

**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI , ACCOUNTANT MEMBER
AND KULDIP SINGH JUDICIAL MEMBER**

**ITA No. 44/CTK/2015: Assessment Year : 2011-12
ITA No. 242/CTK/2016: Assessment Year : 2010-11**

DCIT, Rourkela Circle, Rourkela.	Vs.	M/s. Weldtech Engineers, Laing, Kanbahal, Dist: Sundargarh.
PAN/GIR No. AAAPW 2808 a		
(Appellant)	..	(Respondent)

C.O No.12/CTK/2015 :
(arising out of ITA No.44/CTK/2015)

C.O No.21/CTK/2016 :
(arising out of ITA No.242/CTK/2016)

M/s. Weldtech Engineers, Laing, Kanbahal, Dist: Sundargarh.	Vs.	DCIT, Rourkela Circle, Rourkela.
PAN/GIR No. AAAPW 2808 a		
(Cross objector)	..	(Respondent)

Assessee by : Shri Prajna Raj Mohanty/Sambhulal Agarwal,
FCA
Revenue by : Shri D.K.Pradhan, DR

**Date of Hearing : 24/04/ 2017
Date of Pronouncement : 26/04/ 2017**

ORDER**Per N.S.Saini, AM**

These are appeals filed by the revenue and cross objections filed by the assessee against the separate orders dated 14.11.2014 and 10.3.2016 of the CIT(A) for the assessment year 2011-12 and 2010-11, respectively.

2. The sole ground of appeal in the assessment year 2011-12 and Ground No.1 of the appeal for the assessment year 2010-2011 is directed against the order of the CIT(A) deleting the disallowance of Rs.35,13,768/- in the assessment year 2011-12 and Rs.40,83,944/- in the assessment year 2010-2011 as commission paid.

3. Brief facts of the case are that the Assessing Officer observed that the assessee claimed to have paid commission expenses of Rs.35,12,768/- in the assessment year 2011-12 and Rs.40,83,944/- in the assessment year 2010-2011 to Industrial Marketing Corporation. The Assessing Officer observed that the commission was paid for arranging diesel locomotive works, Varanasi procurement of material from assessee firm. Information u/s.133(6) of the Income tax Act was sought from the Industrial Marketing Corporation and in reply to the same, they have furnished bills raised against the assessee. As per the bills furnished, it is found that the bills were raised as commission against sale of Diesel Locomotive Works, Varanasi at various rate like 2%, 3%, etc. The Assessing Officer observed that in reply Diesel

M/s. Weldtech Engineers, Laing Locomotive Works stated that it was not possible for them to go through each & every case in such a short time but they have gone through a few cases pertaining to period 2009-2010 and as per available details in purchase files/MMIS system, it was intimated that M/s. Weldtech Engineer/Kansbahal have directly participated in the tender and purchase orders were directly placed on them. There was no mention of any commission agent either in their offers or in the purchase order placed DLW. Therefore, the Assessing Officer inferred that the claim of commission expenditure was not genuine. Hence, he disallowed the commission expenses.

4. On appeal, the CIT(A) allowed the commission payment for the assessment year 2011-12 by observing as under:

'I have considered the content and substance of the impugned assessment order and the Grounds of Appeal preferred and the additional submissions made by the Appellant, and accordingly decide as under:

- a) It is clear that the transactions entered into by the Appellant with M/s IMC are aimed at furthering the business interests of the Appellant with M/s DLW. The principal contention/argument of the AO that is adversarial to the Appellant appears to be the written affirmation of M/s DLW. that M/s IMC was not part of the tender, procurement and purchase transactions involving the" Appellant, and the resultant conclusion that M/s IMC therefore pejoratively innocent of these transactions and the Appellant's business affairs. The imputation is therefore that the expenses incurred of the nature of commission payments by the appellant made to M/s IMC were not genuinely, wholly and exclusively incurred and paid for the purpose of business. This is an uncalled for and baseless finding.
- b) Commission agents are employed to carry out the tasks empowered through the agreements signed with them by the principal. In the instant case, procurement, purchase and tender functions were not entailed in the agreement signed between the Appellant and M/s IMC. The facts and circumstances of the case also clear the air about why M/s. DLW since the former as a large organization was dealing with several agents of the same nature employed by their respective competing

principals participating in the tenders and suppliers of materials supplies. Such lack of awareness alone does not take away the character of the payments made being that of commissions or the truth and genuineness of the principal transactions.

c) In the instant case, the list of tasks agreed upon to be performed by M/s IMC on behalf of the Appellant did not include participation by M/s IMC in tenders and purchases, a decision that was the prerogative of the parties concerned in the matter (M/s IMC and the Appellant).

d) The total commission paid of Rs. 35,13,768 to M/s IMC is 3.56% of the Appellant's total Sales Turnover of Rs. 9,87,71,211, which percentage is not an unreasonable figure. Also, the AO has not established that there is any unholy nexus or behind-the-scenes arrangement or cartelization between the Appellant and M/s IMC to suppress the genuine nature of the transactions and with a view to concealing incomes and evading taxes due. In harmony with the principles of economic neutrality, it does appear that M/s IMC is creating economic value for the Appellant through the functions carried out, risks absorbed and assets being time and effort invested by it, and is therefore entitled to be compensated for the same in the form of receipts of Commissions. Compensation can be denied or disallowed only if it is proved that the apparent arrangement is not germane or related to the business and/or is non-genuine and no economic value is being generated by the agent for the principal.

e) It is also shown by the Appellant that Taxes have been deducted at Source on the impugned Commission payments that have also been paid to Government Account. The AO has not questioned the fact of the said payments and the separate fact that M/s IMC had in verity carried out such works as stipulated in the agreement on behalf of the Appellant, and also that the TDS provisions as applicable had been adhered to. The Appellant is free to enter into agreements with and appoint as many agents as it seeks to, in line with its business needs and commercial practices. If the agreements and appointments are wholly and exclusively for the purpose of business, and the payments made in the said regard are fully billed/vouched, accounted for and audited, then there is little scope for Revenue to take a prejudicial view.

f) In fact, in tenders offered by the Government, the Central Vigilance Commission (CVC) has explicitly stated in No. 12-02-6-CTE-SPI(T)-2 dated 21.04.2004 that *"in order to maintain the sanctity of the tendering system, it is advised that the purchases must directly be made from the manufacturers"*. This was issued in response to complaints received that manufacturers were being represented in tenders through agents, a practice which was frowned upon by the CVC. This would mean that a tender is different from an auction where a broker or an agent can participate in bids and purchases on behalf of a client.

g) There are Commission agents who arrange and participate in the purchases and procurements for the principal, and their agents who do not.

The **law** of agency is an area of commercial law dealing with a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person (the agent), who is authorized to act on behalf of another (the principal) to create legal relations with a third party. Succinctly, it may be referred to as a more-or-less equal relationship between a principal and an agent whereby the principal, expressly or implicitly, authorizes the agent to work under his or her or its control and on his or her or its behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him or her and third parties into a contractual relationship. The reciprocal rights and liabilities between a principal and an agent reflect commercial and legal realities. A business owner often relies on an employee or another person to conduct a business. The principal is bound by the contract entered into by the agent, so long as the agent performs within the scope of the agency. Importantly, a third party may rely in good faith on the representation by a person who identifies himself as an agent for another. It is not always cost effective to check whether someone who is represented as having the authority to act for another actually has such authority. If it is subsequently found that the alleged agent was acting without necessary authority, the agent will generally be held liable. In the instant case, the agent being M/s IMC was relatively a ,small and unknown player to M/s DLW, a veritable behemoth in comparison, and also, M/s IMC did not, as per the terms of the agreement with the Appellant, have any authority to involve in purchases and participate in tenders. Therefore, there was little reason for M/s DLW to make enquiries about M/s IMC and certify the genuineness or veracity of the latter in the matter of supplies of materials. All M/s DLW was concerned was the timely delivery of quality-tested products as specified in the tenders. In fact, M/s IMC may be known to M/s DLW only through the person of Shri. Zahiruddin, its proprietor. All the Appellant expected from Mr. Zahiruddin and M/s IMC was total adherence to the terms of the agreement.

