IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1430, 1431, 1432 & 1433/Hyd/2015
Assessment Years: 2009-10, 2010-11, 2011-12 and 2012-13

Sunil Vishram, Hyderabad.	vs.	Asst. Commissioner of Income-tax, Circle – 10(1), Hyderabad.
PAN – AAMPM 3617 P		
(Assessee)		(Respondent)

Assessee by : Shri K.A. Saiprasad
Revenue by : Shri B. Suresh Babu

Date of hearing 26/04/2018
Date of pronouncement 25/05/2018

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

These four appeals filed by the assessee are directed against orders, all dated, 26/10/2015 of CIT(A) – 6, Hyderabad for AY 2009-10, 2010-11, 2011-12 and 2012-13. Since identical issues are involved in these appeals, the same were clubbed and heard together and, therefore, a common order is passed for the sake of convenience.

ITA No. 1432/H/2015 for AY 2011-12

2. Briefly the facts of the case are, the assessee is a proprietor of M/s Classic Chemicals that deals in trading and supply of water treatment chemicals. Assessee filed his return of income declaring a total income of Rs. 1,05,44,238/-. The assessment was completed on a total income of Rs. 1,63,68,054/- by making disallowance of Rs.

52,57,750/- on account of commission, disallowing 20% of expenses debited in profit and loss account under various heads.

2.1 During the assessment proceeding, the Assessing Officer found that the assessee had debited a sum of Rs.52,57,750/- in the P&L account as commission expenses. The assessee was asked to furnish complete details of commission paid to parties, along with the name, address, amount paid, mode of payment, PAN and nature of services rendered by each party. All the parties were summoned and the statements were recorded in the presence of assessee who was also offered to cross-examine the parties by the Assessing Officer. On being asked to justify the amount paid as commission in the light that none of the persons could inform about any specific work done for the assessee, it was submitted that the commission expenses were incidental to run the business and the parties had been paid commission in earlier years also and that the same had been accepted by the Department. The commission was being paid because those parties were instrumental in procuring the business by introducing the customers/ potential customers; this had resulted in increase of the turnover. It was stated that the payments were made through cheques; TDS was made for all the recipients, and that all of them were income tax assessees and therefore the commission expenditure was allowable. The Assessing Officer, after giving his finding on statements recorded from 15 persons (given in para 8 of assessment order) questioned the fact of services being actually rendered by those persons to the assessee.

2.2 According to the Assessing Officer, the question of making payments by cheque and deducting tax u/s. 194H would come into play only when the particular expenses fell under the head "commission" and its nexus with the business of the assessee was proved beyond doubt. He rejected the logic of the assessee as irrelevant, i.e. the payments were through cheques and the TDS was

made and therefore, the expenditure should be treated as genuine. According to the Assessing Officer, none of the persons whose statement were recorded could come out with an iota of credible detail to substantiate their stand that they had rendered any service to the assessee to have deserved to receive any payment on that account. The Assessing Officer on the basis of his analysis arrived at the conclusion that the assessee had over the years adopted the modus operandi of booking certain expenses under the head commission and had tried to legitimise the same by deducting necessary TDS.

2.3 After placing reliance on various case laws, the Assessing Officer concluded that the payments were made by the assessee not for the actual services rendered by the agents for the assessee's business but to reduce tax incidence. Therefore, he found the payments to be not genuine and added the expenditure of Rs.52,57,750/- to the income of the assessee.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. During appellate proceeding, the assessee reiterated the submissions made before the Assessing Officer and submitted that the Assessing Officer ought to have appreciated that the agent need not maintain any record of the nexus and addresses of the persons who had purchased the goods from the assessee through them.

4.1 It was submitted that there was severe competition for business. The assessee being an individual (proprietor) had to necessarily depend upon somebody to achieve and reach higher sales to survive in the market. There was an increase in turnover and in fact the commission claimed at Rs.52,57,750/- in the previous year under consideration (A.Y. 2011-12) was much less than the

commission of Rs.64,76,842/- paid in the earlier year to it. According to the assessee, the salary claimed at Rs.18,02,100/- showed that there were only 2 employees in sales. Therefore, he had appointed the agents, through proper appointment letters right at the starting stage of his business. The assessments for A.Y. 2008-09, 2009-10 2010-11 were completed u/s. 143(3) and in all the years the commission payment was accepted. Complete details of commission payments showing the commission payment, agent wise, date wise details of deductee of tax, PAN of the agents were filed before the AO. Copies of the income tax return acknowledgements and computation of income of the commission agents were also filed before the Assessing Officer. All the evidence before the Assessing Officer proved beyond doubt the genuineness of payment of commission to agents and all the payments were through banking channels. According to the assessee the only doubt that the Assessing Officer had was whether the agents had really rendered the services. Accordingly, called all the agents, all have responded and confirmed the performance service and receipt of commission.

5. After considering the submissions of the assessee and AO, CIT(A) has analysed the issue with the following parameters:

i. There was a contract for supply of goods/services wholly and exclusively for the purposes of the assessee's business (commercial expediency)
ii. The goods or services had actually been supplied in pursuance of such a contract (genuineness of expenditure)
iii. The deduction is not hit by the mischief of any provision of the Income tax Act.

5.1 To what extent these parameters are satisfied in this case is analysed by the CIT(A) as under:

"06.3.1 Commercial expediency: Normally, a contract for service contains explicit statement of the mutual rights and obligations of the parties thereto so that they know what to expect from each other and, in case of breach, are able to enforce specific performance. In this case, there is no contract. There are only stereotype letters addressed by the assessee to the alleged commission agents to the effect that they had been appointed as commission agents and that they would be eligible to receive commission as mutually agreed. Payment of commission on the basis of such bland letters of intent are not generally seen in regular businesses.

06.3.2 Genuineness: For a transaction to be considered as genuine, it is necessary that the apparent must be the real, i.e. the parties to the transaction should have the requisite documents and knowledge which a person, if he had actually done the transaction, would have in the ordinary course of the business. In this case, commission is claimed to have been paid to as many as 16 persons. But, all of them, by and large, displayed lack of primary knowledge about the basic facts of the business, viz. goods for which orders had been procured by them, persons contacted in course of procuring the orders, the contact numbers, etc. Some of them did not even know the assessee (even though they confirmed that their family members knew him). One of them, Ms. Sonal Fitkariwala, did not even know the concern (Shri Vari Enterprises) whose proprietress she was supposed to be. They invariably stated that the employees through whom they had procured orders for the assessee had left and that their current whereabouts were not known. The whole family of Mr. Umesh Agarwal is shown to be working for the assessee as commission agents but none of them furnished satisfactory explanation about the nature, scope and details of the services rendered. These discrepancies have been discussed in detail by the AO in the assessment order."

5.2 CIT(A) observed that it is true that the persons had furnished their respective returns of income and shown the receipt of commission from the assessee. But it is equally noteworthy that they, almost without exception, claimed refund for practically the entire amount of tax deducted at source by the assessee. If they had paid tax at the same rate at which the assessee had, or at a higher rate, the dispute could be treated as merely academic in nature. But, if they practically did not pay any tax (even though they reported the receipts in their respective returns of income), such reporting of

income by them and, for that matter, deduction of tax at source by the assessee on those payments, has hardly any meaning. The details are as below:

Person	PAN	TDS	REFUND CLAIMED
Pannalal Fitkariwala	AAIPF3460B	51,058	36,867
Sonal Fitkariwala	AAGPF2455E	78,539	42,603
Bela Agarwal	ABFPB5720L	89,543	81,877
Kajal Agarwal	AIIPA3538M	37,307	34,153
Rajesh Kumar Agarwal	ACZPA6945M	65,145	58,728
Ketan Agarwal	AFUPA5182N	28,004	22,485
Dimpel Agarwal	AIZPA4974A	24,510	23,779
Indu Jhunjhunwala	ACUPJ4786C	23,000	15,685
Ajay Jhunjhunwala	AAGHA0988F	17,506	17,506
Keshav Agarwal	ARHPA2978D	23,345	19,204
Subhash Chand Gaoddia	AAJPG6304J	20,002	6,486
Umesh Kumar Agarwal	AAAHU5753L	21,340	17,686
Parikh Neema Bhavesh	AGKPP0932G	50,000	0

5.3 CIT(A) observed that the assessee could not furnish any documentary evidence to substantiate that services had actually been rendered by these persons. There are no bills from the payees and no reference to the payees in the purchase orders from the customers. Even the payees could not produce any documentary evidence to substantiate the claim of services rendered by them. Of course, they appeared before the AO and confirmed that they rendered services to the assessee. But, they did not recall the persons who were contacted in the process, how the orders had been procured, what were the specific items of supply, etc. She opined that if a person is a general commission merchant, securing orders from a number of persons for supplies to be made by a number of persons, it would stand to reason that he would not remember the details of transactions for a particular set of persons. But, if a person is working exclusively for a particular supplier, it is not understandable why he or she should not remember the basic details of the transactions. None of the alleged payees displayed any such knowledge.

5.4 CIT(A) observed that in this case, the assessee has been able to show that he made payments to some persons ostensibly as remuneration for services of commission agency rendered by them. The fact that the services had actually been recorded however, has not been established. Hence, such payment cannot be called payment of commission by the assessee in regular course of his business. At the best, it can be called gratuitous payment by him to persons known to him, directly or indirectly. Whether they were his relations or not is not clear but it is clear that they were not strangers either. Whether there was a quid pro quo or not is not known. But, existence of quid pro quo is not necessary to prove. It is sufficient to say that the services for which the payments had ostensibly been made had not been rendered actually and, hence, such payments should not be allowed as business expenditure. The claim of deduction may have been allowed in the past. But, if, on the basis of specific enquiry carried out, the AO reaches a conclusion that the same is not allowable for the assessment year under consideration, there is nothing in law to prevent him from doing so.

5.5 In view of the above observations, the CIT(A) held that there is a preponderance of probability to conclude that the payments did not constitute remuneration for services rendered by these persons and, hence, are not allowable as deduction while computing his profit of business. Considering, however, that some of the payees were in regular business, benefit of doubt to some extent can be allowed. It is noted that the claim of commission payment included a payment of Rs.1,10,000/- to M/s. Sridhar Clearing Services Pvt Ltd, Chennai. The said company was acting as his clearing agent at the dockyard and documentary evidence of the services rendered has also been submitted. Ends of justice should be met if deduction of Rs.5,00,000/- was allowed towards commission expenditure which might have been incurred even though the relevant evidence to the desired degree of

satisfaction may not have been furnished by the assessee. The addition is accordingly reduced to Rs. 47,57,750/-.

6. In AY 2012-13, ld. CIT(A) followed the same decision as in AY 2011-12 by accepting the findings of AO and gave relief to the extent of Rs. 5 lakhs to meet the ends of justice.

7. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds, which are common in 2011-12 and 2012-13, except the quantum of addition:

> *"1. The order of the learned Commissioner of Income Tax (A) is not correct either on facts or in law and in both.*
>
> *2. The learned Commissioner of Income Tax(A) is not justified in confirming a disallowance of Commission payment to the extent of Rs. 5,00,000/- out of total claim of Rs.52,57,750/-.*
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> *3. The learned first Appellate Authority is not justified in confirming the disallowance of the commission payments especially when the First Appellate Authority herself had allowed payment of Rs. 5,00,000 on round sum basis.*
>
> *4. The learned first Appellate Authority failed to appreciate the fact that the commission payments were through Banking Channels and the recipients unrelated are assessed to tax.*
>
> *5. The assessee crave leave to add or amend or alter any of the grounds at the time of hearing of appeal."*

8. Ld. AR of the assessee submitted that the assessee is engaged in sale of various chemicals and most of the chemicals are imported material. There is sever competition for this business. He submitted that the assessee being an individual (proprietor) had to necessarily depend upon somebody to achieve higher sales to survive in the market. He submitted that there is an increase in turnover and in fact the commission claim at Rs. 52,57,750/- in this AY 2011-12 is much less than the commission of Rs. 64,76,842/- paid in earlier AY 2010-11. The gross profit and net profit reflect steady progress.

8.1 Ld. AR submitted that the Profit & Loss a/c (page 3 of paper book) shows the salary claim at Rs.18,02,100 for Asst.year 2011-12. The details placed at Page 67 of the paper book shows that there are only 2 employees on sales to monitor sales. Hence the assesse has to necessarily depend upon outside agencies for the marketing job. (These two emplyees also coordinate the sales bookings done by agents). Therefore he had appointed the agents, through proper appointment letters right at the starting stages of his business. Copies of some of the appointment letters are placed at pages 60 to 64 of the paper book.

8.2 Ld. AR submitted that it is an undisputed fact that the assessments of the assesse for Asst. years 200809, 2009-10 & 2010-11 were completed u/s 143(3) after detailed examination. In all the years the assessee paid the commission to all the agents. In all the years the commission was paid through Banking channel and tax was deducted at source. All the agents were assessed to tax and in some cases the tax is paid at highest slab. He submitted that before the Assessing Officer, the assesse had filed complete details of commission payments. The said details placed at page 15 of paper book show the commission payment agent wise, date wise and the details of deductee of tax. The statement itself indicates the PAN of the agents. Further commodity wise, date-wise, quantity-wise and agent wise commission workings were filed and placed at pages 16 to 30 of the paper book. Statement of TDS, section-wise, filed before Assessing Officer is placed at page 31 of the paper book. He submitted that copies of the Income tax return acknowledgement and computation of the commission agents filed before Assessing Officer are placed at pages 33 to 59 and pages 89 to 92 of the Paper book respectively. All the evidences thus filed before the Assessing officer prove beyond doubt the genuineness of claim of commission to

agents. The assessee had duly complied with all the procedures required, to establish and substantiate his claim.

8.3 Ld. AR contended that in spite of this heavily loaded evidences, and confirmations in favour of the assessee, the Assessing Officer resorted to disallowance simply on presumptions and assumptions. In doing so, the Assessing Officer overlooked the vital facts that:

i) Such commission was allowed in earlier years.

ii) the salary claim for a turnover of Rs.24.52 crores is only 18 lakhs that too mostly for the administration staff only. There is minimum claim of salaries for the field staff. Kind attention is invited to the details of salary payments (Page 67 of Paper Book).

iii) The whole presumption of the Assessing Officer is that the assessee had resorted to this claim to reduce or evade the taxes. The Assessing Officer grossly failed to appreciate the fact that the assesse is constantly offering substantial income to tax. For the Asst.Year 2011-12 the assessee admitted income at Rs.77.95 lakhs on a turnover of Rs.24.52 crores. Considering the fact that this is a trading business of a proprietor to achieve that much turnover and admit such a high income is not an easy task.

iv) The whole approach of the Assessing Officer is as if the assessee had for the first time resorted to claim such expenses. He failed to appreciate the fact that payment of such commission is one of the main expenditure claimed year after year in this line of business.

v) The most important aspect is that based on these findings, the assessment for Asst.Year 2008-09 which was earlier completed u/s 143(3) on 25.09.2010 was reopened u/s 148 and out of the total amount of Rs.24,47,000 claimed as commission payment, the Assessing Officer in his order u/s 143(3) r.w.s.148

disallowed Rs.21,21,000 accepting the payment of Rs.3,26,000 (copy of the order u/s 143(3) r.w.s.148) dt.26.07.2014 is enclosed as annexure). Again for Asst.Year 2009-10 the Assessing Officer in an order u/s 143(3) r.w.s. 148 allowed commission of Rs.3,07,000. similarly for Asst.year 2010-11 in the order u/s 143(3) r.w.s.147 an amount of Rs.16,32,955 was allowed on the similar set of facts. This shows that the Assessing Officer even in his reassessment order is satisfied with a portion of the commission payment. The evidences available for allowing such expenditure, not once but twice, once at the time of 143(3) and for the second time at in the course of 143(3) r.w.s.147, are same and equally applicable and available in other cases also. Hence allowing some payments and disallowing others on similar and identical set of facts is unjustified and arbitrary. This establishes the fact that the disallowance is only on presumptions and not based on any concrete evidences.

vi. The theory of the Assessing Officer that assesseeresorted to agency commission payments only to reduce profit is also not correct. All the recipients have offered the said commission to tax. Some of the agents are in the 20% tax bracket and hence the theory of the evasion / reduction also has no basis.

vii). Another glaring instance is that the Assessing Officer in his over enthusiasm to disallow the commission on sales, disallowed even the commission paid by the assesse to the customs clearance agent on the purchases made. S.No.16 page 2 of the asst. order is the payment of Rs.1,10,000 for Asst. Year 2011-12 to Sridhar clearing service Pvt Ltd. This party is the customs clearing agent at Chennai Port. He renders the service in this regard. The purchases made by the assesse outside India was shipped to India and at the Chennai port the

goods were got delivered through the services of this authorized agent. This party charges commission for each shipment. Relevant documents placed at pages 73 to 88 show the service rendered by this party in respect of one shipment. the Agency commission claim is supported by the bill placed at page 78 of the paper book. Details of goods received and cleared are indicated in the relevant invoices placed at page 84 of the paper book. Details of purchases made cleared by this agent and commission paid are placed at page 66 of the paper book. Appellants ledger Ale in the books of Sreedhar agency shows the service charges claimed from the appellant. Agency commission of Rs.3,000 at page 76 is duly reflected as part of Rs.13,677 at page 72 of the paper book. Thus the Assessing Officer is totally unjustified in disallowing even the commission paid to the clearing agents.

viii. The Assessing Officer in his order at para 6 makes an observation that the assessee had not taken the offer of cross examination. Since none of the agents have denied the receipt of commission and all of them have in fact confirmed the receipt of such commission, the assesse did not find it necessary to cross examine and this can by no stretch of imagination be an issue against the assessee's claim of commission payment to agents.

ix. It is pertinent to submit that none of the agents examined by the Assessing Officer are related to the appellant.

x. It is not, in any case, the allegation of the Assessing Officer that the commission paid to the agents had flown back to the assesse. Hence in such circumstances disbelieving the commission payment is not proper.

xi. In this regard kind attention of the Hon'ble Commissioner of Income Tax is invited to the relevant observations of the Hon'ble member in the case of Sachin B Desai Vs ITO ITA NO.2280/KOI/2013 dt.07.08.15 (Copy enclosed).

"It is quite possible that the company has various types of activities and working as commission agent is also a part and such companies work for many types of clients. Quite possible a director might not be aware of names and details of all the clients of the company. The Assessing Officer should have enquired through the sales man of the commission agent or through the buyers of the products of the assesse in order to verify the actual commission given to M/s. Wide Angle Packaging System (P) Ltd for doing the sales on behalf of the assesse against commission. ***The assesse has paid commission by account payee cheque. Due TDS paid, identity of the commission agent is verifiable which are sufficient evidence on record to prove the genuineness of the transaction and creditworthiness and identity of the so called commission agent.*** *In view of the above I am of the view that the entire commission is allowable.* This ground of appeal is allowed". (emphasis supplied).

8.5 In the light of the above submissions, the ld. AR submitted that the revenue authorities have not justified to disallow the claim of commission payment simply/based on the presumptions and assumptions especially when each one of the agents have categorically confirmed the receipt of agency commission. He, therefore, pleaded the bench to delete the addition made on this count. He relied on the following decisions:

1. Sachin B. Desi Vs. ITO, ITAT Kolkata dt. 07/08/2015.
2. Pinkcity Industries Vs. ITO – Rajasthan High Court, D.B. Income Tax Appeal No. 290/2010.
3. Smt. B. Subhadra Vs. ITO, 92 ITD 285 (Hyd.
4. ITO Vs. shyam Sunder Jajodia, 26 SOT 541 (Delhi)
5. CIT Vs. Printers House (P) Ltd., 188 Taxman 70 (Delhi)
6. CIT Vs. Siddartha Trade Links Pvt. Ltd., ITAT Delhi, 08/12/2011.

9. Ld. DR, on the other hand relied on the order of CIT(A).

10. Considered the rival submissions and perused the material on record. We observe that assessee had claimed commission payment as expenditure and paid through banking channel and deducted TDS as per the provisions of I.T. Act. The issue before us is, AO after recording statement of all agents came to conclusion that all the agents are not genuine as they do not have any basic information of doing any business with the assessee. The same view was ratified by ld. CIT(A). We notice from the statement recorded from agents that all have confirmed the receipt of commission and declared the same as income in their respective returns. From the statement, we notice that few agents are either house-wives, students or retired personnel. They do not have any information of the transaction carried on with the assessee but all of them had a direct link with the assessee as their husbands, parents or one of the family members, who are in direct contact with the assessee. It shows that the subordinates or family members have assisted in carrying out the agency business for the recipient of the commission.

10.1 Coming back to ld. CIT(A)'s observation that there is no contract in existence. It is not necessary that all agents should have written agreement. Generally, these businesses are run on the basis of referral and prompt collection of sale proceeds. The agents refer the clients and collects the commission as soon as the sale proceeds are collected as per the contract terms. There is no question of breach in these type transactions, until the sale proceeds are realized, no agent is eligible to claim and as soon as sale proceeds are received, the due commissions are settled. It is clear from the record that assessee has not claimed any bad debts in these years under consideration.

10.2 With regard to genuineness, assessee has declared the profit and commission consistently over the years and the results are (refer

financial results submitted by ld. AR) consistent. We also notice that assessee has not claimed any bad debts in the statement of accounts, it shows that the sales are genuine and the agents promptly collects the sale proceeds.

10.3 Further, ld. CIT(A) has brought on record that the agents have declared the commission as income in their return and all have claimed refund. We find it difficult to understand, on what way, it will decide the genuineness of transaction in the case of assessee, particularly, when there is no finding that the assessee has received back any commission or enjoyed any benefit out of this transaction except achieving targeted sales.

10.4 CIT(A) observed that assessee made the payment to certain persons ostensibly and has not established the services rendered by them. She further observed that it can be called gratuitous payments to persons known to assessee, but, she could not establish the relationship with the assessee but expressed that it is not clear whether they are relatives, but, they were not strangers either. Further, she held that there is a preponderance of probability to conclude that the payments did not constitute for remuneration for services of agency. At the same time, she allowed a random amount of Rs. 5 lakhs as commission without any basis.

10.5 She failed to consider the other aspects in this case, none of the agents are relatives to the assessee. No businessman will give payment to outsiders on gratuitous basis, particularly, the amount involved are huge. The agents have confirmed that they have received the commission and the other family members or subordinates have assisted them achieve the sales. This aspect cannot be ruled out that no businessman will distribute money on gratuitous basis without taking benefit from such payments. This is also preponderance of probability. Another aspect was also not

considered by ld. CIT(A) that there is no proof that the assessee has received back the alleged commission payment from the respective agents. It shows that the payments are genuine.

10.6 Let us analyse this aspect under judicial view. In the similar situation, the Hon'ble Rajasthan High Court in the case of Pinkcity Industries (supra), has adjudicated as below:

> "*Taking into consideration that the business has gone almost all time and payment was made through account payee cheque, in our considered opinion, the business expenses is wrongly disallowed. Hence, the first issue is required to be answered in favour of the assessee and he ought to have been allowed the expenses which is arising out of the business exigency and in that view of the matter, the observations made in case of S.A. Builders Ltd. CIT(A) 288 ITR 0001Z (SC), the expenses are required to be allowed."*

In the given case, the assessee has maintained sales over the years and carried on the business with the help of only 2 persons to monitor the sales. It is not possible to achieve the volume of 24.52 crores without the services of salesmen or agents. Also all the payments are made through banking channels.

10.7 In the case of ITO Vs. Shyam Sunder Jajodia (supra), the Hon'be Delhi High Court held as under:

> *The assessee claimed a deduction on the ground that he had paid commission to 12 parties. The Assessing Officer rejected the claim of the assessee by observing that there was no agreement for the payment of commission. The Assessing Officer further observed that the assessee failed to prove that expenditure was incurred wholly and exclusively for the purpose of business. On appeal, the Commissioner (Appeals) re-appreciated the controversy and deleted the addition.*
>
> *On revenue's appeal :*
>
> *HELD*
>
> *In order to claim any expenditure not being expenses described in sections 30 to 36 and not being in the nature of capital expenses or personal expenses laid out and spent wholly and*

exclusively for the purpose of business, one's claim has to be examined under the residuary provision of section 37. Hence, in order to be eligible for an expense under this section, one has to fulfil the conditions; (t) the expenditure must not be governed by the provisions of sections 30 to 36, (ii) the expenditure must have been laid out wholly and exclusively for the purpose of the business of the assessee, (iii) the expenditure must not be personal in nature and (iv) the expenditure must not be capital in nature. The expression 'wholly' employed in section 37 refers to the quantum of expenditure, while the word 'exclusively' refers to the motive, objective and purpose of the expenditure.

In the instant case, the assessee had established that payment was made through banking channel. All the payees responded to the query of the Assessing Officer and some of them supplied the information about the services rendered by them. The commission had been allowed in the earlier years and in the subsequent years on similar lines. All the payees were assessed to tax. Their PANs had also been disclosed to the Assessing Officer. The objection of the Assessing Officer was that there was no agreement for payment of commission. It was for the assessee to carry out his business. If he had an understanding with certain person, then it might not be very much necessary to enter into an agreement. The assessee as well as the payees were withstanding to their stand. There was no variance in their conduct. As far as the allegation of failure to produce demonstrative evidence against the assessee was concerned, one had to see the nature of business. The assessee was in the business of sale of plastic dana. The agents were required to send customers for purchase of dana. They could be introduced on phone also. There might not be any demonstrative evidence in certain circumstances but that did not mean that expense was not incurred. The assessee had shown commission income on sale of plastic dana; it suggested that he had carried on business. Thus, all these circumstances were to be seen before making the disallowance. In such circumstances, the disallowance could not be made. The appellate authority had appreciated the facts and circumstances and deleted the disallowances correctly. There was no merit in the instant ground of appeal also. It was to be rejected."

In this case, the assessee has issued appointment letters and the nature of the business is selling of chemicals. The assessee has submitted the agent-wise and chemical wise details before revenue authorities. It shows that the agents or their subordinates had contributed in selling the chemicals.

10.8 In the case of CIT Vs. Printers House (P) Ltd. (supra), the Hon'ble Delhi High Court held as under:

> *1. The question that has been agitated before us pertains to a sum of Rs. 32 lakhs approximately paid as commission by the assessee to several parties. The impugned Order details 18 such persons and also expresses satisfaction that the payments were genuine. Ms. Bansal, learned counsel appearing for the revenue, contends that the payments of commission is not in issue. The argument is that there was no consideration or cause for payment of commission to those parties, since, no services had been rendered by the recipients of commission. This is completely belied by the detailed findings recorded by the Tribunal in paragraphs 7 to 7.13 of the impugned judgment. We note that the Tribunal has also recorded that there is no evidence that commission flowed back to the assessee or that the entries with respect to commission payments were just paper transaction. The following observations being relevant are extracted hereinafter:*
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> *" .. There is no evidence on record to show that the commission was paid to any near relative, family member or sister concern. There is no iota of evidence to show that the payment of commission represented only accommodation entry or was only a paper transaction. There is also no evidence to show that the amount of commission came back to the assessee in any form Since the assessee has given full details including the addresses of buyers and addresses of the agents as well as details of payment etc. the transactions of payment of commission as well as the aspect of rendering services by the commission agents were fully verifiable. However, neither the Assessing Officer nor the learned CIT (Appeals) made any attempt at their end to make probe into the matter for coming to the conclusion that the transactions were bogus, unfair and fraudulent. In our opinion, in absence of any such material on record and in absence of any inquiry conducted to prove the non-genuineness of the transactions the departmental authorities were not justified in disallowing the claim of the assessee which was fully supported by the documentary evidence on record.*
>
> *2. Apart from expressing its satisfaction as to the genuineness of the transaction the ITA T has taken into consideration the fact that commission has been paid and allowed in the past and that the commission percentage is negligible. Ms. Bansal contests this position. The total turnover of the assessee was Rs. 68 crores before tax, inter alia of which included Rs. 25.68 crores of export turnover. The turnover we are concerned with is stated to be Rs. 3.74 crores on which the commission has*

been paid. It has been pointed out by Ms. Bansal that rather than the stated 0.05 per cent the commission, the commission works out to 1.5 per cent in relation to local sales and 7 per cent as far as export turnover is concerned. Even then according to us there remains no reason to doubt these payments. It has been laid down in several decisions of the Supreme Court that the ITAT is a final forum for findings of fact. The High Court would intervene only if a finding appears to be perverse, which we are unable to conclude in the / case in hand."

10.9 In the case of CIT Vs. Siddhartha Trade Links Pvt. Ltd. (supra), the Hon'ble Delhi High Court held as under:

"17. We have heard the rival contentions and perused the records. We find that in view of the voluminous evidence submitted by the assessee in this regard, it cannot be said that assessee, as failed to establish that there was no evidence of rendering the corresponding services by such persons. We find that assessee has duly submitted various documents pertaining to ledger accounts, commission paid, bills raised and correspondences in this regard. The services provided have also been duly explained. It is a settled law that revenue authorities cannot sit into the shoe of the businessman. In this regard, we place reliance upon the decision of the Hon'ble Apex Court in the case of CIT, Bombay Vs. Walchand and Co. Private Ltd. in 65 ITR 381, wherein it was held that "in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively for business, the expenditure has to be adjudged from the point of view of the businessman and not of revenue". Accordingly, we hold that assessee has duly established that sufficient services were rendered for the payment of the commission involved in this regard. Accordingly, we set aside the orders of the authorities below on this issue and decide the issue in favour of the assessee."

In the given case also, assessee has produced the details of sales achieved by the agents by submitting item-wise, agent-wise details before revenue authorities. Further, assessee has filed the relevant books of account relating to agents, payment details, advance tax compliance before authorities. It shows that assessee knows the business he carries on and as per the Hon'ble High Court's observation, it is settled law that revenue authorities cannot sit into

the shoe of the businessman. By referring to CIT Vs. Walchang and Co (supra), in applying the test of commercial expediency for determining whether an expenditure was wholly or exclusively for business, the expenditure has to be adjudged from the point of view of the businessman and not of revenue.

10.10 From the above discussion, it is clear that the assessee has submitted enough evidence in support of utilizing the services of agents in the business and also revenue authorities have not brought any cogent material to show that the payments were come back to assessee and these payments cannot be categorized as gratuitous payments. Therefore, we delete the addition made by the AO. Hence, grounds raised by the assessee are allowed.

10.11 In the result, both the appeals of the assessee in AY 2011-12 and 2012-13 are allowed.

ITA No. 1430/Hyd/2015 for AY 2009-10

11. Briefly the facts in this AY are, the AO during the course of assessment proceedings for AY 2011-12, had enquired into the genuineness of the claim of commission expenditure and had reached a conclusion that the same was not allowable. Based on that finding, he initiated proceedings u/s 147 of the IT Act for AY under consideration and disallowed the claim to the extent of Rs. 28,37,805/-.

12. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) by raising an additional ground challenging the validity of the proceeding u/s 147, which is as under:

> "*The ld. AO, in the facts and circumstances of the case, is not justified in invoking the provisions of section 147 especially when the then AO completed the assessment u/s 143(3) on 23/11/2011.*"

12. The CIT(A) admitted the above additional ground relying on the judgments, inter-alia, NTPC Vs. CIT, 229 ITR 383.

13. Before the CIT(A), it was submitted by the assessee that original assessment u/s 143(3) of the IT Act was made in this case on 23/11/2011. It was submitted that the AO had examined the issue as well as details of the commission expenditure and, after satisfying himself about the same, allowed the same. It was therefore argued that initiation of the reassessment proceedings was not valid.

14. The CIT(A) after considering the submissions of the assessee upheld the action of the AO by holding that the initiation of the reassessment proceedings were valid and she observed as under:

> *"06.0 The submission has been considered. Original assessment u/s 143(3) of the I.T. Act was made in this case on 23.11.2011. In course of the assessment proceeding, the AO had enquired into the claim of the commission expenditure. The assessee had also furnished details of the same. The assessment was made without disallowing the expenditure. That being the case, it could be argued that AO had examined the issue and was satisfied with the explanation. If the AO reached a different conclusion on the same facts, it could be argued that such an action was not appropriate. But, it is not the case where the facts and circumstances of the case were the same when the original assessment was made and when the reassessment was made. As discussed above, he enquired into the issue of commission expenses in case of the assessment proceeding for A.Y. 2011-12 and, based on that finding reached the satisfaction that the expenditure for A.Y. 2009-10 should also be disallowed. The finding of the enquiry for A.Y. 2011-12 constituted a fresh evidence based on which he recorded the reason and initiated proceeding for reassessment for the assessment year under consideration. Hence, it is a case not of mere change of opinion but application of fresh evidence justifying reaching of the different conclusion on the same set of facts. In so far as the payees of the commission were the- same persons as those for A.Y. 2011-12, the application of the adverse finding to the assessment year under consideration was an honest exercise. It is therefore held that the initiation of the reassessment proceedings was valid."*

15. As regards the merits of the addition towards the claim of commission expenditure, following her decision in AY 2011-12, restricted the addition to Rs. 23,37,805/- by giving relief of Rs. 5,00,000/-.

16. In AY 2010-11 also, the CIT(A) upheld the initiation of reassessment proceedings and restricted the addition to Rs. 43,43,887/- by giving relief of Rs. 5,00,000/-.

17. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal, which are common in AY 2009-10 and 2010-11 except the quantum of addition:

> *"1. The order of the learned Commissioner of Income Tax (A) is not correct either on facts or in law and in both.*
>
> *2. The learned Commissioner of Income Tax(A), in the facts and circumstances of the case is not justified in not holding the proceedings initiated u/s 147 as invalid especially when the initial assessment was completed u/s 143(3) of the IT Act.*
>
> *3. The learned Commissioner of Income Tax(A), failed to appreciate the fact that there is no tangible fresh material warranting initiation of proceedings u/s 147.*
>
> *4. The learned Commissioner of Income Tax(A) is not justified in confirming an disallowance of Commission payment to the extent of Rs. 5,00,000/- out of total claim of Rs. 28,37,805/-.*
>
> *5. The learned Commissioner of Income Tax(A), failed to appreciate the fact that the commission payments were already examined and allowed in the assessment initially completed earlier u/s 143(3).*
>
> *6. The learned first Appellate Authority is not justified in confirming the disallowance of the commission payments especially when the Assessing Officer himself has allowed the payments of some agents and the First Appellate Authority herself had allowed further payment of Rs. 5,00,000 on round sum basis.*

7. The learned first Appellate Authority failed to appreciate the fact that the commission payments were through Banking Channels and the recipients unrelated are assessed to tax.

8. The appellant crave leave to add or amend or alter any of the grounds at the time of hearing of appeal."

18. The ld. AR submitted that the notice u/s 148 is issued less than 4 years from the end of the relevant assessment year 2009-10. Hence the proviso to sec 147 may not be directly applicable. However the Hon'ble Income Tax Appellate Tribunal Hyderabad in the case of DCIT Vs. Lee Pharma held that in such cases also the reopening is bad in law if the material facts were disclosed in the original assessment.

18.1 Ld. AR submitted that in the course of the initial assessment in response to the questionnaire issued (page 20 of paper book) the assessee filed the details of commission payments with TDS details. Hence the material facts are available on record and the reopening is bad in law. In any case since the Assessing Officer has no tangible material on record, the reopening is bad in law.

18.2 Further, He also submitted that the judicial authorities have decided that in the absence of tangible material on record, notice u/s 148 cannot be given even within 4 years from the end of the relevant asst.years. For this proposition, he relied on the following cases:

1. Kelvinator, 320 ITR1 560 (SC)
2. Asian Paints, 308 ITR 195 (Bom.)
3. Western Outdoor, 286 ITR 620 (Bom.)
4. Bapalal & Sons, 289 ITR 37 (Chennai)

18.3 On Merits, Ld. AR submitted that the list of commission payments indicated at page 2 of assessment order, the assesse paid commission to 14 members. Out of them 4 members were never examined and the payments to them was accepted as genuine. He submitted that except relying on the iforder for Asst. Order 2011-12,

the Assessing Officer did not bring on record any material to disbelieve the payments to other parties. All the payments were through Bank Channels and the tax was deducted at source. All the agents confirmed the receipt of commissions. None of the agents are related to the assesse and in fact one of the agents is the authorized customs clearing agents to whom commission was paid in connection with services rendered in get the customs clearance for the purchases made by assesse. The said commission is on purchases and not on sales. This shows that the Assessing Officer had disallowed the commission in a routine manner and the CIT(A) erred in sustaining the addition.

18.4 In the light of the above submissions, the ld. AR prayed that the reassessment proceedings may be quashed and the addition may be deleted.

19. Ld. DR, on the other hand, relied on the orders of revenue authorities.

20. Considered the rival submissions and perused the material on record. We find that the AO completed the original assessment u/s 143(3) of the Act after examining the issue as well as the details of the commission expenditure and after satisfying himself about the same, allowed the assessee's claim of commission expenditure. Thereafter, AO reopened the assessment. In the reassessment proceedings, the AO has found no tangible material on record except relying on findings made in AY 2011-12. In this connection, we refer to the following case law:

20.1 In ITO vs. Lakhmani Mewal Das [(1976) 103 ITR 437 (SC)], the Supreme Court held that the powers of the ITO to reopen the assessment, though wide are not plenary. The words used by the statute are "reasons to believe" and not "reasons to suspect". In CIT

vs. Kelvinator Of India Ltd [(2010) 228 CTR (SC) 488], Honourable Supreme Court held that after 01.04.1989, Assessing Officer has power to re-open the assessment u/s 147 provided there is tangible material to come to the conclusion that there is escapement of income from assessment, reasons must have link with the formation of the belief. In CIT vs. Atlas Cycle Industries [(1989) 180 ITR 319 (P&H)], it was held that Assessing Officer will not have jurisdiction to proceed with the reassessment the moment he finds the ground mentioned in the reassessment notice as incorrect or non-existent.

20.2 In the case of Asian Paints, 308 ITR 195 (Bom.), the Hon'ble Court held as under:

> *" It is further to be seen that the Legislature has not conferred power on the Assessing Officer to review its own order. Therefore, the power under Section 147 cannot be used to review the order. In the present case, though the Assessing Officer has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received, it is merely a fresh application of mind by the same Assessing Officer to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator, referred to above, has taken a clear view that reopening of assessment under Section 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for the Respondent No.1 to issue notice under Section 148."*

20.3 In view of the ratio laid down in the above cases, we are of the view that the AO reopened the assessment based on the change of opinion as there is no tangible material found in the reassessment to establish that the income has escaped assessment. In this connection, we refer to the following case laws discussed would

demonstrate what would amount to 'change of opinion' which bars reassessment:

(1) In *Deputy Commissioner of Income Tax Vs. Manak Shoes Co. P. Limited,* (2011) 11 ITR (Trib) 673 (Del), the Tribunal held that where regular assessment had been made under Section 143(3) allowing depreciation of factory building, plant and machinery, and reassessment proceedings were initiated on the ground that depreciation was not admissible since the assessee had no manufacturing activity during the year, the Tribunal found that the matter had been examined during the assessment stage and that there was no fresh information to justify a different inference and notice under Section 148. Though action was initiated within the four year time limit, it was found that it was based on **mere change of opinion** and reassessment proceedings was, therefore, not justified.

(2) In *Consolidated and Fin vest Limited Vs. Asst. Commissioner of Income Tax,* (2006) 281 ITR 394 (Delhi), the High Court held that the doctrine of change of opinion could not be a basis for reopening completed assessments and would be applicable only to situations where the Assessing Officer had applied his mind (in earlier assessment) and taken conscious decision on a particular matter in issue, and it would have no application, where the order of assessment did not address itself to the aspect which was the basis for re-opening of the assessment. The High Court further held that mere production of books of account or other evidence from which the Assessing Officer could have, with due diligence, discovered the material evidence does not necessarily amount to a disclosure within the meaning of the proviso to Section 147 of the Act.

(3) In *Jai Hotels Co. Limited Vs. Asst. DIT,* (2009) 24 DTR 37 (Del), the Delhi High Court has held that there being no new material in the hands of the Revenue leading to view that there was reason to believe that income had escaped assessment, the case is a classic instance of a change of opinion. The High Court further observed that when copies of statement of income, trading account, profit and loss account, audit report etc., were appended to the return filed by the assessee, taking resort to Section 147/148 was unwarranted as it constituted a change of opinion, since the material acted upon had been made available along with return of income.

(4) In *Satnam Overseas vs. Addl. Commissioner of Income Tax,* (2010) 329 ITR 237 (Delhi), the High Court held that the only reason which has been given seeking reopening of the assessment for the years 1997-98 and 1998-99 is that suppression of sales has taken place on account of the fact that when average price of the closing stock is multiplied with the quantity of the sales in the year then the value of the sales would be at a higher figure, than declared by the assessee. Clearly, there is no new material which is alleged to have come to the notice of the Assessing Officer which has caused him to seek reopening of the assessment. Admittedly, the reasons given for seeking reopening of the assessment contains the expression 'perusal of the case record reveals' clearly showing that it is on the basis of the same assessment record as was filed by the assessee, during the relevant assessment years and also scrutinised by the Assessing Officer before passing the orders under Section 143(3). Further, the

new logic, rationale and opinion which has been formed by the Assessing Officer for seeking reopening of the assessment is nothing but a change of opinion and a new approach to the existing facts and material which the Assessing Officer could well have done during the regular assessment proceedings of the relevant assessment years.

(5) In *Commissioner of Income Tax Vs. Eicher Limited,* (2007) 294 ITR 310 (Del), the High Court has taken a view that since the facts and materials were before the Assessing Officer at the time of framing of the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounted to a change of opinion, which would not form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee. The Honorable High Court further observed that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income had escaped assessment and, therefore, the assessment needed to be reopened. The assessee had no control over the way an assessment order is drafted.

(6) In *Commissioner of Income* Tax *Vs. Kelvinator of India Limited,* (2010) 320 ITR 561, the Supreme Court observed that post 01-04- 1989, the power to reopen is much wider. However, **one needs to give a schematic interpretation to the words 'reason to believe' failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen the assessments on the basis of 'mere change of opinion' which cannot be per se reason to reopen.** The conceptual difference between the power to review and power to reassess is to be kept in mind. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre conditions and if the concept of 'change of opinion' is removed, in the garb of re-opening the assessment, review would take place. **One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing officer.** Hence, after 01-08-1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.

20.4 In view of the above discussion, in this case, AO came to conclusion that the payments of commission claimed by assessee are not genuine in AY 2011-12 and he came to conclusion on the same breath that the payments were made in the earlier years are also not genuine even though these assessments were completed u/s 143(3). The findings of AO are mere presumptions and not reached the logical conclusion and not put to test before any adjudicating authorities. If it is allowed to these actions, there cannot be any

completed assessments. The legislature/courts have taken enough precautions to avoid such type of reopening of assessment by mere change of opinion. By relying on the above judicial precedents, in our view, AO has reopened the assessment merely based on presumption and change of opinion. Therefore, the reopening of assessment in AY 2009-10 & 2010-11 are bad in law. Accordingly, ground raised by the assessee is allowed in both the years under consideration.

21. In the result, all the appeals under consideration are allowed.

Pronounced in the open Court on 25th May, 2018.

Sd/-	Sd/-
(P. MADHAVI DEVI)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 25th May, 2018

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Copy to:-

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3) CIT(A) –6, Hyderabad.
4) Pr. CIT - 6, Hyd.
5) The Departmental Representative, I.T.A.T., Hyderabad.
6) Guard File