

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Pawan Singh (JM)
I.T.A. No. 5660/Mum/2016 (Assessment Year 2011-12)

Om Shree International Orion Business Park 702, 7 th Floor Nehru Road Near Station, Santacruz East, Mumai-400 055. PAN : AAAFO3000A	Vs.	ACIT Range 20(2) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri R.C. Jain & Shri Sitaram Pareek
Department by	Shri Ashwin Kumar
Date of Hearing	10.05.2018
Date of Pronouncement	18.05.2018

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 27-07-2016 passed by Ld CIT(A)-36, Mumbai and it relates to the assessment year 2011-12. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.117.21 lakhs relating to foreign commission expenditure.

2. The assessee firm is engaged in the business of export and trading in all kinds of spices, food stuffs, chemicals, engineering goods, garments, textiles etc. During the year under consideration, the assessee had claimed commission expenses of Rs.137.16 lakhs, out of which commission paid to foreign agents was Rs.131.59 lakhs. The foreign commission expenditure included commission expenditure of Rs.117.21 lakhs payable/paid to M/s Tarafa Trading Co.

3. The assessee was asked to justify the commission payment made to M/s Tarafa Trading Co. The assessee explained that the assessee got export

turnover of Rs.1798.25 lakhs through M/s Tarafa Trading Co against which commission payable was Rs.109.13 lakhs. It was submitted that the commission is usually paid after realization of export proceeds. It stated that it has paid a sum Rs.27.79 lakhs during the year under consideration. However, at the year end, M/s Tarafa Trading Co's account was showing closing balance of Rs.117.21 lakhs.

4. The AO noticed that the entire commission payable to M/s Tarafa Trading Co. for the year under consideration remained outstanding as on 31.3.2011. The AO noticed that the assessee has exported goods having value of Rs.829.61 lakhs during the financial year relevant to the assessment year under consideration, against which payments of Rs.638.92 lakhs were received during the current year itself. However the Commission expenditure claimed during the year remained unpaid during the year under consideration, despite realization of export proceeds.

5. The AO further noticed that the assessee was not able to furnish any evidence with regard to appointment of foreign commission agent, any agreement or contract entered with him etc. The assessee could produce only copy of an e-mail communication only to support its liability to pay commission before the AO. The AO has also not mentioned as to whether the e-mail communication related to the exports made during the year under consideration or not. In the e-mail, the commission rate was mentioned at 10% and it is not clear as to whether the assessee has actually paid the commission as mentioned in the e-mail communication.

6. The assessee submitted that it had exported 975 drums of Malt Extract to M/s Guinness Nigeria in FY 2011-12 and the same got damaged. After negotiation, the assessee agreed to export 400 drums at free of cost. Due to heavy loss caused to the assessee in this transaction, M/s Tarafa Trading Company also agreed to waive part of its commission. Accordingly a sum of Rs.81.37 lakhs (which included foreign exchange fluctuation amount also) was

credited to the Commission account in FY 2013-14 relevant to the assessment year 2014-15.

7. Since the assessee did not prove that M/s Tarafa Trading Company has actually rendered services to the assessee, the AO took the view that the Commission expenses claimed to be payable to M/s Tarafa Trading Co., is bogus and accordingly added a sum of Rs.117.21 lakhs to the total income of the assessee. The Ld CIT(A) also confirmed the same.

8. We heard the parties on this issue and perused the record. The Ld A.R reiterated the contentions urged before the tax authorities and the Ld D.R took us through the short-comings noticed by the tax authorities.

9. The Ledger account of M/s Tarafa Trading Company shows an opening balance of Rs.3.42 lakhs and during the year under consideration, commission was credited to the tune of Rs.113.79 lakhs. Since the assessee did not make any payment during the year under consideration, the closing balance remains at Rs.117.21 lakhs (3.42 + 113.79).

10. However the assessee has furnished its explanation before the AO, wherein it has been stated that Commission expenses provided during the year under consideration was Rs.109.13 lakhs and sum of Rs.27.79 lakhs was paid during the year under consideration. This explanation is not supported by the Ledger account of M/s Tarafa Trading Company and hence there is contradiction between the explanation and the facts available on record. There is one more contradiction. In the explanations, the assessee has stated that the export was Rs.1798.25 lakhs, while the AO states the export as Rs.829.61 lakhs.

11. Further the assessee has explained about the damage caused to the goods exported in FY 2011-12 and replacement made by it. We are unable to understand as to how the subsequent events would help the assessee to substantiate the commission expenses booked during the year under

consideration. Those events may, in a way, justify the action of non-payment of commission amount, but what is required to be established is whether there was really a liability to pay commission expenses during the year under consideration.

12. It was stated that the Commission shall be paid on realization of export proceeds. The AO has noted that the assessee has exported goods worth Rs.829.61 lakhs through M/s Tarafa Trading Co. during the year under consideration and the assessee has realized a sum of Rs.638.92 lakhs during the current year itself. The assessee has not explained as to why the commission was not paid on the amount realized during the year under consideration? The events relating to damage of goods have occurred in the succeeding year much after closure of the accounting period and it could not have been visualized by the assessee when it realized the export proceeds.

13. The AO has stated that the Export invoice does not mention anything about commission payment. However, during the course of hearing, it was submitted that the details of commission payment is mentioned in Bill of Lading.

14. From the foregoing discussions, we notice that the assessee has furnished certain explanations, while what was required to be shown is that there was an obligation/liability to pay commission. The Ld A.R submitted that M/s Tarafa Trading Company was acting as its commission agent for the past ten years and commission was paid to it in the earlier years also. According to Ld A.R, the commission liability was mentioned in Bill of lading.

15. For payment of commission, there is always no necessity that there should be a written contract. What is required to be proved is that the Export order was received by the assessee due to the efforts of the foreign agent. Hence the assessee is required to link the commission payment with the relevant export invoice and then furnish certain correspondence or other documents to show that the relevant export order was received due to the

efforts of commission agent. Since the M/s Tarafa Trading company is claimed to have acted for the assessee in the past years also, the rate of commission can also be examined/justified vis-à-vis past payments. We notice that the assessee has not furnished explanations in the above said lines.

16. There should not be any dispute that the initial onus to prove expenditure claim lies upon the assessee. In the instant case, we are of the view, the explanations furnished by the assessee do not support the claim of expenditure. However, considering the facts that the foreign agent was acting for the assessee in the past and the bill of lading also mentions about commission payments, we are of the view that the assessee may be provided with one more opportunity to prove the commission payment liability. Accordingly we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the assessing officer for examining the claim afresh after affording adequate opportunity to the assessee. After considering the information and explanations that may be furnished by the assessee, the AO may take appropriate decision in accordance with the law.

17. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order has been pronounced in the Court on 18.05.2018.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 18/05/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai

6. Guard File.

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BY ORDER,

Senior Private Secretary
ITAT, Mumbai