

**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.2035/KOL/2016
[Assessment Year: 2012-13]**

DCIT, Circle-10(1), Kolkata.	vs	M/s. Creative Technotex (P.) Ltd., 73/29. Golf Club Road, Kolkata-700033. PAN-AADCC9167C
(Appellant)		(Respondent)
Appellant by	Sh. Sallong Yaden, Addl. CIT	
Respondent by	Sh. Subhash Agarwal, Advocate	
Date of Hearing	08.05.2018	
Date of Pronouncement	27.07.2018	

ORDER

PER S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

This appeal by the Revenue against the order dated 12.08.2016 passed by CIT(A)-4, Kolkata for AY 2012-13.

2. The only issue is to be decided as to whether CIT(A) is justified in confirming the addition made by the AO on account of non-deduction of TDS invoking the provisions u/s 40(a)(ia) of the Income Tax Act, 1961 (in short "Act").

3. Brief facts of the case are that the assessee is a Private Ltd. Company and declared total income of Rs.1,26,85,320/-. Notices u/s 143(2) & 143(1) were issued, in response to which authorized representative on behalf of the assessee appeared. During the course of scrutiny proceedings, the AO found the assessee debited an amount of Rs.70,60,956/- through the credit notes on account of sales promotion expenses. For non-deduction of TDS, the AO added the said amount to the total income of the assessee, invoking provision u/s 40(a)(ia) of the Act vide his order dated 31.01.2015 passed u/s 143(3) of the Act.

4. The contention of the assessee before the CIT(A) in first appellate proceedings was that all the relevant details of incurring such sales promotion expenses filed in the assessment proceedings and the AO never doubted the genuineness of the expenditure relating to sales promotion. Further, the TDS was deducted on commission paid to C& F agents and no TDS is deductible on the

reimbursement of expenses paid to C & F agents on sales promotion. The CIT(A) considering the remand report of the AO deleted the addition made by the AO.

5. Before us, the Ld.DR submits that the assessee was paying commission to agents without deducting TDS and referred to page No.2 of AO. A plea was taken before CIT(A) that it is a reimbursement and argued that it is not a case of reimbursement and is an incentive and TDS is deductible. He Ld.DR relied on the order of AO.

6. The Ld.AR submits that the assessee has appointed C & F agents, outside West Bengal, for the sale of the aprons. Within West Bengal, the assessee conducts its business directly through the distributors. In the instant year, the assessee had debited Rs. 6,13,30,638/- as selling and distribution expenses to the P&L a/c. The A.O. added the expenses amounting to Rs.70,63,956/- on account of non-deduction of TDS treating the same as "commission" paid to the C & F agent instead of sales promotion as contended by the assessee. The A.O. in the assessment order had stated that the same C & F agents were allowed both commission fixed on sale and the credit notes in garb of sales promotion for the similar amount of sale. That the C & F agents are separately paid commission and the TDS on such payment is duly deducted by the assessee. Copy of a statement showing the total commission paid during the year alongwith the TDS deducted on the same is placed at page 18 of Paper Book. It is further submitted that the assessee pays additional amounts to the C & F agents which are in nature of reimbursement i.e. 50% of the expenses incurred by the C & F agents and reiterated the submissions made before CIT(A) that it does not attract the provisions of sec 194H of the Act.

7. It is further submitted that the assessee had made a total payment of Rs.70,63,956.50 partly direct to the C & F agents, partly to the distributors through the C & F agents and also partly direct to the distributors. The payments were under various heads and were basically in the nature of reimbursement of the expenses incurred by the C & F agents. A statements showing the different categories of the sales promotion is placed at page 19 of the Paper Book and the said reimbursement was based on a pre-determined rate.

8. It is further submitted that the assessee has given incentives to the C & F agents and distributors for boosting the sales. The ITAT, Kolkata in the case of M/s. Kan Tech Solutions (P) Ltd ITA No.1004/Kol/2012 order dated 08.07.2015 has held that no TDS is deductible on the payments that are in nature of

incentives and referred to para 6 in page No.7 of the Paper Book containing case laws. Further, the assessee during the year, had floated various schemes for its C & F agents against which the C & F agents were gifted various items. Sample copies of such scheme are placed at page No.26 of Paper Book and detailed explanation on various incentives/reimbursements given by the assessee as under:

(a) *“Scheme: The assessee has claimed Rs. 31,51,713/- towards the expenses incurred in respect of the scheme, which was launched to increase sales. Under this, the C & F agents used to incur the expenses and then a detailed statement was sent to the assessee against which the assessee used to reimburse the 50% of the expenses to the C & F agents. Sample copies of the statement showing the expenses incurred by the C & F agent alongwith with the credit note issued by the assessee is annexed herewith and marked as Annexure: 'F'. It is further submitted that C & F agents have provided a certificate which proves that the payment made to them by the assessee was in the nature of reimbursement towards the expenses incurred by them for the schemes opted by them. Sample copies of the same are annexed herewith and marked as Annexure: 'G'.*

It is further submitted that the beneficiary of these schemes are the distributors with whom the assessee has no relationship of principal and agent. The assessee does not pay any commission or any other incentives to these distributors. The assessee is in contact with the C & F agents only. Both the assessee and the C & F agents contribute to the schemes floated by the assessee and thus, there is principle to principle relationship between the assessee and the C & F agents and thus the reimbursement by the assessee to the C & F agents towards the scheme under no circumstances can be termed as commission.

(b) *Trip: The C & F agents were given additional scheme benefit as an incentive. The assessee used to give credit note to the C & F agents towards the Scheme Benefit. The amount of payment was predetermined. For e.g the amount for a trip to Thailand was Rs.44,000/- and that of Malaysia or Dubai was Rs. 60,000/- and for Mauritius it was Rs. 1,10,000/-. The amount was paid irrespective of the expenses incurred by the distributors. Total expenditure incurred under this head was Rs.11,18,000/-. Sample Copies of the credit note towards the trips is annexed herewith and marked as Annexure: 'H'.*

(c) *Showroom: The assessee had incurred a total amount of Rs. 11,41,600/- towards the payment made to the show room staffs of end customers/LPG Distributors. The assessee awarded Rs. 10/- per pc to the showroom staff in Punjab and Haryana market for the boost in the sales. This payment was directly made to the show room staff so that they get incentive to push sales of assessee's products to the ultimate consumers. A list showing the payment made to the individual staff is annexed herewith and marked as Annexure: 'I'. It is further submitted that the payment to the individual staff was a very small amount with an average around of Rs. 3,600/-.*

(d) *Telephone and staff expenses: The assessee used to bear the 50% of the expenses incurred towards the telephone and staff expenses who were deputed at the place of C & F Agent. The assessee incurred a total of Rs.3,16,090/- towards the reimbursement of the abovementioned expenses to C & F agent. Copy of the credit note relating to the said expenses is annexed herewith and marked as Annexure: 'J'.*

(e) *Convention: The assessee has incurred an amount of Rs.4,96,719/- under the head convention. During the year, the assessee itself organized very meetings and programs for its distributors in hotels. The meetings and programs were organized for the distributors which would boost the sales of the company. Further, the assessee has also reimbursed a part of the convention expenses incurred by the C & F agents which is included in the above amount. Copies of hotel bills and credit note given to the C & F agents is annexed herewith and marked as Annexure: 'K'.*

(f) *Sampling: The assessee has incurred a total of Rs. 65,295/- under the head sampling. The assessee has basically reimbursed the claim, relating to the free sample distribution in cooking competition, to the C & F agents (through credit note). Copies of the same are annexed herewith and marked as Annexure: 'L'.*

(g) Travelling: The assessee has made a payment of Rs. 7,66,290/- to the travel agent Cox & King on behalf of the C & F agents. The said payment was made by the assessee for sales promotion and incentive to boost sales. Copy of the bills are annexed herewith and marked as Annexure: 'M'.

(h) Hotel bills: This expense amounting to Rs.8,249/- was incurred by the assessee towards the hotel booking of CEO of the company. The CEO of the company, Mr. Zayed Ahmed, went for the promotion of the business of the company and thus, the expense being incidental to the business are allowable. Copy of the bill is annexed herewith and marked as Annexure: 'N'.

(i) Gift: The assessee during the year had incurred an expenditure of Rs. 2,04,373/- for the gift given to certain C & F agents. The C & F agents provided a copy of the bill and claimed the reimbursement of the same from the assessee. The assessee has basically reimbursed the dues, in the nature of gifts, to the C & F agents."

9. It is argued by Ld.AR that the above-mentioned expenses incurred by the assessee were basically reimbursement of the expenses claimed by C & F agents. The reimbursement was made by the assessee to the C & F agents to the distributors only on achieving a target or under a scheme and was in nature of sale promotion. That as per provision of sec. 194C of the Income Tax Act, 1961, no TDS is liable to be deducted for the payment made on account of reimbursement of expenses and argued that there is no question of applicability of provision of sec. 40(a)(ia) in the instant case.

10. It is further submitted that the expenditure incurred by the agents on behalf of the assessee cannot form part of income in their hands and no tax will be deductible at source therefrom, under the provisions of Chapter XVII-B of the Act and no tax will be deductible at source at the time of payment or reimbursement of the aforesaid expenses by the payer or the tax-deductor to the payee or tax-deductee and placed reliance on the order of Kolkata Tribunal in the case of *Satyendra Jhujhunwalla vs ITO, ITA No.1988/K/2009, order dated 11.11.2011 (Kol.)* placed at pages 09 to 13 in the Paper Book.

11. Heard rival submissions and perused the material available on record. The CIT(A) found the entire impugned amount is in the nature of reimbursement or incentive and held that the AO is wrong treating the entire expenditure as commission. It is noted from the record, that the assessee deducted TDS on the fixed amounts paid to C & F agents towards commission u/s 194H of the Act and there is no dispute regarding this aspect and the details of which were placed at page No.18 wherein it is clear that TDS of Rs.37,37,934/- was deducted on commission amount of Rs.3,73,96,154/-. It is seen from the order of CIT(A) that major disallowance of Rs.31,51,713/- out of impugned amount was incurred by C&F agents on behalf of the assessee which were reimbursed @ 50% by the

assessee. The CIT(A) examined the statement shown by the expenses incurred by the assessee, C & F agents alongwith credit notes and certificates considering the payments made by the assessee to the C & F agents.

12. It is also observed from sample copies of schemes at pages 22 to 24 which shows that the scheme of Annual Purchase Bonanza-2011 is being operated by the C&F agents/stockist of M/s Creative Technotex Pvt. Ltd. of respective region and they are responsible for timely distribution of scheme awards. It is seen from the page No.25 wherein the names of CNF agents are provided and amounts of their contribution is reflected against their names. Total contribution of C&F agents towards the above said scheme was Rs.31,51,713/- as pointed out by the CIT(A) in his order at page No.7. Ld. AR pointed to the page No.26 as it is a LPG distributor scheme reimbursement form of AP Traders of Kanpur placed at Sl.No.1 in the list at page No.25 containing the names of oil companies, schemes entitled, quantity & cost of gift, total value scheme and their respective contributions. The said form shows total value of scheme is Rs.1,05,000/- and half of it i.e. 50% is Rs.52,500/- was born by the assessee and its contribution of Rs.52,500/- was credited to ledger account of C & F agent under the sales promotion vide credit note. Therefore, we find force in the arguments of ld.AR that it is not a commission and there is no principal and agent relationship. It is a sales promotion to grow simultaneously. It is a benefit to the distributor and assessee has no relationship with the distributor.

13. We find from page No.88 of Paper Book that the assessee incurred foreign trip expenses to an extent of Rs.11,18,000/- and the credit notes were placed at pages 89 to 96 of Paper Book. As discussed above regarding the sample copies at pages 22 to 24, we note that a trip to Thailand offered to one person on achieving sale of 75 boxes or 2700 pieces and in our opinion, it is not a commission and is additional benefit given to the C&F agents. The CIT(A) examined the list of payments made to individual staff and having finding no adverse comment from AO in the remand proceedings upheld the contention of assessee that it was paid to showroom staff directly to boost the sale at an average of Rs.3,600/-. The contention of Ld.AR was that no deduction of TDS is required on the reimbursement of expenses on sales promotion. The ld.AR placed on record a decision of Hon'ble High Court of Andhra Pradesh & Telangana in the case of United Breweries Ltd. reported in 387 ITR 150 which held that discounts offered by the Andhra Pradesh Beverages Corporation Ltd.(in short "APBCL") to the retailer

could only be treated as sales promotion expenses, and not as commission and the relevant portion at para No.9 is reproduced hereunder below:-

9. "From the facts noted by the Tribunal, in the order under appeal, it is evident that beer was sold by the respondent-assessee to the APBCL, and the APBCL had, in turn, sold the beer, purchased by them from the respondent-assessee, to retail dealers. Both these transactions were independent of each other, and were on a principal to principal basis. No services were rendered by the retail dealer to the respondent-assessee, and the incentive given by the respondent-assessee, to the retailers as trade discount, was only to promote their sales. The Tribunal rightly held that in the absence of relationship of a principal and agent, and as there was no direct relationship between the respondent-assessee and the retailer, the discount offered by the respondent-assessee to the retailers could only be treated as sales promotion expenses, and not as commission, as no services were rendered by the retailers to the respondent-assessee."

14. Further, Ld.AR placed reliance on the order dated 08.07.2015 in the case of M/s Kan Tea Solutions Pvt.Ltd. at para 6, we noted that the AO disallowed the claim for non-deduction of TDS by invoking provision under section 40(a)(ia) of the Act. The CIT(A) confirmed the same. The Tribunal held that the said incentive is in the nature of discount and not commission and deleted the addition made by the AO and confirmed by the CIT(A). Relevant portion 6 to 7 is reproduced hereunder:-

6. "Briefly stated facts are that the assessee company is engaged in rendering several commercial services like collecting dues from market on behalf of principal company maintaining office staff of the principal company in lieu of commission and incentive. Generally the commission was paid for rendering services but the facilities are extended in a particular area but to render services in remote areas for few collections as incentive work even. The AO during the course of assessment proceedings noted such incentive at Rs.48,10,829/- and disallowed the claim of incentive for non deduction of TDS u/s 194H of the Act by invoking the provisions of section 40(a)(ia) of the Act. Aggrieved assessee preferred appeal before CIT(A), who confirmed the action of AO by observing in para 4 as under :-

"4. I have considered the finding of the AO and submission made by the A.R. during appellate proceeding. The first and second ground of appeal are regarding addition by disallowance of commission paid u/s 40(a)(ia). The facts of the case is the assessee made payment on account of commission and incentive to various agents to the tune of Rs.76,48,727/- out of this amount, the assessee deducted TDS u/s 194H on payments of Rs.28,37,898/- but assessee did not deduct any TDS on the amount of Rs.48,37,898/-. The AO disallowed the amount of Rs.48,37,898/- u/s 40(a)(ia). During appellate proceeding the A.R. submitted that the payment was made to various collecting agents as incentives and no payment in any individual case was more than Rs.50,000/-. I have considered the submission of the A.R. and finding of the AO I agree with the A.O. that as per Sec. 194H any payment over and above Rs.2,500/- the payer has to deduct TDS. The A.O. has given his findings that in the profit and loss account the total amount of payment of Rs., 76,48, 727/- has been shown under the head commission and incentive. Even in the audit report this amount has been shown under one head i.e. commission and incentive. Therefore, I find that AO's action of making disallowances of Rs.48,37,898/- u/d 40(a)(ia) for non-deduction of TDS is justified. Hence, appeal on this ground is dismissed. Aggrieved assessee preferred second appeal before Tribunal.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. Before us the assessee contended that during the year commission was paid to the parties and incentive was also paid to several persons, who physically collect the money from different places as per the direction of the team employed. According to the assessee, this is not commission but incentive on collection of money from different places by various persons as per the direction of the team employed by the assessee company. This incentive includes travelling allowance also. We find that this incentive is not given at a fixed rate for payments which is known in the trade as incentive for actual collection and this incentive is in the nature of discount and not commission. Once this is in the nature of discount or can be called as incentive but not commission then the assessee is not liable to deduct TDS on this and accordingly we direct the AO to delete the disallowance. This issue of the assessee's appeal is allowed."

15. In view of above, the decision of Hon'ble High Court of Andhra Pradesh and Telangana (supra) and order of Co-ordinate Bench on similar issue and discussion made herein above, we find no infirmity in the order of CIT(A) and it is justified Ground Nos. 1 & 2 raised by the Revenue are dismissed.

16. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 27.07.2018.

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

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

*Date:-27.07.2018
*Amit Kumar**

Copy forwarded to:

1. Appellant- DCIT, Circle-10(1), Kolkata.
2. Respondent-M/s. Creative Technotex P.Ltd., 73/29, Golf Club Road, Kolkata-700033.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT-Kolkata Benches

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