

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai**

**Before Shri G.S. Pannu, Accountant Member
and Shri Ravish Sood, Judicial Member**

ITA No. 2817/Mum/2017
(Assessment Year: 2009-10)

M/s. Small Wonder Industries	D C I T - 24(3)
78, Virwani Indl. Estate	Mumbai
Western Express Highway	Vs.
Goregaon (E)Mumbai 400063	

PAN – AALFS6318Q	
Appellant	Respondent

Appellant by: Shri Prakash K. Jotwani	
Respondent by: Shri Abdul Hakeem M	

Date of Hearing: 28.08.2018	
Date of Pronouncement: 12.09.2018	

ORDER

Per Ravish Sood, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-42, Mumbai dated 23.01.2017, which in itself arises from the order passed by the A.O under Section 143(3) r.w.s 263 of the Income Tax Act, 1961 (hereinafter "the Act") dated 29.11.2013.

2. The assessee while assailing the order of the CIT(A) has raised before us the following grounds of appeal: -

- “1. (a) *On the facts and circumstances of the case and in law the Learned Commissioner of Income Tax (A) has erred in confirming the additions of Rs.2,12,136/- on account of commission paid to two parties. The same may be deleted in full.*
2. (a) *The Learned CIT (A) ought to have appreciated that the fact the commission expense paid was verified the time of the original assessment made. All the details relating to the commission expense made are genuine and all documents to prove that the same were genuine have been submitted to the assessing officer.*
(b) *The Learned DCIT ought to have appreciated that the appellant has submitted confirmations from the sales party viz. M/S Vishnu Group of companies, that both the agents were*

working for the appellant and they have given services as liaison work between the parties.

(c) The Learned DCIT ought to have appreciated the fact that return of income of one agent is submitted with your goodself, which reflects that he earns commission income. Hence, the expense claimed by the appellant is genuine.

Without prejudice to the above, I also wish to state as under:

- 1. The appellant had filed an appeal against re-opening of the case u/s. 263 against order passed u/s. 143 (3) r.w.s 264 dated 29.11.2013 at Income Tax Appellate Tribunal. Further, the Ld. ITAT vide order 24/02/2017 has decided the matter in favor of the appellant and has treated the assessment u/s. 263 as bad in law.*
- 2. The Ld. ITAT has appreciated the fact, that the order passed u/s. 143(3) was not erroneous and prejudicial to the interest of the revenue since the Ld. Assessing officer had collected necessary details, examined the same and then framed the assessment u/s. 143(3), where he had allowed the said expense as business expense.*
- 3. Hence, taking the above facts into consideration, since the Ld. ITAT has decided that assessment u/s. 263 was bad in law, the assessment order passed u/s. 264 is void ab-initio.*
- 4. Your appellant craves leave to add to, alter, amend, modify or delete any of the grounds of appeal.”*

3. Briefly stated, the assessment in the case of the assessee firm for A.Y. 2009-10 was completed on 21.11.2011, determining its total income at Rs. 49,72,441/- against the returned income of Rs. 49,04,386/-. The CIT-24, Mumbai, observed that as the A.O without making necessary verifications had allowed the commission expenses aggregating to Rs. 2,12,136/- which were claimed by the assessee company to have been paid to (i) Shri Kiran Jain : Rs. 77,160/-; and (ii) Shri Rajendra Jain : Rs. 1,34,976/-, thus the order passed by him was erroneous and prejudicial to the interest of the Revenue. On the basis of his aforesaid deliberations the CIT revised the assessment order vide his order passed under Section 263, dated 19.02.2013 and set aside the matter to the file of the AO for the limited purpose of verifying the genuineness and veracity of the commission claimed by the assessee firm to have been paid the aforementioned persons.

4. That pursuant to the order of the CIT-24, Mumbai the A.O framed assessment under Section 143(3) r.w.s. 263 of the Act, dated 21.11.2013. On the basis of necessary deliberations, the AO being of the view that the assessee has failed to specify the nature of services which were rendered by the aforementioned persons, viz. Shri Kiran Jain and Shri Rajendra Jain, thus characterised the commission expense as a non-genuine expense and added back the same to assessee's total income. In the backdrop of his aforesaid observations the AO assessed the income of the assessee firm under Section 143(3) r.w.s. 263 of the Act at Rs. 51,84,576/-.

5. Aggrieved, the assessee assailed the assessment order in appeal before the CIT(A), which, however, was dismissed by him vide his order dated 23.01.2017.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The learned Authorised Representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal, submitted that the order passed by the CIT-24, Mumbai, dated 19.02.2013 under Section 263 had been set aside by the Coordinate Bench of the Tribunal i.e ITAT "E" Bench, Mumbai, vide its order passed in ITA No. 2464/Mum/2013, dated 24.02.2017 (copy placed on record). It was thus averred by the learned A.R. that now when the very foundation of framing the assessment under Section 143(3) r.w.s. 263 of the Act is no more in existence, thus the order passed by the AO under Section 143(3) r.w.s. 263 of the Act does not survive.

7. Per contra, the learned Departmental Representative (for short 'D.R') did not controvert the aforesaid factual position.

8. We have heard the authorised representatives of both the parties, perused the orders of the lower authorities and the material available on record. We find that as the order passed by the CIT-24, Mumbai under Section 263, dated 19.02.2013, on the basis of which the assessment was framed by the A.O under Section 143(3) r.w.s. 263 had been set aside by the Coordinate Bench of the Tribunal, hence the very genesis of the

addition made in the hands of the assessee firm leading to the present appeal before us does not survive. We thus, in the backdrop of the aforesaid factual position set aside the order of the CIT(A) and vacate the addition of Rs. 2,12,136/- made by the A.O

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

Order pronounced in the open court on 12th September, 2018.

Sd/-
(G.S. Pannu)
Accountant Member

Sd/-
(Ravish Sood)
Judicial Member

Mumbai, Dated: 12th September, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -42, Mumbai*
4. *The Pr. CIT-31, Mumbai*
5. *The DR, "J" Bench, ITAT, Mumbai*

By Order

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Assistant Registrar
ITAT, Mumbai Benches, