

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “C” KOLKATA

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1420/Kol/2016
Assessment Year:2012-13

ACIT, Circle-32, 10B, Middleton Row, 2 nd Floor, Kolkata-71	<u>बनाम</u> / V/s.	Jitendra Seth 87, Karnani Estate, 209, A.J.C. Bose Road, Kolkata-700 017 [PAN No.AJHS 9552 M]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Saurabh Kumar, Addl. CIT-SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Miraj D Shah, AR
सुनवाई की तारीख/Date of Hearing	04-07-2018
घोषणा की तारीख/Date of Pronouncement	27-07-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue’s appeal for assessment year 2012-13 challenges Commissioner of Income Tax (Appeals)-9, Kolkata’s order dated 31.03.2016 passed in case No. 749/CIT(A)-9/Cir-32/2014-15/Kol, reversing Assessing Officer’s action disallowing assessee’s commission paid of ₹51,56,694/- as well as partly restricting section 54F deduction disallowance to ₹42,39,181/- out of ₹56,52,242/-; respectively, involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short ‘the Act’

Heard both the parties. Case file perused.

2. Learned Representatives take us the CIT(A)’s detailed discussion *qua* the former issue of assessee’s commission expenditure disallowance reading as under:-

“4.2 Ground No.2: This ground is against the disallowance of commissions expenses of Rs.51,56,694/- claimed by the assessee as a deduction in computing the income. I have perused the assessment order and considered the written submission and oral submissions made by the Authorised Representative of the appellant. I find that the assessee is engaged in the business of man power recruitment under his proprietary concern Ms Career Probe. On perusal of the audited accounts of the year under consideration I find that the books of account of the concern were duly audited u/s44AB of the Income Tax Act 1961. The appellant had a gross receipt of Rs.198.70 Lakh and against this the appellant had earned a net profit of Rs45.34 Lakh. The appellant had claimed commission expenses of Rs.79.55 Lakh as expenses in the profit loss account. The AO issued notices to the persons who were placed by the appellant to verify if the party to whom commission was paid had rendered any services. As per the AO all these parties refused using the services of the commission agent and hence while assessing the appellant disallowed a sum of Rs.51,56,694 on account of commissions expenses and held that the assessee failed to establish that the expenses were incurred for the purpose of assessee business.

4.3 I find that the assessee has fled the details and evidences with respect to the parties to whom the commission was paid. The details available include:

- (a) Name & address of the Agents
- (b) PAN details of the Agents
- (c) Bill issued by the Agents
- (d) Detail of the services rendered i.e. name of candidate and to which company the candidate was placed.
- (e) TDS on the payment to agents was duly deducted as per law
- (f) The payments to the agents were made by account payee cheque the gents whose commissions the AO disallowed as not for the purpose of business were as follows:

Sl.No.	Name of commission agents	PAN	Gross commission
1	Pradip Jiswal	ACXPJ 1983G	5,00,000
2	Ragav Trust Rahul Trust	AAATR 3121P AAATR 4724Q	5,00,000 5,00,000
4	Urmila Devi Jiswal	AGHPJ 0842Q	2,30,000
5	Reema Jaiswal	AJNPJ 7607C	2,20,000
6	Kiran Jaiswal	AKYPJ 5714C	1,25,000
7	Ashok Kr Jaiswal	ACWPJ 3917D	3,00,000
8	Jayant Jaiswal	AKYPJ 5737F	1,25,000
9	Seema Jaiswal	AILPJ 3705A	3,00,000
10	Durgadas Karmakar	AAFHD 9208Q	2,00,000
11	Sujata Karmakar	ATGPK 0744 G	1,50,000
12	Manas Kanjilal	AFCPK 7807G	3,00,000
13	Parth Pratim Bhattacharjee	ADVPB 8331 P	85,000
14	Kabita Jaiswal	AILPJ 3706D	3,25,000
15	Triveni Prasad Jaiswal	AGHPJ 0841P	2,25,000
16	Anil Kr Bhuwalka	AACHA 5021M	1,20,000
17	HUF	AQZPB 3362M	3,15,000
18	Rahul Bhuwalka	BBJPB 7165G	1,85,000
19	Avisek Bhuwalka Rohit Bhuwalka	BCCPB 7484G	1,80,000
20	Sunil Kr Bhuwalka	AAFHS 5744G	2,00,000
21	Plentitude Inc	AAMFP 2628M	22,286
22	Manjula Chndrasekher	AMWPK 7829D	34,438
23	Omprakash Yadav	AAJPY 8595K	90,000
	Total		51,56,694

In the assessment proceedings the AO has issued notices u/s 133(6) of the IT Act 1961 to the allowing persons whom were placed by the appellant and the responses to the notice issued by the AO are also available in the table below:

S.No.	Name of the candidate	Placement fees received	Commission paid	Remarks
1	Rohit Dhondy	4,14,166.67	5,00,000	Commission paid is more than placement fees received
2	Vineet Chhabra	34,82,925.00	4,50,000	Not referred by anyone
3	Mark Poply	9,60,000	4,50,000	Refused having utilized your services
4	Rajiv Bhatia	8,50,170.00	4,25,000	Not referred by anyone
5	Suresh Kasi	5,95,833.34	3,50,000	Not referred by anyone, specifically denies knowing the person to whom commissions has been paid
6	Deepti Verma	7,33,480.00	3,50,000	Refused having utilized your services
7	Vinod Zutshi	6,49,425.00	3,00,000	Not referred by anyone
8	Nagendra ED	2,86,500.00	85,000	Not referred by anyone
9	Ankhi Das	10,18,155.00	5,50,000	Refused having utilized your services
10	Subhayu Basu	16,00,000.00	8,00,000	Not referred by anyone
11	Seema Trivedi	4,60,000.00	2,00,000	Not referred by anyone
12	Dhananjay P Kulkarni	1,81,250.00	56,694	Reused having utilized your services
13	Katyashini Sivaraj	3,41,000.00	90,000	Not referred by anyone
12	Dhananjay P Kulkarni	1,81,250.00	56,694	Refused having utilized your services
13	Katdyashini Sivaraj	3,41,000.00	90,000	Not referred by anyone

4.4 I find that the assessee is engaged in man power placement. In this business, as explained by the appellant the business process of the assessee is to place senior level executives in very big corporate houses. The assessee first takes a mandate from the company to place the required manpower. Then the assessee starts the manpower search. The human resources required being very senior level official, the assessee most of the times cannot advertise openly for the manpower requirements. This is required to ensure confidentiality of such information being shared in general public. The assessee uses data base available on portals like Naukri.com etc but as the profile of the candidates being in very high positions, such quality of data base is not available most of the times. It is a common knowledge that good quality manpower is pouched by companies. In fact many senior bureaucrats are also being pouched by the Corporates. Therefore given the senior profile and sensitive position of the

companies and candidates the nature of the assessee's business is such that it has to rely on discreet information. Such discreet information is available directly from the prospective candidate who meets the requirement of the client and is ready to leave his/her present assignment and take a new job. Only if this information is available then the assessee is able to move further. This information is available only with the persons who has direct knowledge that a particular candidate is interested in leaving his/her existing job or such information is available indirectly i.e. a close associate of the proposed candidate reveals such information about the interest of the candidate to change his job. This is the most important and vital information in the business of the assessee. This role of sharing information about the candidate being available for change of job is the key in this business. The assessee had claimed to have made payments for these services to the said agents or persons giving leads. Unless the person to whom the payment was made was not examined no adverse inferences could be drawn. The AO in this case failed to make any inquiries with the commission agents. Thus the AO failed to make any inquiries with the commission agents. Thus the AO failed to understand the entire business process and the AO also failed to correctly investigate the matter. Unless the agents were not examined by the AO it was not possible for him to come to a finding with respect to the fact that the expenses were incurred for the purpose of the business or not. I find that on this very issue the Assessing Officer has not brought any evidences against the assessee. In my opinion the AO cannot, merely on the inquiry with the candidates come to the conclusion that the commission expenses were not incurred for business. Impugned order rather find that the inquiry with the candidate was irrelevant is also demonstrated by the assessment order itself. Impugned order find that the most of the candidates have stated that they have not utilized the services the appellant itself. If this is true then the commission receipt of the appellant is also not arising or accruing from placement of these candidates. While the companies where these candidates were placed have paid the appellant the commission and the same was duly assessed and accepted by the AO. The AO is thus accepting the income of the appellant as income from placement fees despite the fact that the candidate had disputed that the appellant and not render any services. This shows that the candidates are even disputing that role of the assessee in the placement. This fact rather demonstrates that the candidates hardly are aware and or hardly keep in mind the persons who were involved in their placement. In such circumstances it the AO is not justified in to expect that a candidate would remember who contacted him for his placement job which took place 2-3 years ago. This appears to be next to impossible in the facts and circumstances of the case. In most of the cases the placement agents represent themselves as representative of the company. As far the candidate is concerned he is interacting with the representative of the company. The candidate is not concerned if the person contacting him is an employee of the company or an outsourced agency. The assessee has relied on various case laws. I find most of the case laws apply to the case of the appellant hence the same are not once again reproduced in the order. I find that the appellant has made the commission by account payee cheques, the appellant has produced full details of commission expenses including complete details including payment by cheques bills and recipients income tax PAN details, the name of candidates and their CV and the job to which they were placed was also provided I thus find that the AO failed to carry out any relevant enquiry in this respect. I find that in the preceding year i.e. assessment year, the assessee was engaged in the same business and also taken services from the parties and paid commission to them and no disallowance was made by the AO. I also find that in AY 2013-2014 the assessee case was assessed u/s.143(B) of the IT Act 1961 by the same office and the commission expenses paid were duly accepted in scrutiny assessment and no disallowance were made. I therefore hold that the commission expenses were incurred for the business of the assessee. The Hon'ble Supreme Court has held in the case of Sasoon David & Co. Pvt. Ltd. vs. CIT, 118 ITR 261 that it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. It was also held by the Bombay High Court in CIT vs Sigma Paints Ltd 188 ITR 6 that payment of commission is an allowable expenditure if the same is incurred wholly and exclusively for the purpose of business carried on by the assessee. Hon'ble Gujarat High Court in the case of Swastik Textiles Co. Pvt. Ltd. 150 ITR 55 upheld the contention of the assessee about

allowability of commission payment on the ground that there was no evidence to support the finding of the Tribunal that services had not been rendered by the commission agents. Hon'ble Supreme Court has also held in the case of Dhanraj Giriji Raj Narshingh Raj, 91 ITR 544 that it was for the assessee to decide how best to protect his own interest and it was not open to department to prescribe what expenditure the assessee should incur and in what circumstances he should incur such expenditure.

4.5 in the case of the appellant there is no dispute to the fact that the assessee has made payments towards commissions to the above-named parties by way of account payee cheques and deducted TDS thereon. These parties have confirmed the transaction. All these parties are Income Tax assessee and all such details were placed before the AO by the assessee. Considering the above cases and the facts of the case before us, I am of the considered view that the disallowance made by the AO is not justified. I hold that the said expenditure has been incurred by the assessee in the course of his business and it is for assessee as to how to run his business. The Department is not justified to state that there was no need to appoint commission agent and, therefore, expenditure incurred was not required. I therefore hold that the said expenditure is an allowable expenditure. This ground is allowed.”

3. We have given our thoughtful consideration to rival contention. Learned Departmental Representative reiterates assessment findings that the assessee's alleged commission agents did not support its case during their respective statements. We find no merit in the instant argument. It has come on record that this assessee is engaged in highly level employees' requirement business. He declared income from the said business activity amounting to ₹198.70 lakh along with commission of ₹79.55 lakh debited in the profit and loss account. The Assessing Officer disallowed a part thereof to the extent of the impugned sum of ₹51,56,694/- mainly on the ground that the corresponding parties did not support his case. We make it clear that all the corresponding payments have been subjected to TDS; wherever necessary. There has not been any enquiry on part of the Assessing Officer to find out as to whether all these parties who have not supported assessee's case have claimed the corresponding TDS credit or not in respective tax records. Coupled with this, we find that the Assessing Officer has also not carried out the necessary verification on assessee's ultimate customers/clients who have appointed the highly qualified personnel through the assessee. The Revenue further fails to rebut the fact that similar commission payments have already been accepted as allowable in latter assessment years (supra). We therefore take into account all these facts and circumstances to uphold the CIT(A)'s findings deleting the impugned disallowance under challenge. The Revenue's instant former substantive ground fails accordingly.

4. This leaves us with Revenue's latter grievance seeking to revive Assessing Officer's action disallowing u/s 54F deduction claimed of ₹56,52,242/- as reversed to the extent of ₹42,39,181/- in CIT(A)'s order under challenged as follows:-

"4.6 Ground No.3 & 4: Both these grounds are interrelated and hence they are taken up for disposal together. This ground is against the rejection of the claim u/s. 54F of the Income Tax Act for Rs.56,52,242/ The brief facts of the case is that the assessee sold a land at Hasur Sarjapura Road, Bangalore for Rs.2,52,00,000 against this he paid a brokerage on sale for Rs.3,60,000. Thus the net sale consideration as per the assessee was Rs.2,48,40,000. The assessee had purchased this property in the year 2005-2006 for a consideration of Rs.47,44,163 and the indexed cost of the property was determined at Rs.74,93,295. Thus the capital gains was determined at Rs.173,46,704/-. Out of this the assessee invested Rs.50,00,000 was deposited in bonds eligible u/s. 54FC of the IT act 1961 and the balance amount of capital gains of Rs.1,23,46,704 was liable for tax. Out of this amount the assessee claimed that he had invested a sum of Rs.8093,855 in construction of a residential house and accordingly the assessee claimed a deduction u/s.54F of the Act for Rs.56,52,242 and on the balance amount of capital gains for Rs.66,94,461 the assessee offered the same to tax and paid the tax thereon.

4.7 In the assessment proceedings the AO issued notices and obtained the sanction plan and found that the building was sanctioned as commercial cum residential building. The AO show caused the assessee to explain the issue to this the assessee submitted that the plot was residential and there was no demarcation of the commercial and residential portion on the date when the return was filed as the building was under construction at that time. Thus the appellant stated that he was advised to claim on the entire amount. However in the assessment proceedings the appellant submitted that the deduction may be restricted to the residential portion of the said house.

4.8 The AO however was of the opinion that as the building was both residential and commercial the deduction u/s 54F of the Act was not applicable and hence the disallowed the entire claim of the deduction made by the appellant. The AO also had issued commission to the ITO Bangalore the visit the site and the said ITO on visit to the found that the building was in a structure form and had a glass façade. Without observed that the building comprised of basement, silt area, ground floor, first floor, second floor terrace and lift and as per the AO the 2nd floor was only residential. The AO then held that as per his estimate the cost of construction of 2nd floor was to be determined by dividing the entire area for the building including terrace and lift room etc and the cost for the second floor was to be estimated at 15% lower than the average cost. The AO thus held that even if the deduction was to be allowed the deduction should be Rs.14,98,481 instead of Rs.56,52,242.

4.9 I have perused the assessment order and considered the written submission and oral submissions made by the Authorised Representative of the appellant. I find that the building was sanctioned as residential and commercial building however on physical verification of the building by the ITO t Bangalore no commercial activities were found to be conducted on the said building. The building comprised of ground plus three stories and also had common service area including basement, stilt floor,

terrace and lift. The area of the each floor was 154.32 sq. mts. And the total area of the building was 715.36 sq. mts.

4.10 I find that the provisions of Section 54F of the IT Act 1961 is a benefit giving section and the same should be constructed liberally. Once an assessee falls within the ambit of a beneficial provision, then the said provision should be liberally interpreted. The Apex Court in the case of *Bajaj Tempo Ltd.* 196 ITR 188 (SC). A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally, and since as provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not frustrate it. While interpreting the various provisions, the Court must not adopt a hyper technical approach and to apply cut-and-dry formula. A pragmatic approach should be adopted so that the object of the introduction/insertion of a particular provision could be achieved. [Similar views have been expressed in *Juggilal Kamlatpat v CIT* [1969] 73 ITR 702 (SC); *CIT v. Strawboard Manufacturing Co. Ltd.* [1989] 177 ITR 431 (SC) at page 434 and *CIT v. South Arcot District Co-operative Marketing Society Ltd.* 176 ITR 117 (SC) at page 119]. The Supreme Court in *CCE versus Favourite Industries*, (2012) 7 SCC 153 has observed:-

'21 Furthermore, this Court in *Associated Cement Companies Ltd. v. State of Bihar* [(2004) 7 SCC 642], while explaining the nature of the exemption notification and also the manner in which it should be interpreted has held: SCC p. 648, para 12)

“12. Literally, exemption is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially, in a growing economy. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden of progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking, liberal and strict construction of an exemption provision is to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in the nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. (See *Union of India v. Wood Papers Ltd.* [(1990) 4SCC 256: 1990 SCC (Tax) 422] and *Mangalore Chemicals and Fertilisers Ltd. v. CCT* [1992 Supp (1) SCC 21] to which reference has been made earlier.)”

22. In *G.P. Ceramics (P) Ltd. v. CTT* (2009) 2 SCC 90], this Court has held: (SCC pp. 101-102, para 29)

“29. It is now a well-established principle of law that whereas eligibility criteria laid down in an exemption notification are required to be construed strictly, once it is found that the applicant satisfies the same, the exemption notification should be construed liberally. [See

CTT v. DSM Group of Industries [(2005) 1 SCC 657] (SCC para 26); ITSCO Ltd. v. State of Jharkhand [(2005) 4 SCC 272] (SCC para 42-45); State Level Committee v. Morgardshammar India Ltd. [(1996) 1 SCC 108]; Novopan India Ltd v. CCE & Customs [1994 Supp (3) SCC 606]; A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala [(2007) 2 SCC 725] and Reiz Electrocontrols (P) Ltd. v. CCE. [(2006) 6 SCC 213]”

4.11. In this case the deduction u/s. 54F it is required that the investment should be made in a residential house. In this case it is seen that the appellant had made an investment in the residential house. The said house was sanctioned to be both residential and commercial. Therefore in my opinion the appellant satisfied the condition of the investment in a residential house and thus the section must be constructed liberally to grant deduction to the appellant to the extent of residential house investment. I therefore hold that the appellant was entitled to deduction u/s 54F of the Act on the investment made in the residential portion. Having held so, it is relevant to segregate the residential and commercial area. The ITO at Bangalore has physically inspected and found that there was a structure and no commercial activity was found. The AITXO opined that as there was a glass facade and this gives a commercial look to the building. However, factually no commercial activity was found to be done in the said premises. I further find that the AO method of determination of residential area is not backed by any basis. The AO came to a conclusion that only 2nd floor is to be treated as residential is not supported by any basis. It is well known that ground floor of buildings are used for commercial activities and such practice is seen all over the Country and therefore I hold that the ground floor area be held to be commercial in nature and the rest three floors are held to residential in a nature. I further hold that the basement, stilt, terrace and lift room are a part of the common area of the entire building for common use by all the occupants hence this area also is to be considered 25% commercial and 75% residential area. I also hold that the best method to determine the cost of construction is to spread the total cost over the four floors equally and accordingly I direct that 25% of the investment should be considered to be made for commercial area and 75% of the investment should be considered to be made for residential area. I therefore hold that the deduction u/s.54F of the IT Act 1961 should be restricted to 75% of the claim made by the appellant. I therefore determine the deduction u/s 54F of the Act at Rs.42,39,181 (75% of Rs.56,52,242) and the AO is directed to recomputed the capital gains accordingly. This ground is partly allowed.”

Learned Departmental Representative vehemently contends that Assessing Officer had rightly made the impugned disallowance as the assessee had not fulfilled the relevant conditions for claiming section 54F deduction in question. We do not find any dispute between parties about the assessee having transferred his relevant capital asset followed by re-investment of the consequential capital gains is new asset which happens to be both residential as well as commercial. The Revenue's endeavour is to disallow the entire deduction component *qua* the re-investment of assessee's capital gains made in the new building comprising of four floors. We make it clear that

taxpayer is very fair in declaring the ground floor of his new house as used for commercial purpose as against the remaining three upper floors taken as a residential unit. The question that arises for our consideration is as to whether the CIT(A) has rightly apportioned assessee's deduction to 25% is to 75%; floor-wise or not. Our instant adjudication supports the CIT(A)'s action to this effect as he has rightly proceeded on an assumption that section 54F is a deduction provision to be liberally construed. This is not the Revenue's case that the 3 floors of the building in question are not used for residential purposes. We therefore affirm the CIT(A)'s findings under challenge restricting the assessee's deduction claim to the extent residential portion of the building only by treating the same to be "a residential house" as per the true legislative intent u/s 54F of the Act. The Revenue fails in its instant latter substantive ground as well.

5. This Revenue's appeal is dismissed.

Order pronounced in open court on 27/07/2018

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 27/07/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ACIT, Circle-32, 10B, Middleton Row, 2nd Floor, Kolkata-71
2. प्रत्यर्थी/Respondent-Jitendra Seth, 87, Karnani Estate, 209,AJC. Bose, Road, Kol-17
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary,
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता