

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member]

I.T.A. No. 371/Kol/2017

Assessment Year: 2011-12

&

I.T.A. No. 372/Kol/2017

Assessment Year: 2012-13

Manish Chand Agarwal.....Appellant

7, Ghore Bibi Lane

Flat No. 4AD

Kukmini Annexe

Kolkata - 700 054

[PAN : ADAPA 8173 D]

ACIT Circle-40, Kolkata..... Respondent

Rabindra Sarani

(Poddar Court), 4th Floor

Kolkata - 700 001

Appearances by:

Shri Subhash Agarwal, Advocate, appeared on behalf of the assessee.

Shri Arup Chatterjee, Addl. CIT, Sr. DR appearing on behalf of the Revenue.

Date of concluding the hearing : January 23rd, 2018

Date of pronouncing the order : February 15th, 2018

O R D E R

Per J. Sudhakar Reddy :-

Both these appeals filed by the assessee are directed against the separate but identical orders of the Id. Commissioner of Income Tax (Appeals)-13, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 11/11/2016.

2. As the issues arising in both these appeals are identical, for the sake of convenience, we dispose of these appeals by way of this common order.

3. The assessee is an individual and is engaged in the trading of iron ore. His business is located at Noamundi, District West Singhbhum, State Jharkhand. He procures the iron ore from different mines and sells them to different parties.

4. We first take up ITA No. 371/Kol/2017, appeal for the Assessment Year 2011-12.

5. The assessee filed his return of income on 24/09/2011, declaring total income of Rs.27,56,630/-. The Assessing Officer completed assessment u/s 143(3) of the Act, on 29/03/2014, *inter alia* making additions on account of

- a) sale at lower side/ suppression of sale
- b) ingenuine commission expenses
- c) ingenuine freight inwards

Aggrieved the assessee carried the matter in appeal without success.

6. Further aggrieved, the assessee is in appeal before us on the following grounds:-

"1. (a) For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have deleted the addition of Rs.19,28,466/- made by the A.O. on account of alleged sales shown on the lower side.

(b) For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have held that the finding of the A.O. that addition of Rs. 19,28,466/- made by rejecting the accounts is not sustainable in law.

2. For that on the facts and in the circumstances of the case. the Ld. CIT(A) ought to have deleted the addition of Rs.99,59,165/- made by the AO in respect of payments made towards commission expenses.

3. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have deleted the addition of Rs.63,28,231/- made by the A.O. in respect of freight inwards.

4. That the appellant craves leave to add, alter or delete a.. or any of the grounds of appeal."

7. Ground No. 1 is against an addition of Rs.19,28,466/-, made by the Assessing Officer on the ground that the assessee has suppressed/ not recorded his sales. The Assessing Officer discussed the same at para 1 at page 1 & 2 of his order. The Assessing Officer found that on 4 sale bills, the quantity of the iron ore sold i.e. 5-18 MM was mentioned and thereafter fluid was applied for erasing the same and thereafter the iron ore was sold at a much lower rate. The Assessing Officer as well as the ld. CIT(A) were of the opinion that the size of the iron ore lumps on these four bills were intentionally erased by applying fluid so as to under invoice the goods. Bills No. 14, 15, 17 and 34 were cited. The assessee submits that no such

erasing has been done on bill no. 34, a copy of which was placed in the paper book. Regarding the other three bills, it was pointed out that it was a case of a typographical error and the quantity sold, the rate etc. are part of the record and it is not a question of under invoicing of sales. It was vehemently contended that the rate of 2086 for invoiced SSN14, SSM15 and SSM17 were because, what was sold was not lumps of size 5-18 MT. It was contended that the assessee maintains stock register and the sale was made by paying Central Sales Tax and VAT and to parties who are both Income Tax and Sales Tax assesseees, who had paid the sale consideration by way of cross cheques, except in the case of an amount of Rs.68,000/- paid in cash. It was submitted that the Assessing Officer has not bothered to enquire with the purchasers or with the Mining Authorities or any other Government Authorities like Sales Tax etc. and has on surmises and conjectures come to the conclusion that the assessee has received consideration in excess of what is recorded in the books of accounts. He referred to the detailed written submissions made before the Assessing Officer and argued that when the goods are dispatched, the assessee had to inform the Mining Department in the prescribed Form along with fees to be paid for the said sales. Thus, he submits that quality of goods as the subject matter of control by the Mining Department of the Government and in the absence of any contrary evidence found by the Assessing Officer this addition cannot be made, based on a typographical error, which was erased to reflect the correct position.

7.1. The ld. D/R, relied on page 18 of the order of the ld. CIT(A) and submitted that the quantitative details of purchases along with the corresponding sales of the iron ore items mentioned in the bills were not co-related by the assessee with opening and closing stock. He submitted that co-relation of quantities supported by purchase bills, were not submitted by the assessee. It was argued that this is failure on part of the assessee to substantiate its claim with proper documentary evidence, which led to the ld. CIT(A) to confirm the addition.

7.2. The ld. A/R, in reply submitted that iron ore is purchased from various mines and thereafter it is segregated into various categories and then only sold. Thus he submits that it is impossible to co-relate a purchase with a particular sale

because the nature of goods purchased is different from the nature of the goods sold after segregation. He pointed out that no enquiry has been made from any of the buyers nor the Assessing Officer has an iota of evidence that the assessee has received consideration in excess of the amount mentioned in the sale invoices.

7.3. On consideration of rival contentions, we are of the considered view that the addition in question cannot be sustained for the simple reason that the Assessing Officer has no evidence whatsoever that the assessee has received any amount in excess of what has been mentioned in the sales invoices. The assessee has submitted copies of the prescribed forms filed by it before the Mining Department of the Government, for verification. Sales invoices of the goods supplied were also filed. Income was received by way of cross account payee cheques except an amount of Rs.68,000/- against sale of Invoice No. SSM/17/2010-11, dt. 31/05/2010. The assessee has been maintaining stock registers, disclosing quantities. On these facts, to allege that the assessee had received amounts in cash, more than what is mentioned in the invoices as well as in the prescribed form filed with the Mining Department of the Government of India, Sales Tax declarations etc., without any contrary evidence cannot be countenanced. In our view, the addition has been made merely on surmises and conjectures. He did not examine the purchasers nor could find any document to controvert the assessee's stand. In the result, this addition is hereby deleted.

8. Ground No.2, is on a disallowance of commission on the ground that the same is ingenuine.

The Assessing Officer made the disallowance on the ground that no commission was paid in the previous year and the basis and reason for paying the commission is not found in this year. He also held that the assessee failed to furnish details on the rate of commission as well as the basis of payment. The Assessing Officer further held that the sales were made to similar parties and to related parties in the previous year and for the very same sales no commission was paid for the previous year. Hence, there is no justification for the same. He rejected the contention of the assessee that the payments were made by cheques and Ms. Tripti Sharma, who received the commission, had paid Income tax @

30%+ 3% on this commission and that the assessee had paid service tax on this commission payment and that Ms. Tripti Sharma has raised invoices mentioning therein the nature of services and that TDS was deducted on the payments and hence it is a genuine payment, on the ground that this is a systematic manner of reducing income. He held that it is not a case of double taxation of income.

On appeal, the Ld. First Appellate Authority, held that the assessee failed to give the reason for commission payment as no commission was paid for the very same sales in the previous year. He held that the assessee has not proved that the services were rendered, though he was specifically directed to do so. He held that the onus cannot be shifted to the Assessing Officer. He did not comment on the notices issued u/s 133(6) of the Act, to Ms. Tripti Sharma and the reply filed by them along with the various documentary evidences filed by them confirming the receipt of commission. Aggrieved the assessee is before us.

8.1. The ld. Counsel for the assessee repeated the contention made before the Assessing Officer as well as the ld. CIT(A). He submitted that the Assessing Officer made enquiries with the commission agents by issuing notice u/s 133(6) of the Act, and has got all the required information and as these evidences and clarifications are in favour of the assessee. He pointed out that the Assessing Officer is silent on this issue and made an addition without considering the evidences and records. He submitted that in each of the bill raised by Ms. Tripti Sharma, the nature of services has been mentioned. He pointed out that the M/s Tripti Sharma has confirmed directly to the Assessing Officer the receipt of payments towards commission and freight and filed copies of invoices, ledger account, bank account details, nature of services etc. He pointed that what was paid was not only commission, but service charges for lifting of iron ores from mines as certain supervisory services were required for the same by the assessee. He submitted that though the parties were the same to a large extent, this is a highly competitive market and the assessee has to sustain its sales by engaging the services of people who have substantial influence and experience in this trade on commission basis, lest the assessee loses its shares in the market. It was also pointed out that the turnover increased 2.17 per cent and net profit increased 2.74

per cent during the year and that this expenditure did not result in reduction of profits. The reply given by the assessee to the Assessing Officer was relied on.

8.1.1. The Id. D/R, submitted that the assessee has not proved the nature of services that were rendered despite being specifically asked for by the Id. CIT(A). He further pointed to page 18 and 21 of the Id. CIT(A)'s order and submitted that the assessee could not inform as to how the commission agents were identified and how they identified the clients in turn, what was their office establishment etc. He submitted that merely because the Assessing Officer had conducted enquiries and collected certain material, the burden does not shift to the Assessing Officer. He relied on the order of the Id. CIT(A) and submitted that the assessee failed to demonstrate the genuineness of this commission.

8.2. The Id. Counsel for the assessee relied upon the decision of the Jurisdictional High Court in the case of *CIT vs. Ms. Inbuilt Merchants Ltd., judgement dt. 14th March, 2014* and submitted that the Hon'ble High Court has held that the Assessing Officer was wrong in ignoring the evidence produced by the assessee. He further relied on the decision of the Kolkata 'A' Bench of the Tribunal in ITA No. 1133/Kol/2013, Assessment Year 2009-10, in the case of *ITO Ward-12(3) vs. M/s Jai Vikshu Niketan*, where under similar circumstances, the Bench relied on the decision of the Hon'ble Jurisdictional High Court in the case of *M/s. Inbuilt Merchants Pvt. Ltd. (supra)* and directed the Assessing Officer to allow the commission paid by the assessee as expenditure.

9. After hearing rival contention, we find that the assessee has replied to the Assessing Officer as follows:-

The Assistant Commissioner of Income Tax,
Circle 40,
18, Rabindra Sarani, Poddar Court, 4th Floor,
Kolkata – 700 001.

Submitted

Sir,

Sub: Manish Chand Agarwal PAN: ADAPA8173D, Assessment Year 2011-12

Re: Our letter dated 10/03/14 submitted at your office

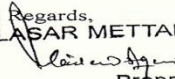
In furtherance to our letter dated 10/03/14, wherein we have explained the genuineness of the commission paid by us. In this connection we would like to bring the following facts also for your kind consideration.

The assessee paid a commission of Rs. 87,59,165/- (which includes Service Tax of Rs. 8,17,946/-) to M/s Tripti Sharma. Both M/s Tripti Sharma and the assessee are under @ 30% + 3% tax slab. The returned income of M/s Tripti Sharma during the assessment year 2011-12 amounted to Rs. 3,47,71,800, and the recipient paid income tax of Rs. 1,05,91,016 and interest of Rs. 8,81,437. A copy of acknowledgement is enclosed herewith. Besides the above the assessee has paid service tax @ 10.3% amounting to Rs. 8,17,946. Thus the transaction has not resulted in saving of any tax. Rather the transaction resulted in excess payment of tax to the extent of Rs. 8,17,946.

Under the circumstances, the payment of commission cannot be said to be non genuine or bogus, as bogus commissions are paid for saving taxes. Bogus payments are an arrangement between two parties for reduction of the total tax liability. But the commission transaction of the assessee has resulted in payment of more tax. The same is exhibited as under:

Particulars	Tax Savings	Tax Paid
Saving of Tax by assessee on payment of Commission of Rs. 87,59,165@ 30.9%	27,06,582/-	
Payment of Tax on the receipt of commission by the recipient @ 30.9%		27,06,582/-
Payment of service tax by the assessee		8,17,946/-
Total	27,06,582/-	35,24,528/-

From the above it is crystal clear that the transaction was not entered into for saving any tax. It was a genuine and bonafide transaction resulting in excess payment of tax to the ex-chequer. As such your honour is requested to allow the payment of commission and oblige.

Thanks and Regards,
For SRI SALASAR METTALICS

Proprietor
(Manish Chand Agarwal)
Assessee

Submitted on 17/03/2014

9.1. The Assessing Officer issued a notice u/s 133(6) of the Act, to M/s Tripti Sharma. A copy of the same is at page 60 of the paper book. Information asked by the Assessing Officer in this notice is as follows:-

1. *Opening and closing balance of the assessee.*
2. *Amount of Freight Received/debited to the party as per purchase bill.*
3. *Amount of payments received with mode of payments*
4. *Copy of bank statements showing the said amount of transaction.*
5. *Copy of return of income filed.*
6. *Audit report with list of debtors duly certified by the Auditor.*
7. *Date wise copy of the account of the said party for the said period.*

10. M/s. Tripti Sharma, replied to the Assessing Officer on 07/02/2014, confirming the transactions and furnishing the following documents/information:-

1. *Opening and closing balance of the assessee.*
2. *Amount of Freight Received/debited to the party as per purchase bill.*
3. *Amount of payments received with mode of payments*
4. *Copy of bank statements showing the said amount of transaction.*
5. *Copy of return of income filed.*
6. *Audit report with list of debtors duly certified by the Auditor.*

10.1. No adverse inference has been drawn by the Assessing Officer on this reply and documents. Before us the assessee filed a copy of the documents furnished by M/s. Tripti Sharma directly to the Assessing Officer in reply to the notice issued u/s 133(6) of the Act. Copies of the invoices raised by M/s. Tripti Sharma and copies of the ledger accounts have also been filed before us. The nature of service has been clearly mentioned in these invoices raised. The assessee also furnished partywise sales against which commission was paid as furnished by M/s Tripti Sharma. The rate of commission is specified at Rs.150 per Metric Tonne. In the case of Ved Prakash Sharma, the nature of service is described as "commission and supervisory charges". The quantity and the rate are mentioned in these invoices. Tax has been deducted at source on all these payments required under the Act. Service tax has been paid on these commission. Ms. Tripti Sharma has paid Income tax at the highest marginal rate, on the commission and supervisory charges

received from the assessee. This is not a case of payment of commission only. Payment has been made towards supervisory work. On these facts to disallow the commission on the ground that, no service have been rendered and that partywise details have not been given and that there is no necessity for paying commission etc. are mere surmises of the revenue authorities party wise details have been furnished. The sales have increased during the year as compared with the previous year. Profits have also gone up. When the assessee feels that it requires the services of commission agents as well as of supervisory agents, for sustaining or increasing its sales and when it provides all the documentary evidence in support of the payment of commission, as well as supervisory charges and when the revenue could not find an iota of evidence to controvert or contradict the evidence produced by the assessee, the disallowance cannot be made on the basis of the opinion of the revenue that this expenditure need not be incurred by the assessee.

The Hon'ble Calcutta High Court in the case of *M/s. Inbuilt Merchants Pvt. Ltd. (supra)*, held as follows:-

"The views expressed by the Assessing Officer are erroneous in law. The Assessing Officer has overlooked the importance of the books of accounts maintained in the ordinary course of business. Reference in this regard may be made to sub-section (2) of [Section 32](#) of the Indian Evidence Act, 1872. The books of accounts maintained in the ordinary course of business are relevant and they cannot be discarded in the absence of appropriate reasons. The mere fact that recipient did not reply in some cases or they were not found at the address furnished by the assessee does not in the least prove the fact that they were non existent or that the payments shown to have been made by the assessee were imaginary. With the advancement of technology, it has become possible to sell goods throughout the country through the internet. For that purpose, agents are required throughout the country. The mechanism in that regard has been disclosed by the assessee and has been recorded in the order of the CIT (Appeals). For the purpose of carrying on its business, the assessee has to recruit the agents. It may not be possible for the assessee to know them personally. Whatever address was furnished to the assessee, has been disclosed to the Income-tax Department. Payments were admittedly made by cheque after deduction of tax. The tax deducted as source has duly been

deposited. The judgment in the case of [CIT vs. Precision Finance Pvt. Ltd.](#) reported in 208 ITR 465 relied upon by Mr. Bhowmick does not really assist him. The aforesaid judgment is an authority for the proposition that mere payment by account payee cheque cannot establish that the transaction was genuine, but in the case before us, besides the fact that payment was made by cheque, there are other pieces of evidence available which are as follows:

- a) Books of Accounts maintained by the assessee in the ordinary course of business;*
- b) Deduction of Tax at source;*
- c) Deposit of the money deducted at source;*
- d) Particulars of the recipient were duly furnished;*

We are, as such, of the opinion that the views expressed by the learned Tribunal are unexceptionable. We, therefore refuse to admit the appeal. The appeal is thus dismissed."

10.1.1. The assessee, in our view has furnished all the evidences, he has discharged the burden of proof that lay on him and as the Assessing Officer has no proof whatsoever, in support of his conclusion. This is a case where the Government has got not only tax on this amount at the highest rate of Income Tax possible but also collected service tax on this amount. No prudent businessman would make a bogus claim and pay highest rate of Income Tax in addition to Service Tax. In our view, the same amount is being taxed twice. In view of the above discussion, we delete the addition and allow this ground of the assessee.

11. Ground No. 3 is on the issue of disallowance of freight charges, on the ground that the same is not genuine.

11.1. The Assessing Officer disallowed the same on the ground that the assessee could not furnish proper explanation as to why freight inward had to be paid when material was purchased and sold at the same town. The Assessing Officer observed as follows:-

"That assessee has to lift the goods from the stockyard of the vendor and transport the same to the plot (stockyard) of the assessee which is 2-3 kilometers and payments have been made through cheques and M/s Tripta Sharma raised a bill

of 44697 Mt. of material which is exactly same as per the purchase quantity. And M/s Tripta Sharma has replied to our notice u/s 133(6) and confirmed the receipt of the carriage charges and payment made to all the parties through cheque.

4.1. The submission of the assessee is not found correct as there is found not any need to transport the goods from the same destination that too about 2-3 Kilometer when the material is to be supplied.

(ii) Further as above transaction of commission with M/s Tripta Sharma found to be fictitious and thus freight expenses not reliable. Freight expenses in respect of other parties also found not reliable and genuine also when illogical rate difference as above."

12. Thereafter, on the ground that commission payment to Ms. Tripti Sharma was found fictitious, he held that freight expenses paid not only to Ms. Tripti Sharma but also to other parties were not genuine. On appeal the Id. First Appellate Authority, upheld the same stating that the assessee has not been able to produce evidence even at the remand stage in support of his claim. He held that the assessee was asked to show the godown rent, transportation dated of the goods rate per tonne from godown to mines and from mines to godown etc. and client wise dispatch along with bills and truck numbers and that this as proof was not submitted by the assessee, the disallowance was confirmed.

12.1. The Id. Counsel for the assessee relied on the submissions made by the Assessing Officer and took this Bench through pages 67 to 94 of the paper book and pointed out that transport and mining permits are issued by Government for transportation of iron ore form one place to another and that copies of these permits were submitted both before the Assessing Officer and the Id. CIT(A) and that all the details asked for by the revenue authorities were very much their in these permit copies. He took this Bench through the copies of the Transportation permits and pointed out that the place from which the goods are loaded, the quantity of goods, the vehicle number, the name and address of the seller, the name and address of the buyer as well as the destination to which the goods have to be transported, along with the date of transportation are mentioned in these permits/transit form issued by the Government. He took this Bench through each

of the invoice which are accompanied by this transport permit and argued that the goods had to be transported from the stock yard of the seller, to the assessee own stock yard and that by the admission of the Assessing Officer, there is a distance of 2 to 3 Kms between the same. He submitted that the goods cannot be moved on its own and had to be transported for this 2 to 3 Kms and freight has to be paid for such movement. He submitted that payments were made through account cheques and account copies of all the transporters were furnished. He pointed out that the Assessing Officer has made enquiries by issuing notices u/s 133(6) of the Act, to these transporters and had got confirmation of the transactions. The Id. Counsel for the assessee submitted that on the strength of such evidences both furnished by the assessee and gathered by the Assessing Officer, the disallowance made was totally unjustified and based on surmises and conjectures. He also filed a copy of such lease agreement of the land on which the stock yard of the assessee was located.

12.2. The Id. D/R relied on the order of the Id. CIT(A) and submitted that mere confirmation of receipt of transport charges by third parties does not lead to a conclusion that he payment was genuine. He argued that the commission payment was held to be ingenuine to the very same party, Ms. Tripti Sharma and thus, the freight payment was claimed to reduce the profit of the assessee. He pointed out that item-wise details was not furnished by the assessee though invoices and permits were furnished.

13. After hearing rival submission, we find that the Assessing Officer admits that the distance between the stockyard of the vendor and stock yard of the assessee is 2 to 3 Kms. The assessee has furnished copy of invoices, evidencing "purchase of goods", along with, goods transport challan/permit in Form-D, issued as per Section 23C of Mines and Minerologies (development and regulation), Act, 1957. Each of these transport permit as a Serial No., a date of issual, the name and address of the seller, the quantity of the goods, the name of the mineral, the vehicle no., the name and address of the vendor, the name and address of driver, as well as the time and date of dispatch of material. On the face of such detailed information is given by the Government Department, the finding of the Revenue authorities

that the assessee has not furnished the necessary details is factually incorrect. The assessee has also filed Form of permit from the Commercial Tax Department from Government, which gives similar details. When the Assessing Officer issued notice u/s 133(6) of the Act to the various transporters, calling for information of these payments of transportation were confirmed. Payments were made by crossed account payee cheques against bills raised. On these voluminous evidences, it is wrong on the part of the revenue authorities to hold that the freight expenses are not genuine. There is no evidence with the revenue authorities to conclude that the evidence filed by the assessee or the evidence furnished by the third parties directly to the Assessing Officer are false. We have held that payment of commission and service charge to Ms. Tripti Sharma is to be allowed. Under these circumstances, we hold that the disallowance of freight inward, is bad in law. Hence, the Assessing Officer is directed to grant this deduction. In the result, Ground No. 3 of the assessee is allowed.

In the result appeal of the assessee is allowed.

14. Now we take up ITA No. 372/Kol/2017, for the Assessment Year 2012-13.

14.1. The Grounds of Appeal, reads as follows:-

"1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have deleted the addition of Rs.1,44,80,743/- U/S 40A(2)(b) in respect of discount allowed to M/s Sri Salasar International (P) Ltd. made by the A.O. by treating the same as ingenuine and unreasonable

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.2,39,48,623/- made by the A.O. treating the advances received as deemed dividend U/S 2(22)(e) and also invoking the provisions of section 68 and treating it as unexplained cash credit.

3. For that on the facts and in the circumstances of the case, the Ld. CIT(A) ought to have deleted the addition of Rs.1,09,87,048/- .made by the A.O. in respect of commission paid to various parties.

4. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.76,84,880/- made by the A.O. in respect of freight inward.

5. That the appellant craves leave to add, alter or delete all or any of the grounds of appeal."

15. Ground No. 1, is against the disallowance made u/s 40A(2)(b) of the Act. The assessee already stated that he is the sole proprietor carrying on the business under the name of style of M/s. Sri Salasar Mettalics. He is also the Director in a company M/s. Salasar international Pvt. Ltd. During the year, the assessee sold iron ore to M/s. Salasar international Pvt. Ltd., which is an exporter of iron ore.. At the year-end i.e., on 31st March, 2012, the assessee gave discount of Rs.1,44,80,743/-, to M/s. Salasar international Pvt. Ltd. The Assessing Officer disallowed this discount by invoking Section 40A(2)(b) of the Act by holding as follows:-

"INGENUINE AND UNREASONABLE Discount of Rs.1,44,80,743/-

(Also disallowable u/s 40A(2)(b) of the Act)

It was stated that discount is genuinely given to the company against sales and duly reflected as per Audit report which is found not satisfactory at all as under.

- (i) When admittedly as stated above basis and reasonability of discount not known to the assessee and when neither even details of sale furnished during the year.*
- (ii) As per Audit report and also stated during the assessment proceedings, discount has been made to related person M/s Sh Salasar International (P) Ltd., of which assessee is a Director and other Director brother of the assessee and shareholders also related persons (family member) but reasonability and basis not found.*
- (iii) When accounts books not produced and thus transaction found to be not genuine also going to conclude that assessee does not have any reasonable explanation, despite various opportunities as above and despite summons issued u/s 131 as above and even despite appearance of accountant. Accordingly Amount is added to the income as ingenuine, illogical and unreasonable discount."*

15.1. Aggrieved the assessee carried the matter in appeal. The assessee submitted before the Id. CIT(A) that the Assessing Officer has not granted adequate opportunity and it had completed the assessment on 15th September, 2014, though the assessment was getting time barred on 31st March, 2015 and hence he could not submit all the required details. The Id. CIT(A) admitted this claim of the assessee and called for remand report from the Assessing Officer. The

Assessing Officer gave an opportunity to the assessee during the remand proceedings and gave a remand report.

15.2. On this disallowance, the assessee submitted that the discount had to be given to M/s. Salasar international Pvt. Ltd as there is a steep increase in the export duties in the year under consideration as compared with the earlier year. It was further submitted that M/s. Salasar international Pvt. Ltd, has considered this discount allowed as its income and accordingly offered the income for taxation.

Evidences were filed from M/s. Salasar international Pvt. Ltd. The Id. CIT(A) confirmed the addition on the ground that the assessee has not furnished adequate details. He held that the assessee has not submitted the reasonableness of giving the discount. He further observed that no such discount was issue in the earlier previous year. Aggrieved the assessee is in appeal.

15.3. The Id. Counsel for the assessee drew the attention of the Bench to copy of accounts of M/s. Salasar international Pvt. Ltd. and pointed out that the export turnover has increased during the year from 15.60 Crores to 25.73 Crores, which is 80% and whereas the customs duty payment has increased from 98.93 Lakhs to Rs.761.62 Lakhs, which is more than 750%. He strongly disputed the finding of the Id. CIT(A) that books of account were not produced and pointed out that books of account were produced during the assessment proceedings and the Assessing Officer has examined the same and recorded as such. He pointed that this amount has been taken as income by M/s. Salasar international Pvt. Ltd. and tax paid on the same and submitted that it is not a case of tax being saved.

The Id. Counsel for the assessee submitted that a plain reading of Section 40A(2)(a) of the Act, demonstrates that the Section is not attracted unless the assessee's incurred expenditure. He pointed out that in the case on hand, the income from sales was reduced by giving a discount and under such circumstances, the Section is not attracted as it is receipt of a lesser sale rate as consideration and not a case of expenditure being claimed.

15.3.1. For the proposition that when discount is given on sales, Section 40A(2)(b) of the Act, is not attracted, he relied on the judgement of the Hon'ble Delhi High

Court in the case of *United Exports Vs Commissioner of Income Tax*[2009] 185 TAXMAN 374 (Delhi).

15.4. The ld. D/R, on the other hand, controverted the arguments of the assessee and submitted that there is no justification for the assessee to give the discount to a concern where he and his family members are Directors. He vehemently contended that no justification was given as to why a discount had to be given by the assessee. He relied on the order of the ld. CIT(A) and submitted that when similar discount was not given to M/s. Salasar international Pvt. Ltd. in the previous year, then also the profits of that company had remained at the level of Rs.26.33 Lakhs, as in this year. He contended that the assessee had transferred its profits of M/s. Salasar international Pvt. Ltd. and in the process saved taxes.

16. After hearing rival contentions, we find that the assessee justified the giving of discount on sales by pointing out that there was a huge increase in customs duty liability on M/s. Salasar international Pvt. Ltd. during the year. The customs duty has increased from 0.98 Lakhs to 7.61 Crores i.e. more than 7.5 times. All the required evidence have been furnished to the Assessing Officer by the assessee by way of confirmation from M/s. Salasar international Pvt. Ltd. M/s. Salasar international Pvt. Ltd. has accounted for this discount in its accounts and the expenditure incurred by its on purchase of iron ore has been reduced to that extent, resulting in increase in profits and taxes paid on profits at the maximum Income Tax rate. Just because the assessee and M/s Salasar International Pvt. Ltd. are under the same management, a disallowance cannot be made. No comparable case has been cited by the revenue to demonstrate that this discount given on sales is excessive or that this transaction is not at Arms' Length. Addition is made merely on surmises and conjectures. Hence in our view, this addition is bad in law.

17. Be it as it may, the Hon'ble Delhi High Court in the case of *United Exports Vs Commissioner of Income Tax, Delhi (supra)* at para 11, held as follows:-

"11. Lastly, we fail to understand how the provisions of [Section 40-A\(2\)\(b\)](#) are, at all, applicable in the facts of the present case. [Section 40A\(2\)\(a\)](#) runs as under:-

"(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the (Assessing) Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

This provision in the Act pertains to disallowance to an expenditure which is made by the assessee i.e. an amount actually spent by the assessee as an expenditure. The expression used in this provision is "incurs any expenditure in respect of which payment has been or is to be made to any person"(emphasis supplied). The emphasised words clearly show that actual payment must be made and there has to be an expenditure incurred before the provision can be said to be applicable. A trade discount, and admittedly it is not in dispute that the subject matter of the claim is a trade discount, and not an I.T.A. No. 356/2009 Page 9 expenditure, clearly therefore there does not arise the question of applicability of [Section 40-A\(2\)\(b\)](#)."

18. Respectfully following the propositions of law laid down in this case and applying the same to the facts of the case on hand, and also in view of our factual discussion, we delete this disallowance and allow the ground of the assessee. In the result, this ground of the assessee is allowed.

19. Ground No. 2, is on the addition of Rs.2,39,48,623/-, made by the Assessing Officer both u/s 2(22)(e) as well as Section 68 of the Act.

19.1. The assessee had received advances of Rs.2,39,48,623/-, from M/s Salasar International Pvt. Ltd. After hearing rival contentions, we find that the addition made u/s 2(22)(e) of the Act is bad in law for the reason that the assessee holds only 1.51 per cent of the total voting power of the shareholders in M/s Salasar International Pvt. Ltd.. To invoke Section 2(22)(e), at least 10 per cent of the total voting power should be held by the assessee. Moreover, the assessee had made sales amounting to Rs.4,16,74,502/- to M/s Salasar International Pvt. Ltd., which in turn has made exports. Thus the amount in question was for purchases. As this

amount was paid in the course of business, Section 2 (22)(e) of the Act, is not attracted.

19.1.1. Coming to the addition made u/s 68 of the Act, we find that M/s Salasar International Pvt. Ltd. has confirmed the transactions and also given the sources from which it has given the advances for purchases. The turnover of this company is more than 25.73 Crores and the revenues are more than 28.01 Crores. The Bank Statements, sources of funds etc. have been furnished. The Assessing Officer as well as the Id. CIT(A), on the one hand stated that this is an addition to be made u/s 2(22)(e) as M/s Salasar International Pvt. Ltd., has accumulated profits and on the other hand made an addition u/s 68 of the Act. This is a contradictory stand.

19.1.2. Be it as it may, the addition made u/s 68 of the Act, is bad in law as the assessee has proved the identity, the creditworthiness as well as the genuineness of the transactions. In the result, this addition is hereby deleted.

20. Ground No. 3 is against the addition of Rs.1,09,87,048/-, made in respect to commission paid by the assessee to various parties. The issue is identical to the issue dealt by us in Ground No.2 for the Assessment Year 2011-12, in ITA No. 371/Kol/2017. At para 9 to 10.1.1. of this order, we have adjudicated the same. For the sake of brevity, we do not repeat the same. Suffice to say that the assessee has furnished all necessary evidences, along with nature of services rendered, the sale on which commission was paid and to which party, the confirmation from these parties along with the Income Tax details of these parties, etc. The assessee was able to achieve increase in turnover of 4.05 per cent and increase in net profit of 74.89 per cent. The commission paid had increased only 10.23 per cent. The Assessing Officer does not have any evidences to controvert the documentary proof filed by the assessee. The addition was made on surmises and conjectures. Hence for the reasons cited by us while dealing with the identical issue for the Assessment Year 2011-12, we delete this addition and allowed this ground of the assessee.

21. Ground No. 4, is against the addition of Rs.76,84,880/-, made in respect to freight inward. The very same issue was dealt by us while dealing Ground No. 3 for

the Assessment Year 2011-12 in ITA No. 371/Kol/2017. Our findings are at paragraph 13 of this order. For the sake of brevity, we do not extract the same. For the very same reason and as the disallowance was made this year based on the findings of the Assessment Year 2011-12, we delete this addition and allow this ground of the assessee.

22. In the result, both the appeal of the assessee are allowed.

Kolkata, the 15th day of February, 2018.

Sd/-

[Aby T. Varkey]
Judicial Member

Dated :15.02.2018
{SC SPS}

Copy of the order forwarded to:

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3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches