

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A", KOLKATA**

**BEFORE SH.P.M.JAGTAP, ACCOUNTANT MEMBER AND
SH. S.S.VISWANETHRA RAVI, JUDICIAL MEMBER**

**ITA No.976/KOL/2017
[Assessment Year: 2013-14]**

Zenith Fish Corporation, B/52, Diamond Park, Joka, Kolkata-700104. PAN-AAAFZ3455E	vs	Pr. CIT-9, Kolkata.
(Appellant)		(Respondent)
Appellant by	Sh. K.M.Roy, FCA	
Respondent by	Sh. P.K.Srihari, CIT DR	
Date of Hearing	19.06.2018	
Date of Pronouncement	27.07.2018	

ORDER

PER P.M.JAGTAP, ACCOUNTANT MEMBER

This appeal filed by the assessee is directed against the order of Ld. Pr. CIT-9, Kolkata dated 16.03.2017 passed u/s 263 of the Income Tax Act, 1961 (in short "Act").

2. The assessee in the present case is a partnership firm which is carrying on the business as commission agent from fisheries. The return of income for the year under consideration was filed by it on 26.09.2013 declaring a total income of Rs.15,25,460/- . In the assessment completed u/s 143(3) vide an order dated 05.11.2015, the total income of the assessee was determined by the AO at Rs.50,56,052/- after making the following three additions:-

- | | | |
|-------|---|-----------------------|
| (i) | <i>Unexplained expenditure u/s 69C</i> | <i>Rs.36,141/-</i> |
| (ii) | <i>Disallowance of commission paid to one of the partners M/s Rista Fisheries & Infrastructure Ltd.</i> | <i>Rs.34,53,003/-</i> |
| (iii) | <i>Disallowance u/s 43B</i> | <i>Rs.41,448/-</i> |

3. The records of the assessment made u/s 143(3) of the Act came to be examined by Ld.CIT. On such examination, he found that a commission of Rs.80,71,911/- was paid by the assessee to one of its partners namely M/s Rista Fisheries & Infrastructure Ltd. Although the said commission to the extent of Rs.34,53,003/- was disallowed by the AO, Ld.CIT was of the view that the same should have been disallowed by the AO entirely as per the provision of section 40(b)(v) of the Act. According to him, as per Explanation 4 to section 40(b)(v), only an individual could be treated as a working partner and not the company and the order of the AO passed u/s 143(3) allowing commission to the partner company to the extent of Rs.46,18,908/- was erroneous as well as pre-judicial to the interests of the Revenue. He therefore, issued a show cause notice to the assessee u/s 263 of the Act in response to which it was submitted on behalf of the assessee that there would be Double Taxation of the same amount if the commission paid to the partner company had been disallowed and added to the income of the assessee. It was also submitted on behalf of the assessee that the claim of the assessee for deduction on account of commission paid to the partner company was duly examined by the AO and after applying his mind, a relief of Rs.46,18,908/- was allowed by him on this issue. After taking into consideration the submissions made on behalf of the assessee, Ld. CIT held that the AO had not pursued in-depth inquiry in different way before allowing the claim of the assessee for commission paid to its partner company to the extent of Rs.46,18,908/-. He accordingly held the order passed by AO u/s 143(3) to be erroneous as well as pre-judicial to the interests of the Revenue and setting aside the same, he directed the AO to make the assessment afresh on the issue of allowablility of commission paid by the assessee firm to its partner company M/s Rista Fisheries & Infrastructure Ltd. vide his order dated 16.03.2017 passed u/s 263 of the Act. Aggrieved by the order of Ld. CIT, the assessee had preferred this appeal before the Tribunal.

4. Ld. Counsel for the assessee invited our attention to the relevant portion of the assessment order at page No.2 & 3 to show that the issue relating to the assessee's claim for deduction on account of commission paid to its partner company M/s Rista Fisheries & Infrastructure Ltd. was duly examined by the AO and after applying his mind, the claim of the assessee for the said deduction of Rs.80,71,911/- was disallowed by the AO to the extent of Rs.34,53,003/-. He contended that the issue relating to the assessee's claim for the said deduction thus was not only inquired into and verified by the AO but while deciding the same on application of his mind, a possible view was taken by the AO. He contended that Ld.CIT, therefore, was not justified in revising the order of the AO on the said issue by exercising his powers u/s 263 as it is not permissible for him to substitute his own view in the place of possible view taken by the AO.

5. Ld.DR on the other hand contended that the entire commission paid by the assessee firm to its partner company should have been disallowed by the AO keeping in view the specific provisions contained in section 40(b)(v) and the issue relating to Double addition/taxation of the said amount was not a relevant consideration for over-looking the specific provisions contained in Explanation 4 to section 40(b)(v). He contended that there was thus a clear-cut error in the order of the AO passed u/s 143(3) in allowing the relief of Rs.46,18,908/- to the assessee on this issue and Ld.CIT was fully justified in revising the order of the AO by exercising the powers conferred upon him u/s 263.

6. We have heard the arguments of both parties and also perused the relevant material available on record. It is observed that even though the order of the AO passed u/s 143(3) was treated to be erroneous by Ld.CIT on the ground that there was an error on the part of the AO in allowing the claim of the assessee firm for the commission paid to its partner company M/s Rista Fisheries & Infrastructure Ltd. to the extent of Rs.46,18,908/-, a perusal of the impugned order passed by him

u/s 263 of the Act clearly shows that the order of the AO u/s 143(3) was finally set aside by him by treating the same as erroneous on the ground that the AO had not pursued an in-depth inquiry in diligent way before allowing the claim of the assessee for such commission entirely. He accordingly directed the AO to make the assessment afresh on the issue of allowability of commission paid to the partner company M/s Rista Fisheries & Infrastructure Ltd. after conducting the necessary inquiries. As contended by Ld. Counsel for the assessee in this regard, the issue relating to the assessee's claim for such commission was duly examined by the AO and on such examination, the commission of Rs.80,71,911/- paid by the assessee firm to its partner company was disallowed by the AO to the extent of Rs.34,53,003/- thereby giving a relief of Rs.46,18,908/- to the assessee. He has also invited our attention to the relevant portion of the assessment order wherein this issue was considered, discussed and decided by the AO as under:-

“Further, on perusal of the return of income filed by the assessee firm as well as evidences produced by the A/R it was observed that the assessee firm is commission agent and derived commission from fish sale on behalf of the customers. During the course of scrutiny proceedings Mr. Srimanta Chakraborty one of the partners of the firm was asked to explain why the commission amounting to Rs. 80,71,911/-paid to Srimanta Chakraborty as a representative heirs to act all the formalities on behalf of the domestic company namely M/s. Rista Fisheries & Infrastructure Ltd one of the partners of the firm would not be disallowed being the commission paid to a domestic company. However, the company was represented by one of the Directors Mr. Srimanta Chakraborty who was duly authorized by the company in this behalf.

As a representative heir of the domestic company Mr. Chakraborty explained that any payment of salary, bonus, commission or remuneration by whatever name called hereinafter referred to as "remuneration" to any partner who is a working partner, or of interest of any other partner, which, in either case, is authorized by, and is in accordance with, the terms of the partnership deed is an allowable component in the hands of partnership at the time of

ascertaining book profit as well as profit for the year under consideration in which such sum is paid or payable as per provision of section 40(b)(iii) of the I.T. Act, 1961. Moreover, any payment of remuneration paid by any firm to its working partners should be allowable as per provision of section 40(b)(v) of the I.T. Act, 61 to ascertain the maximum limit of expenses can be defrayed under this nomenclature "Parters' Remuneration'.

On perusal of the reconstituted partnership deed dated 17.12.2009 M/s. Rista Fisheries & Infrastructure Ltd a company incorporated under the Indian Companies Act, 1956 having its registered office at 282, Diamond Harbour Road, Behala, Kolkata-700034 was included as a incoming partner to the firm M/s Zenith Fish Corporation and will be represented by one of the directors Mr. Srimanta Chakraborty on behalf of the company as per board resolution dated 17.12.2009 who is also an existing partner of the firm. Further, it was agreed that the new partner would not be entitled to get any kind of Remuneration but will receive commission and share of profit or loss of the firm. In this context reliance may be placed as per provision of section 40(b) (v) of the Income Tax Act, 61 explanation - 4 as envisaged

"For the purpose of this clause, working partner means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner".

If the commission paid by the firm to the authorized representative Mr. Srimanta Chakraborty for his own service rendered then entire amount of commission should have been reflected as business income derived from the firm in the individual return of income filed by Mr. S. Chakraborty for the year under consideration. But the entire commission of Rs. 80,71,911/- reflected in the books of accounts of the company M/s. Rista Fisheries & Infrastructure Ltd and brought into tax for the F.Y. 2012-13 relevant to the A.Y. 2013-14. So, the commission paid to the company cannot be allowed as per provision of u/s 40(b) (v) explanation - 4 of the I.T. Act. 61.

Mr. S. Chakraborty, A/R contradicted with the bone of contention of the issue raising the question of double taxation on the amount of commission paid by the firm to the company as the income was brought into tax by the company in the same year. If the amount of commission is disallowed in the hands of firm then it cannot be the taxable income in the hands of company.

Simultaneously, company paid directors remuneration to its existing five directors amounting to Rs. 36,30,000/-. Out of which only Rs. 31,30,000/- was brought into tax by four directors individually for the A.Y. 2013-14 as business income and paid tax accordingly at the maximum marginal rate i.e. 30% except one Mr. Swapan Bose received remuneration of Rs. 5,00,000/-. So, the entire amount of commission reduced by the amount of Rs. 5,00,000/- paid by the firm to the company should be allowed.

In view of the facts and figure of the case as well as explanation taking into consideration offered by Mr. S. Chakraborty, A/R of the firm commission paid by the firm cannot be allowed at any cost but the profit element offered by the company and the directors remuneration paid by the company to its four directors to the tune of Rs. 14,88,908/- and Rs. 31,30,000/- respectively are reduced e admissible amount due to maximum tax rate @ 30% for both the amount paid by the firm and directors. If entire amount of commission paid by the firm is disallowed reciprocal effect would be given to the directors and company. So, to avoid intricate as well as corrugated Income Tax proceedings both the amount of Rs.46,18,908/-(Rs.31,30,000/- + Rs.14,88,908/-) as directors remuneration and profit offered by the company is allowed and reduced from the amount of commission paid. The balance amount is ratified for addition would be provident to the prejudicial interest of revenue. Hence, balance commission amount of Rs.34,53,003/- (Rs.80,71,911/- - Rs.46,18,908/-) paid by the firm is disallowed and added back to the total income.”

7. A perusal of the relevant portion of the assessment order as reproduced above clearly shows that the issue relating to the claim of the assessee for deduction on account of commission paid to its partner company M/s Rista Fisheries & Infrastructure Ltd. was examined by the AO in the light of the relevant provisions of Act including Explanation 4 to section 40(b)(v) and after making necessary inquiry in the relevant facts of the case, the claim of the assessee was allowed by him partly for the specific reasons given elaborately in the assessment order. As rightly contended by the Ld. Counsel for the assessee, this issue thus was duly verified /examined by the AO during the course of assessment

proceedings by conducting the necessary inquiry and after applying his mind, a possible view was taken by him on merit while partly allowing the claim of the assessee for deduction on account of the commission paid to its partner company. In our opinion, there was thus no error in the order of the AO passed u/s 143(3) as alleged by Ld.CIT in his impugned order passed u/s 263 calling for any revision. We accordingly set aside the impugned order of Ld.CIT passed u/s 263 of the Act and restore that to the AO passed u/s 143(3).

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 27.07.2018.

Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(P.M.JAGTAP)
ACCOUNTANT MEMBER

Date:-27.07.2018
Amit Kumar

Copy forwarded to:

1. Appellant- Zenith Fish Corporation, B/52, Diamond Park, Joka, Kolkata-700104.
2. Respondent-Pr.CIT-9, Kolkata.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT-Kolkata Bench

Sr.P.S./H.O.O
ITAT, KOLKATA