

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCHES : “ C ” NEW DELHI]**

**BEFORE SHRI S. K. YADAV, JUDICIAL MEMBER AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**I. T. Appeal No. 2069 (Del) of 2016
Assessment Year : 2010-11.**

Kay Dee Industries, 32 – Rajasthani Udyog Nagar, D E L H I – 110 033.	Vs.	Joint Commissioner of Income Tax, Range : 19, New Delhi.
PAN : AAAPK 3331 L		
(Appellant)		(Respondent)

Assessee by : Shri R. S. Singhvi, C.A.; &
Shri Satyajeet Goel, C. A.

Department by : Shri S. L. Anuragi, Sr. D. R.;

Date of Hearing : 22.05.2018;

Date of Pronouncement : 09.08.2018.

ORDER.

PER PRASHANT MAHARISHI, A.M. :

This appeal is filed by the assessee against the order of Commissioner of Income Tax (Appeals)-12, New Delhi, dated 12.02.2011, for assessment year 2010-11 confirming that addition of Rs.9,31,957/-

on account of commission paid to M/s. Ashapura Associates @ 7% against the rate of 5% paid to other commission agents, disallowed by the learned Assessing Officer, under section 37 of the Income Tax Act.

2. The brief facts of the case is that assessee is a partnership firm engaged in the business of manufacturing of auto parts. Assessee filed its return of income at Rs.2,37,41,360/-, which was assessed at Rs.2,69,45,593/- vide order under section 143(3) of the Act on 25.03.2013. The issue involved in the appeal is payment of commission of Rs.9,31,957/- paid to M/s. Ashapura Agencies, which was disallowed by the learned Assessing Officer vide para No. 3 of his order, holding as under :-

“ 3.1 During the year, the assessee has debited a sum of Rs.2.24.31.837/- under the head Commission on Sales. The details tiled by the assessee in this regard have been examined. Out of total commission paid a sum of Rs.1,83,71,391/- has been paid on domestic sales and Rs.40.60.446/- has been paid on Export Sales. From the details filed by the assessee it is seen that commission on domestic sales has been paid to 21 parties at the rates ranging from 1.5 % to 1 he assessee has filed copies of accounts and confirmation of the major recipients of commission and also agreements entered into with these commission agents. On the issue of variation in the rates of

commission the assessee has vide its letter 31.01.2013 submitted as under :-

" It will be further seen that Commission is given at different rates as mentioned below :-

i) The rate of 7% is given only to one Agent M/s Ashapura Associates, Ahmedahad who runs the Ahmedahad Depot for entire state of Gujarat, the biggest sale depot in terms of sale. They are the oldest Agent appointed on 01.04.2006) and who gave the trend of opening Sale depot to the assessee Jinn in other states also. The agreement was for the term of five years. The Copy of Agreement is enclosed herewith.

ii) The rate of 5% Commission is given to other agents appointed thereafter and they have to borne the depot expenses like Rent, Electricity, Telephone and Staff salaries (refer to clause 5 of Agreement also). The Copies of some of the Agreements are enclosed herewith.

iii) The Commission rate of 3%, 2% and 1.5% is given to the agents who have not to borne the Depot expenses like Rent, Electricity, Telephone and staff salaries. These expenses are borne by the Assessee firm. The copies of some of the Agreements/Appointment letters are enclosed herewith clarifying the said terms. "

3.2 It is seen that the terms and conditions in respect of M/s. Ashapura Associates being paid commission @ 7% and other parties in receipt of commission @ 5% are identical only with regard

to term of agreement and the obligation on the part of the commission agent to bear bad debts in respect of orders booked by them. The salient terms of these agreements which are common to the agreements between the assessee and M/s Ashapura and between the assessee and other recipients of commission @ 5% are as under :-

- a) "The Agency will be for the terms of Five Years from the date of execution of this agreement determinable nevertheless at the option of the either party by giving to the other two months notice".
- b) "If any order received from the agent proves to be a bad debt or results in a loss to the firm, the Jinn shall be entitled to deduct the loss so caused from the commission earned by the agent in respect of that order. "

In the case of agreement between the assessee and M/s. Ashapura Associates all direct and indirect expenses i.e. Rent Electricity. Telephone and Staff Salaries etc. shall be borne by the assessee despite payment of commission @ 1% to this party. On the other hand in other cases all direct and indirect expenses i.e. Rent, Electricity, Telephone and Staff Salaries etc. shall be borne by the Commission Agents in spite of their being paid commission @ 5%, in fact the agreement between the assessee and M/s. Ashapura Associates is completely identical to the agreement between the assessee and another commission agent M/s. Asian Motors, Patna except that the latter party is entitled to commission of 3% as against 7% payable to M/s Ashapura

Associates. M/s. Asian Motors, Patna like M/s. Ashapura Associates is also not under an obligation to bear the direct/indirect expenses. The assessee was required to explain the wide difference in the rate of commission in spite of the terms of agreement with other parties being more favourable inasmuch as all the direct and indirect would be borne by them. The assessee vide its letter dated 19.02.2013 submitted that with the appointment of M/s. Ashapura Associates as agent on 01.07.2002 the assessee started a new trend of opening sales depot, whereas prior to this time assessee was selling goods through distributors, After being motivated from the Gujarat case it further opened Sales Depot in other cities e.g. Jaipur (w.e.f. 01.03.2006), Kalyan (22.12.2006) and Indore (22.12.2006). However, in the year 2010 the assessee has reduced tire rate of commission to 5 % in the case of M/s. Ashapura Associates. Assessee's contention is not acceptable as the present agreement with M/s. Ashapura Associates was signed on 01.04.2006 by which time the assessee had opened depots in other cities such as in Indore. The agreement for sale of products in Madhya Pradesh and Chhatisgarh were entered into with M/s Swaraj Motors, Indore on 15.12.2006 and with Shri Binay Bajaj. Raipur on 03.06,2006 respectively for payment of commission @ 5%. Moreover, the terms of the agreement with all the parties gave the assessee liberty to terminate the agreement anytime after giving a notice of two-months. Therefore, even if initially the assessee had entered into an agreement with M/s Ashapura Associates for payment of commission @ 7%, it was at liberty to terminate the same any time by giving a notice of two-months. When the assessee

was confronted regarding payment of commission made to M/s. Ashapura Associates at excessive rate, it vide its letter dated 04.03.2013 further submitted that this party has sold the largest volume of products in comparison of other agents, which has resulted in higher sale and that this party rendered services which involved development and promotion of the overall market for the assessee's products. The assessee has also mentioned that such higher commission was paid to this party for getting more orders as the said party had good rapport with parties in the automobile line in the Gujarat State. So far as the fact that M/s. Ashapura Associates has executed largest volume of sales is concerned, the same alone does not justify the huge difference of 4% between payments made to M/s. Ashapura Associates and M/s. Asian Motors on identical terms and conditions. As regards nature of services rendered by M/s. Ashapura Associates there is no difference between the services rendered by this party and other parties, as the scope and nature of services to be rendered by all these commission agents are specifically provided in their respective agreements. Rather M/s. Ashapura Associates is not under an obligation to bear direct/indirect expenses like many parties such as M/s. Swaraj Motors and Shri Binay Bajaj, who are getting commission only w 5% It is pertinent to point out that the assessee has itself admitted that in the next year it has also reduced the rate of commission payable to 5% in the case of M/s. Ashapura Associates.

3.3 Although, the assessee and M/s. Ashapura Associate are not parties covered by the provisions of section 40A(2) of the Income Tax Act, 1961. However, as per the provisions

of section 37 for being allowed any expenditure has to be expended wholly and exclusively for the purposes of business. The Hon'ble Supreme Court in various decisions held that taxing authorities have right to consider whether expenditure incurred by the assessee was excessive. The ratio of decisions of the Hon'ble Supreme Court in the following cases is relied upon :-

- i) Laxminarayan Madan Lal Vs. CIT (SC) 86 ITR 439;
- ii) Swadeshi Cotton Mills Co. Ltd. Vs. CIT (SC) 63 ITR 57;
- iii) Laxmiratan Cotton Mills Co. Ltd. Vs. CIT (SC) 73 ITR 634.

The Hon'ble Supreme Court in the case of Laxminarayan Madan Lal Vs. CIT (SC) 86 ITR 439 held as under :-

“ In our opinion, the facts of this case come within the rule laid down by this court in Swadeshi Cotton Mills Co. Ltd. Vs. Commissioner of Income-tax (3). The question whether an amount claimed as an expenditure was laid out or expended wholly and exclusively for the purpose of the business has to be decided on the facts and in the light of the circumstances in each case. The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income- tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made, it is still open to the Income-tax Officer to consider the relevant factors and determine for

himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under section 37 of the Act. ”

The Hon'ble Rajasthan High Court in their decision in the case of Jaipur Electro (P) Ind. Vs CIT_(Raj.) 134 CTR 237 have held that the doctrine that the businessman is the best judge of business expediency does not affect the right, any duty, of the assessing authorities to know whether it was incurred for business purposes and not for the extraneous consideration. Now- a question arises, as to whether given the facts of assessee's case payment of commission to M/s. Ashapura Associates @ 7% can be considered as having been expended wholly and exclusively for the purposes of business or for extraneous consideration, when other parties such as M/s. Asian Motors. Patna are providing identical services @ 3% on identical terms and conditions. Had the assessee made the payment of commission to M/s. Ashapura Associates as a prudent businessman, the same could have been allowed in full. However, taking into consideration all the facts and surrounding circumstances concerning this issue, it cannot be said that the assessee has shown any prudence by paying commission @ 7%, while the assessee paid commission to other parties @ 5%, on terms which are more favourable to the assessee than the terms as per agreement with M/s. Ashapura Associates and @ 3% to M/s. Asian Motors. Patna on the same terms as with M/s. Ashapura Associates. Therefore, after taking into consideration all the facts it is held that commission paid to M/s. Ashapura Associates is at least excessive by 2% as at the most only commission paid @ 5%

to this party can be considered as having been expended wholly and exclusively for the purpose of business. The assessee has paid total commission of Rs.32.61.849 to M/s. Ashapura Associates during the F.Y.2009-10. out of which a sum of Rs.9,31.957/- is being disallowed as not having been expended wholly and exclusively for the purpose of business. I am satisfied that the assessee has furnished inaccurate particulars of its income and therefore, penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961 are being initiated against the assessee.

(Disallowance : Rs.9,31,957/-). ”

3. The assessee carried the matter before the learned CIT (Appeals) who confirmed the addition as assessee could not substantiate the commercial exigency of such payment @ 7% as the other parties were paid commission @ 5%. In view of this, assessee is in appeal before us.

4. The learned authorized representative submitted an agreement before us stating that the assessee has paid commission @ 7% to M/s. Ashapura Associates, who is acting as sole selling agent of the firm for sale of its products. He further referred to clause 7 of the Agreement, according to which the bad debt is also on account of the commission agent. He further stated that the

assessee has also submitted a confirmation of the commission agent where the tax has been deducted on sale of goods at Ahmedabad Depot. He further submitted that the payments have been made by account payee cheques. He further stated that in earlier years the commission paid by the assessee has been accepted and no disallowance has been made. He further referred that agreement is made on 1st day of April, 2006 and the disallowance first time has been made in assessment year 2010-11. He further stated that M/s. Ashapura Agencies and the assessee are not related parties under section 40A(2) of the Act and despite this disallowance has been confirmed by the learned CIT (Appeals).

5. The learned Departmental Representative relied upon the orders of the learned lower authorities.

6. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The assessee has paid commission to one M/s. Ashapura Associates, Ahmedabad, @ 7% of the sales at Ahmedabad Depot. For the payment of the commission the assessee has entered into an agreement on 1st April, 2006 with the commission agent, who is also responsible for the recovery of sale

proceeds as per clause 7 of the agreement. This is not the first year of the payment of commission to that party. The recipient of the commission income is also not related party under provisions of section 40A(2) of the Act. The learned lower authorities have disallowed the payment without showing any reason except stating that there is no business exigency shown by assessee. It is an established law that in what manner the assessee should carry on his business should be left to the assessee only. The Revenue authorities are only authorized to see whether the expenditure has been laid out or expended by the assessee for the purposes of the business or not. In the present case, the amount of commission for this year have been paid @ 7% and total commission paid is Rs.32,61,849/- out of which the disallowance of Rs.9,31,957/- has been made holding that 2% of the total commission paid is excessive. Such powers are only available when the payment is made to a related party. It is not the case of the Revenue that the party has not rendered services to assessee. In view of this, we reverse the finding of the lower authorities and direct the learned Assessing Officer to delete the disallowance of Rs.9,31,957/-.

7. In the result, appeal filed by the assessee, is allowed.

The order is pronounced in the Open Court on :09th **August, 2018.**

-Sd/-
(S. K. YADAV)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 09/08/2018

MEHTA

Copy of the Order forwarded to :-

1. Appellant;
2. Respondent;
3. CIT;
4. CIT (Appeals);
5. DR, ITAT, ND.

//True Copy//

BY ORDER

ASSISTANT REGISTRAR