons. These persons appeared in person before the Assessing Officer in response to the summons issued U/s 131 of the Act and all of them confirmed the transaction and receipt of commission. The payments of the commission made through banking channels and necessary tax was deducted at source, which was duly deposited in the government treasury. The allegation that the amount received through cheque was returned back

in cash to the assessee is completely baseless and based on surmises. No such evidence brought on record. Further, the assessee has started new business with National Highway Authority of India during the year. The turnover has increased substantially. The books were duly audited and no discrepancy was pointed out by the Assessing Officer. The other allegation that this amount might have been towards the illegal payment for getting the advertisement is also without any basis. No evidence is on record to support such observation. The Id. CIT(A) observation to sustain the addition that the payment was illegal gratification or bribe paid to the public servant is completely baseless and it is only surmises and conjectures. There is no evidence on record, which substantiates this observation of the Id. CIT(A). This expenditure incurred by the assessee was wholly and exclusively for the purpose of business and such expenditures are allowable expenditures U/s 37 of the Act. Considering all these facts, the Bench find that the Id. CIT(A) was not justified in sustaining the addition. Further the case laws relied upon by the Id. CIT(A) were also having different facts, therefore, the ratio laid down in these cases laws, cannot be made a basis for sustaining the addition in this case. Moreover, the view taken by the Bench is also supported by various decisions, such as CIT Vs. Noshira Dara Mody (2014) 50 Taxman.Com (Bombay), CIT Vs Nanglia Fabrics (P) Ltd. 220 Taxman 17 (Guj), CIT Vs Shree Rama Multi Tech Ltd. 220 Taxman 76

(Guj), CIT Vs. E. Ram Chandran 359 ITR 671 (Mad) and Maruti Ins. Distribution Services Vs CIT 225 Taxman 63 (Del). Considering the ratio laid down in these case laws and the facts on the issue, Bench direct to delete the addition. This ground of appeal is allowed.

8. The 2nd ground of the appeal is against disallowing the TDS credit of Rs. 6799/-. The Id CIT(A) has confirmed the disallowance by holding that the income corresponding to the TDS amount of Rs. 6799/- has been shown by the assessee in the preceding year. According to Section 199 r.w.r 37BA, credit for such TDS would not be allowable in this year.

9. Now the assessee is in appeal. The Id AR of the assessee has submitted that during the year under consideration the assessee has claimed TDS of Rs. 6799/- for which sales has been booked in previous year. Such TDS was deducted by the client at the time of payment made to the assessee and also issued TDS certificate in the year of payment. Therefore we submit that the assessee has correctly claimed TDS of Rs. 6799/- during the year under consideration and should be allowed to the assessee.

10. On the other hand, the Id DR has relied on the orders of the authorities below.

11. I have heard both the sides on this issue. It is noted from the written submissions of the A.R. of the assessee wherein he has prayed that TDS

was deducted by the client at the time of payment made to the assessee and TDS certificate was issued during the year of payment. The Id A.R. further submitted that the assessee has correctly claimed TDS of Rs.6799/-. In this view of the matter, it will be in the interest of justice and equity to restore the ground of appeal to the file of the Assessing Officer to decide it de novo after taking into consideration various facts of the issue including issue of the TDS certificate. Accordingly, ground No. 2 of the appeal is allowed for statistical purposes.

12. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 12/12/2017.

Sd/-
(भागचंद)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12th December, 2017

*Ranjan

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

1. अपीलार्थी / The Appellant- Shri Raj Kumar Baid, Jaipur.
2. प्रत्यर्थी / The Respondent- The I.T.O., Ward 6(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 853/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar