

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.2945/M/2016
Assessment Year: 2011-12**

**ITA No.6380/M/2016
Assessment Year: 2012-13**

Asst. Commissioner of Income Tax, Circle-7(1)-1, Room No.573, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400 020	Vs.	M/s. Guru ashish Exim Pvt. Ltd., 111, 1 st Floor, Mandvi Navjivan Bldg., 121/127, Kazi Sayed Street, Masjid Bunder (W), Mumbai - 400 003 PAN: AABCG3409P
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Haresh Purushottamdas Shah, A.R.
Revenue by : Shri V. Vidhyadhar, D.R.

Date of Hearing : 09.04.2018
Date of Pronouncement: 12.06.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 25.02.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

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2. The grounds raised by the Revenue are as under:

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A)

erred in deleting the addition made on account of disallowance of commission expenses of Rs. 2,18, 72, 797/- without appreciating the fact that the assessee has clearly failed to prove that the payment of commission is required in its nature of trade.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition made on account of disallowance of commission expenses of Rs. 2,18,72,797/- without appreciating the fact that the assessee has clearly failed to established the commission expenses as genuine.

3. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside to the file of the A.O. or confirm the order of the AO.

4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

3. The issue raised in ground No.1 & 2 is as regards the deletion of addition of Rs.2,18,72,797/- by Ld. CIT(A) as made by the AO by disallowing the commission paid by the assessee when the assessee failed to establish the genuineness of the same.

4. The facts in brief are that the assessee is engaged in the business of trading in export licenses. During the year the assessee paid a total commission of Rs.3,12,46,853/- to various parties the details whereof were submitted before the AO comprising name of the parties, PAN number, amount of commission and TDS deducted. The AO issued notice under section 133(6) of the Act from whom the assessee purchased the licenses and also to whom the assessee sold the licenses besides issuing notices to the recipient of commissions in response to the said various parties submitted their response as under:

Name of the agent	Reply	Remarks
Amit Gupta HUF		Did not submit the specific details called
Alka Bhavesh		

Doshi		for.
Everest Holding Pvt		
Dynasty Finance Pvt. Ltd.	No details	However ledger a/c shows transaction with Sharp Menthol India Ltd who denied involvement of any agent.
Aditya Agarwal	This party stated that it received commission for the transaction with Sharp Menthol India Ltd.	However, M/s Sharp Menthol India Ltd stated they have dealt directly with the assessee.
Anil Kumar Lohia HUF	It stated that the commission was received for transaction through M/s BD Associates & Panama Poly Products Pvt. Ltd.	M/s. BD Associates confirms the involvement of this particular agent. However, other party did not submit any details.
Bhanji K Karia	Notice received unserved.	
Deo Sharan Giri HUF	Notice received unserved	
Amritlal B. Karia HUF	Did not reply	
Akash Jain	He stated that the commission was received in respect of transaction relating to Reliance Inds. Ltd.	However, Reliance Inds denied any such transaction.

5. Further, in response to notice u/s 133(6) M/s Arti International stated that they were directly engaged with the assessee at the time of buying and selling of licenses. The assessee had total transaction of Rs. 2,65,40,090/- with this party.

6. Further, in response to notice u/s 133(6) M/s Amar Singh & Sons stated that they were introduced by their agent Mr. Ravi Sharma. However, no commission has been paid to Ravi Sharma as per the details submitted by the assessee.

7. Further, in response to notice u/s 133(6) M/s Sharp Global Ltd stated that they were directly engaged with the assessee at the time of buying and selling of licenses. The assessee had total transaction of Rs. 35.72 Crores with this party.

8. Further, in response to notice u/s 133(6) M/s Aaron Healthcare & Export Pvt Ltd stated that they were directly engaged with the assessee at the time of buying and selling of licenses. The assessee had total transaction of Rs. 4.45 Crores with this party.

5. In view of the above replies from the various parties the AO issued show cause notice to the assessee and asked to justify the payment of commission which was replied by the assessee vide letter dated 05.02.2014 by submitting that the customers to whom the licenses were sold or from whom the licenses were purchased were not having any direct agents. According to the assessee these agents provide the assessee the information as to availability of licenses and prices to be quoted etc. The assessee further submitted that the information supplied by these agents are kept on record and without keeping such type of information and having agents in the market it is not possible to survive in this line of business. Besides the assessee submitted that the payments were made by account payee cheques, TDS were deducted and none of the agents were related parties. The AO rejected the contention of the assessee and came to the conclusion that 70% of the total commission paid was not genuine and not liable under section 37 of the Act for the various reasons as has been enumerated in para 10 of the assessment order.

6. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by observing that assessee has filed all the details before the AO and the similar commission has been allowed in earlier four assessment years and deleted the order of disallowance.

7. The Ld. D.R. vehemently argued before us that the order of Ld. CIT(A) is totally wrong and against the facts on record. The Ld. D.R. referred to the responses received from the

parties both buyer as well as sellers of DEPB export licenses. In the majority of the cases the parties denied the involvement of any dealer/commission agent who facilitated the purchase or sale of DEPB export licenses and in some cases the parties confirmed that no commission payment was made. Under these circumstances the whole transactions of payment of commission were served with the doubts and as to genuineness of the said transactions. The Ld. D.R. stated that considering the response of various parties to the notices under section 133(6) the AO has rightly disallowed the 70% of the commission. The Ld. D.R. further stated that mere allowance of the same nature of expenses in the earlier four years which was one of the grounds stated by the Ld. CIT(A) for allowing the claim of the assessee is not correct. Finally, the Ld. D.R. submitted that the order of Ld. CIT(A) be reversed and that of the AO be affirmed.

8. The Ld. A.R., on the other hand, submitted that the assessee is engaged in the business of purchase and sale of DEPB export licenses and the nature of business is such that the services of the agents are required to be hired and without which it is not possible for the assessee to carry on its business. The Ld. A.R. submitted by taking us to the paper book page No.22 which comprised the details of commission paid and TDS deduction thereupon and also took us to the details of credit notes registered from 01.04.10 to 31.03.11. The Ld. A.R. also took us through the details of various customers to whom the licenses were sold and the corresponding commission paid after deduction of TDS. The

Ld. A.R. contended that since the buyers and sellers are not aware of the middlemen involvement whose job is to tell the assessee about the availability of these licenses and the potential buyer of these licenses so denial of these parties of any middlemen involvement is quite natural and should not be taken to deny the legitimate claim of the assessee by way of commission. Finally, the Ld. A.R. prayed before the Bench that the appeal of the Department should be dismissed by upholding the order of Ld. CIT(A).

9. We have heard the rival submissions of both the parties and perused the material on record. The facts on record show that the assessee is in the business of purchase and sale of DEPB export licenses. During the year assessee has paid commission of Rs.3,12,46,853/- to various agents who are involved in the purchase and sale of DEPB export licenses. According to the assessee, the AO issued notices under section 133(6) to various parties to verify the genuineness of the commission paid by the assessee. However, in most of the cases the parties denied that any agent was involved in the deal and therefore AO finally disallowed 70% of the total commission claimed during the year. The Ld. CIT(A), on the other hand, deleted the entire addition by passing a very detailed order by reasoning that disallowance on adhoc basis is wrong in view of the nature of business of the assessee and allowance of such expenses in the preceding four financial years etc. Facts on record leave no room for doubt that the assessee, indeed, has paid commission as the AO himself has allowed 30% out of the total commission paid. Dispute is only

with regard to the quantum of the payment. As could be seen from the facts on record some of the purchasers and sellers to whom notices were issued under section 133(6) of the Act have clearly denied the involvement of commission agents for arranging the sale and purchase of such licenses. Therefore, it can not be absolutely ruled out that the assessee to some extent has inflated the payment. Under these circumstances, we are not in agreement with the conclusion drawn by the Ld. CIT(A) that entire disallowance as made by the AO to the tune of 70% of the total commission is incorrect. Under these circumstances, we are of the considered view that a reasonable disallowance has to be made so that any leakage of revenue is brought to tax. Accordingly, we deem it reasonable and fit to restrict the disallowance on account of commission to 15% of the total commissions. The order of Id CIT(A) is set aside and the AO is directed to disallow 15% in place of 70%.

The appeal of the Revenue is partly allowed.

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10. The issue raised is identical to the one as decided by us in ITA No.2945/M/2016. Therefore, our finding in the said appeal would, mutatis mutandis, apply to this appeal as well. Accordingly, the appeal of the Revenue is partly allowed. The

Order pronounced in the open court on 12.06.2018.

**Sd/-
(Saktijit Dey)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 12.06.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.