

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3569/MUM/2015
Assessment Year: 2007-08**

Mrs. Prajwal Arvind
Kamath, 2004, Fiona,
Hiranandani Estate
Ghodbunder Road,
Patlipada Thane-400607.

Dy. Commissioner of
Income Tax Circle-3,
Thane.
Vs.

PAN No. AIUPK5845K

Appellant

Respondent

Assessee by : Mr. Devendra Jain, AR
Revenue by : Mr. Rajesh Kumar Yadav, DR

Date of Hearing : 23/07/2018
Date of pronouncement : 30/07/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2007-08. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-2 [in short 'CIT(A)'], Thane and arises out of the assessment completed u/s 143(3) r.w.s. 254 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal read as under:

1. On the facts and circumstances of case and in law, the AO has erred in adding the commission of Rs.35,91,680/- u/s 69C paid to the following parties by treating them as bogus expenditure.

- Indravarun Sales Agency Pvt. Ltd. Rs.11,22,400/-
- Nova Corporate Services Pvt. Ltd. Rs.11,22,400/-
- Niserial Corporate Services Pvt. Ltd. Rs.13,46,880/-

Total Rs 35,91,680/-

2. On the facts and circumstances of case and in law, the CIT(A) has erred in not considering the following additional ground of appeal raised by the appellant that

- Instead of disallowance of entire commission of Rs.35,91,680/- only certain percentage of net profit, say 5 to 10% may be disallowed

3. On the facts and circumstances of case and in law, the CIT(A) has erred in not considering the following additional ground of appeal raised by the appellant that

- Without prejudice to ground no. 1 as per form 35 and the above ground no. 2 the credit for TDS on the said commission may please be granted to the appellant.

4. On the facts and circumstances of case and in law, the CIT(A) has erred in not considering the following additional ground of appeal raised by the appellant that

- Without prejudice to ground no. 1 as per form 35 and the above ground no. 2 and 3. instead of entire commission, the commission net of TDS may please be disallowed.

3. Briefly stated, the facts of the case are that Assessing Officer (AO_ had made original assessment u/s 143(3) determining total income at Rs.2,01,67,820/-. In appeal, the Ld. CIT(A) gave relief of Rs.13,46,880/- and the total income was recomputed at Rs.1,88,20,940/-. The assessee filed an appeal before the ITAT. The Tribunal *vide* order dated 23.01.2013 (ITA No.1574/Mum/2011) held as under :

“6. After considering the Order of the Assessing Officer and the CIT(A) and submissions of the learned A.R. we are of the view that the matter should go back to the file of the Assessing Officer to examine the case afresh. The assessee-company has stated that the cases relied upon by them were not examined in right perspective by the Ld. CIT(A). It was also submitted that the commission has been paid to these parties in subsequent year has been accepted. This fact has to be examined afresh and since the assessee is paying commission to these parties regularly, therefore, there is no problem to produce these parties or to file confirmation from these parties. All the parties must be assessed to tax as the heavy commission amount has been paid. Therefore, it is necessary to file their income tax record before the Assessing Officer. In view of these facts and circumstances, we set aside the Order of the Ld. CIT(A) and remand the matter back to the file of the Assessing Officer to pass order afresh, after affording a reasonable opportunity of being heard to the assessee.”

3.1 Accordingly, the AO issued notice u/s 143(2) and 142(1) to the assessee. He asked the assessee to furnish details *vide* notice u/s 142(1) dated 24.06.2013 along with copy of ITR of the above three parties. The assessee *vide* reply dated 06.08.2013 stated that the copies of ITR were not available. Thereafter, in order to verify the transactions, the AO issued notice u/s 133(6) to the above parties, calling for certain information along with copy of ITR. All the notices were returned back by the postal authorities unserved with the remarks ‘not known’ or ‘unclaimed’. Thereafter, the AO directed the Inspector of Income Tax to serve the above notices. However, the Inspector failed to serve any notice at the given address as no such concern was running in the said address.

The AO noted that the Deputy Director of Income Tax (Inv.), Unit – VIII(1), Mumbai in his report dated 30.06.2009 has stated that these entities along with some other companies were controlled by one Mr. Sandeep Sitani, who admitted, in the statement u/s 132(4) recorded on 22.06.2008 that in collusion with Mr. Dinanath Yadav and Mr. Pradeep Prajapati, he was providing accommodation entries to various persons. The AO has extracted the relevant portion of the above report at page 2-9 of his assessment order dated 24.02.2014.

Further the AO mentioned that it was the contention of the assessee before the Tribunal that commission paid to the abovementioned parties in subsequent years have been accepted. The AO observed that during the AY 2008-09, an amount of Rs.15,55,000/- was paid to Nova Corporate Service Pvt. Ltd., which was disallowed and added in the assessment. The case was not selected for scrutiny for AY 2009-10. Thus the AO observed that the contention of the assessee before the Tribunal that commission has been paid to these parties in subsequent years was misleading. Finally, the AO observed that the assessee failed to file any submission before him as per the directions of the ITAT.

Thus, taking into account the above facts, the AO made an addition of Rs.35,91,680/- treating the transactions being bogus in nature.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The assessee submitted during the course of appellate proceedings that the payments were made by crossed cheques and all the parties were private limited companies, tax was duly

deducted and paid to the government. It was further stated that the alleged bogus commission works to only 13.7% of total commission claimed i.e. Rs.35,91,680/- out of Rs.2,62,10,017/-. The assessee also submitted that the AO had not brought any material on record to prove that cash was received back and hence, benefit of doubt be given to the assessee. It was stated that physical production of the concerned persons was not within the hands of the assessee. Alternatively, it was submitted that only a part of the amount be added as the entire claim cannot be treated as bogus and the TDS amount be allowed as expenditure. The assessee also submitted before the Ld. CIT(A) that "as per the Department itself, the recipients have not filed their returns and the question of receiving the cash back in respect of TDS does not arise. Hence, it becomes a genuine business expenditure or loss."

However, the Ld. CIT(A) observed that the AO, as directed by the Tribunal, had given an opportunity to the assessee to justify that the commission paid was genuine, however, even in the reassessment proceedings, the assessee completely failed to prove the genuineness of commission paid to the parties. The assessee completely failed to produce the ITR of these three parties even after the Tribunal directed to obtain it from the assessee. The Ld. CIT(A) thus held that the basic requirement to prove the genuineness of commission paid has also failed. Also taking into account the report dated 20.06.2009 submitted by the Deputy Director of Income Tax (Inv.), Unit-VIII(1), Mumbai, the Ld. CIT(A) confirmed the addition of Rs.35,91,680/- made by the AO.

5. Before us, the Ld. counsel of the assessee files an written submission in support of his argument that the assessee had filed various documentary evidence like proof of payment by banking channel, MOU with payees, invoices, service tax levied by payees, PAN of payees, TDS done by it out of payments etc. It is stated by him that in the fresh assessment proceedings, the AO insisted upon the copies of income tax return of the payees, whereas the assessee has no control of the payees and hence copies of the income tax return could not be filed. It is stated that however, the department could have very well internally obtained these records. The Ld. counsel submits that the report dated 30.06.2009 of the Deputy Director of Income Tax (Inv.) relied on by the AO was not provided to the assessee nor an opportunity for cross-examination was given. It is stated that the said report is prior to the date of passing of original assessment order and the department never relied on the said report even before the CIT(A) or ITAT in the first round of proceedings. Finally, the Ld. counsel submits that the ITAT 'D' Bench Mumbai in the case of the assessee for the AY 2008-09, based on the same facts have directed the AO to restrict the disallowance to 10% of the disputed commission amount of Rs.30,55,000/- and recompute the income of the assessee. It is stated that the same principal may be followed for the impugned assessment year.

6. *Per contra*, the Ld. DR submits that the assessee failed to comply with the order of the Tribunal dated 23.01.2013 and therefore the Ld. CIT(A) has rightly dismissed the appeal filed by the assessee.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

It has been held in *Seshasayee Brors. Ltd. v. CIT* (1961) 42 ITR 568 (Mad.) that where an assessee sets up a claim for a particular deduction in the computation of his income, but is unable to establish necessary facts in this regard, the Department would be justified in disallowing the claim. Also in *CIT v. Calcutta Agency Ltd.* (1951) 19 ITR 191 (SC), it was held that the burden of proving the necessary fact in order to entitle the assessee to claim exemption was on the assessee. Also in *Nund & Samont Co. (P) Ltd. v. CIT* it has been held that it is for the taxpayer to establish by evidence that a particular amount is deductible.

The burden of proof is limited to primary or initial onus. In *Mather & Platt (India) Ltd. v. CIT* (1987) 168 ITR 493 (Cal), *Ritz Hotels (Mysore) Ltd. v. CIT* (1992) 196 ITR 614 (Kar), it has been held that once such primary onus is discharged, such burden shift to the revenue.

The Co-ordinate Bench, in the case of the assessee for the impugned assessment year has restored the matter stating that “It was also submitted that the commission has been paid to these parties in subsequent year has been accepted. This fact has to be examined afresh and since the assessee is paying commission to these parties regularly, therefore, there is no problem to produce these parties or to file confirmation from these parties. All the parties must be assessed to tax as the heavy commission amount has been paid. Therefore, it is necessary to file their income tax record before the Assessing Officer.”

We find that the assessee failed to file before the AO the relevant documents as mentioned in the above order of the Tribunal.

Also we find that the AO has relied upon the report dated 30.06.2009 of the Deputy Director of Income Tax (Inv.) without giving a copy of it to the assessee. The Ld. CIT(A) has also relied upon the above report.

In view of the above facts, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO for a *de novo* order. We direct the AO to furnish to the assessee the full report of the Deputy Director of Income Tax (Inv) dated 30.06.2009. We direct the assessee to file before the AO the details as envisaged at para 6 of the order of the Tribunal dated 23.01.2013.

The AO is further directed to examine the parties and give opportunity to the assessee for cross-examination. The assessee would furnish before the AO the relevant documents/evidence to facilitate the assessment proceedings. Needless to say, the AO would give the assessee a reasonable opportunity of being heard before finalizing the assessment order.

8. In the result the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 30/07/2018.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/07/2018

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai