

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

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No. 234/Jab/2015

निर्धारण वर्ष/ Assessment Year : 2008-09

Sanjay Kale, Vishnu Nagar, Parasia Road, Chhindwara (MP) PAN : AMCPK 1268 L	Vs	Income Tax Officer-1, Chhindwara (MP)
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri G.N. Purohit, Sr. Adv.
Revenue by :		Shri P.D. Chougule, DR

सुनवाई की तारीख/Date of Hearing : 14/03/2018

घोषणा की तारीख /Date of Pronouncement: 16/03/2018

आदेश/O R D E R

PER MANISH BORAD, ACCOUNTANT MEMBER:-

This appeal of assessee for Assessment Year 2008-09 is directed against the order of the CIT(A)-I, Jabalpur dated 22.09.2015 vide appeal No.J/CIT/A/I/JBP/ITO/W/I/CWA/203/10-11, arising out of order under Section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), framed on 24.12.2010 by the ITO-1, Chhindwara.

2. Briefly stated facts, as culled out from the records, are that assessee is an individual running proprietorship firm M/s. S.K. Enterprises which is engaged in the business of deriving commission receipts from Tata Finance in relation to finance scheme for four wheelers. Income of Rs.2,67,050/- declared in the return of income filed on 25.03.2009. Case selected through CASS and necessary notices under Section 143(2)/142(1) were issued and served upon the assessee. Learned Assessing Officer made various addition totaling to Rs.16,64,162/- which majorly included disallowance under Section 40(a)(ia) of the act for non-deduction of tax at source on commission paid at Rs.11,15,549/- and assessed total income of the assessee at

Rs.19,31,210/- . Appeal by the assessee before the learned CIT(A) brought part relief. Now the assessee is in appeal before the Tribunal raising following grounds:-

"1. The learned CIT(A) has erred in law and on facts of the case in confirming the addition of Rs 11,15,549/- on wrong assumption of the facts of the case. The addition of Rs 11,15,549/- should be quashed in toto.

2. The learned CIT(A) is not justified in ignoring the revised grounds of appeal submitted before him on 11.09.2015 at his behest as the grounds raised were argumentative and ignoring the of Notification No S.O.17.17(E) dated 12th January 1977 and provisions of Section 44AA and 44AB for confirming the addition of Rs 11,15,549/- same should be deleted.

3. The learned CIT(A) failed to appreciate that Section 40(a)(ia) and 194H had no application in the facts of the case no disallowance could be made by the A.O. for overriding payment of commission to kamal kumar Ahilya addition is unwarranted.

4. The learned CIT(A) has not issued any notice in terms of Section 251(4) denying Opportunity to the assessee before changing the basis of addition from 40(a)(ia) to none proving of Section 37(1) where the genuineness of payment is not doubted by the A.O. The addition is not sustainable in law.

5. The observation of CIT(A) in Para II of the order for conditional deletion of addition should be expunged."

3. From the perusal of above grounds, following two issues need our adjudication viz. (1) whether the learned CIT(A) was justified in confirming the disallowance under Section 40(a)(ia) at Rs.11,15,549/- and (2) whether the assessee is liable to get its accounts audited under Section 44AB of the Act. As both the issues are commonly related to the commission income as well as commission expenditure, we are adjudicating them together.

4. Learned Counsel for the assessee submitted that the assessee is having an agreement with Tata Finance and receives commission as per the percentage and other conditions mentioned in the agreement. During the

year under assessment, gross commission receipts as per the TDS Certificate is Rs.21,95,772/- on which Tata Finance has deducted TDS. Further, the assessee, in order to conduct the business more expeditiously, entered into a sub-contract with Mr. Kamal Kumar Aheliya, thereby agreeing to share 50% commission. It has further contended that the gross receipts during the year was much below than the prescribed limit of gross turnover required for the purpose of application of provisions of Section 44AB of the Act for getting its accounts audited. As the assessee was not required to get its accounts audited under Section 44AB of the Act, it is also not required to deduct the tax at source and therefore, no disallowance was called for under Section 40(a)(ia) of the Act. Learned Counsel further referred and relied upon the decision of the co-ordinate bench of this Tribunal in assessee's own case for assessment years 2006-07 and 2008-09 in ITA Nos. 233 & 234/Jab/2015 dated 13.12.2016, which has been decided in favour of the assessee. On the other hand, learned Departmental Representative vehemently argued supporting the order of the lower authorities.

5. We have heard the rival contentions and perused the record placed before us and also gone through the order of the co-ordinate bench of this Tribunal dated 13.12.2016 relied upon by the learned Counsel for the assessee. The issues raised in this appeal relates to the disallowance under Section 40(a) (ia) of the Act for non-deduction of tax at source on the alleged commission expenditure of Rs.11,15,549/-. We observe that the assessee, who is an agent on behalf of Tata Finance, received a gross commission of Rs.21,95,772/- during the year. There also stand entered a sub-contract between the assessee and Mr. Kamal Kumar Aheliya, thereby agreeing to share the commission received from Tata Finance. It is true that the total commission is received in the account of the assessee, but in the financial statement prepared by the assessee, assessee has disclosed gross receipt of

Rs.10,80,223/- and the remaining amount of Rs.11,15,549/- has been disclosed by Mr. Kamal Kumar Aheliya in his profit and loss account. During the assessment proceedings, learned Assessing Officer took a view that the assessee should have disclosed total gross receipts under his name in the profit and loss account and the commission of rs.11,15,549/- is to be shown as payment made to Mr. Kamal Kumar Aheliya towards commission expenditure. Learned Assessing Officer also concluded that the assessee was liable to deduct tax at source on the alleged commission expenditure of Rs.11,15,549/-. On the basis of these findings, learned Assessing Officer made addition under Section 40A(3) at Rs.3,65,549/- and disallowance under Section 40(a)(ia) at Rs.11,15,549/-. Learned CIT(A), while adjudicating this issue, deleted the disallowance under Section 40A(3) of the Act relating to cash payment exceeding Rs.20,000/- by observing that when the disallowance of Rs.11,15,549/- is confirmed, then making the disallowance of Rs.3,65,549/- under Section 40A(3) of the Act will make it a double addition.

6. From the perusal of the financial statements as well as paper book, we find that Revenue has not disputed the fact that the gross receipt of the assessee has not exceeded Rs. 21,95,772/- which is the total commission provided by Tata Finance and duly shown in Form No.26AS. Looking to this figure of turnover of Rs.21,95,772/-, there stands no reason to justify the action of the Assessing Officer treating the assessee liable for getting its accounts audited under Section 44AB of the Act, because the alleged receipt is from commission and Tata Finance has also shown the payment as commission and therefore, the gross receipt of commission is a business receipt and not a professional receipt. It is also not disputed by the Revenue that the in the preceding year the assessee's books of accounts were not required to be audited under Section 44AB of the Act which could have

5

triggered the possibility of making disallowance under Section 40(a)(ia) of the Act for non-deduction of tax at source. It is also pertinent to note that that the co-ordinate bench vide its order dated 13.12.2016 in assessee's own case for AYs 2006-07 and 2008-09 (supra) has decided the very issue of parting of the commission with Mr. Kamal Kumar Aheliya in 50:50 ratio and the Tribunal has decided as follows:-

"12. I have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. This is a case where I noted that the assessee had paid 50% of the commission received to Kamal Ahelya on the basis of the service rendered by him in getting the loan proposal etc. prepared as well as follow up with the clients and the assessee. The assessee was carrying on the business as a commission agent of the Tata Finance for the last four years. The commission has also been paid to Shri Kamal Ahelya from this year, as the agreement has been entered into and made effective from 01.04.2005. The assessee has duly explained before the Assessing Officer as is apparent from page 2 of the assessment order, the nature of the services to be rendered by Kamal Ahelya. Kamal Ahelya also uses the laptop computer, mobile and online facility for guiding the customer and providing the Information to them for getting the vehicle loan. This is an arrangement entered into between the assessee as well as Kamal Ahelya. Once the assessee has submitted that the copy of the agreement and the nature of the activities have been carried out by Kamal Ahelya on the basis of which the commission has been paid. In my opinion, the onus gets shifted on the Assessing Officer to bring the evidence to the contrary. Without bringing any evidence on record, merely not relying on the assessee, will not meet the requirement of the law. This is a settled law in view of the decision of the Hon'ble Supreme Court in the case of Daulatram Rawatmull reported in 87 ITR 349 (SC) that apparent is real. Onus is on the person who alleges apparent is not real. The assessee has duly submitted the nature of the services as well as the agreement. I, therefore, set aside the order of the CIT(A) on this issue and delete the addition of Rs.3,98,878/-."

7. From the perusal of above order, we find that the issue adjudicated by the co-ordinate bench related to the genuineness of the expenditure relating to commission paid to Mr. Kamal Kumar Aheliya. Applying the decision of the Tribunal on the facts of the instant appeal, we are of the view that the assessee was not required to get its books of accounts audited under

6

Section 44AB of the Act and even if the gross receipts are taken at Rs.21,95,772/-, the assessee is eligible to claim the expenditure of commission paid to Mr. Kamal Kumar Aheliya at Ra.11,15,549/-. However, one fact which has also not been disputed by the assessee that out of total commission expenditure of Rs.11,15,549/-, sum of Rs.3,65,549/- has been paid in cash for which learned Assessing Officer has made disallowance under Section 40A(3) of the Act which was deleted by the learned CIT(A) only because disallowance under Section 40(a)(ia) of the Act was confirmed. We, therefore, in the given facts and circumstances of the case, are of the view that disallowance under Section 40(a)(ia) at Rs.11,15,549/- stands deleted, but the disallowance under Section 40A(3) of the Act for the alleged cash expenditure exceeding Rs.20,000/- in cash totaling to Rs.3,65,549/- needs to be confirmed. We order accordingly.

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

Order pronounced in the Court on 16th March, 2018 at Jabalpur.

Sd/-

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

**(MANISH BORAD)
ACCOUNTANT MEMBER**

Jabalpur; Dated 16/03/ 2018

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण./ DR, ITAT, Jabalpur
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./ Asstt.Registrar)
आयकर अपीलीय अधिकरण, बहमदाबाद / ITAT, Jabalpur