h) Therefore, the express non-mention of M/s IMC on the purchase/tender/procurement documents alone, therefore, will not negate the fact of the impugned transactions and the truth and character of the Commission payments. The AO has not carried out any investigations or inquires, on unearthed/discovered any evidences that suggest that the transactions and payments were not what they seemed to be. The decision to disallow has been made on presumption, surmise, conjecture, supposition, and a summary and unilateral conclusion based on rudimentary facts (of M/s DLW being apparently unaware of M/s IMC and the consequent affirmation that M/s IMC did not find mention as a participant in the tender/purchase/procurement transactions) taken in prejudiced isolation and based on a spurious implied "transcendental" principle that seeks to cover/fill the schism between flimsy foundations and meretricious arguments on one side and a tendentious decision on the other. This is not a scientific, professional and responsible exercise carried out by the AO. Much more homework was required to be done by the AO in discharge of her responsibilities, which she plainly failed to carry out.

i) The payments of Commissions totaling Rs. 35,13,768 made by the Appellant to M/s IMC are therefore found to be in order and related

M/s. Weldtech Engineers, Laing

to the business of the Appellant. Nothing contrary mandating an adverse view and a disallowance has been proved by the AO."

5. Also, for the assessment year 2010-2011, the CIT(A) allowed the commission payment by observing as under:

"I have considered the matter in detail. The contention of the assessee appears to be correct and acceptable. The AO's conclusion is based on far fetched logic and on not correct interpretation of the facts on record. It is not that the assessee has claimed commission payment for the first time for the AY 2010-11. M/s, IMC, Varanasi has been working as a liaison agent for the assessee for long and commission payments are being made year after year. Tax is also being deducted as per law on the commission payment made to IMC. I also find that during the previous year relevant to the AY 2009-10, commission payments to the tune of Rs.22,23,697/- was made to IMC and in the scrutiny assessment for that year passed u/s.143(3) on 27.12.2011, no disallowance of commission was made. I also find that the Id. CIT(A)-II, Bhubaneswar, vide his order dt.14.11.2014 in ITA No.0688/13-14 for the AY 2011-12 has deleted the disallowance of commission payment of Rs.35,13,768/- made to IMC by observing as under in the last page of his order:

"h) Therefore, the express non-mention of M/s IMC on the purchase/tender/procurement documents alone, therefore, will not negate the fact of the impugned transactions and the truth and character of the Commission payments. The AO has not carried out any investigations or inquires, on unearthed/discovered any evidence that suggest that the transactions and payments were not what they seemed to be. The decision to disallow has been made on presumption, surmise, conjecture, supposition, and a summary and unilateral conclusion based on rudimentary facts (of M/s DLW being apparently unaware of M/s IMC and the consequent affirmation that M/s IMC did not find mention as a participant in the tender/purchase/procurement transactions) taken in prejudiced isolation and based on a spurious implied "transcendental" principle that seeks to cover/fill the schism between flimsy foundations and meretricious arguments on one side and a tendentious decision on the other. This is not a scientific, professional and responsible exercise carried out by the AO. Much more homework was required to be done by the AO in discharge of her responsibilities, which she plainly failed to carry out.

i) The payments of Commissions totaling Rs.35,13,768 made by the Appellant to M/s IMC are therefore found to be in order and related to the business of the Appellant. Nothing contrary mandating an adverse view and a disallowance has been proved by the AO."

I am in full agreement with the above observations of the Id. CIT(A)-tl, Bhubaneswar. **On the facts of the case, therefore, the disallowance of Rs. 40,83,944/- on account of commission payment cannot be sustained and is directed to be deleted."**

6. After hearing the rival submissions and perusing the materials available on record, we find that the D.R. relied on the order of the Assessing Officer. He could not point out any specific error in the order of the CIT(A). Therefore, we do not find any infirmity in the orders of the CIT(A). Therefore, the same are confirmed and ground of appeal of the revenue is dismissed.

7. Ld A.R. of the assessee did not press the cross objections filed by the assessee in both the assessment years. Hence, we dismiss them as not pressed.

8. In the result both the appeals of the revenue and cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 26 /04/2017 in the presence of parties.

SD/-

(Kuldip Singh)

JUDICIAL MEMBER

SD/-

(N.S Saini)

ACCOUNTANT MEMBER

Cuttack; Dated 26 /04/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : .DCIT, Rourkela Circle,
Rourkela
2. The Respondent. M/s. Weldtech Engineers,
Laing, Kanbahal, Dist: Sundargarh
3. The CIT(A)-II, Bhubaneswar
4. The Pr. CIT(A)-II, Bhubaneswar
5. DR, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack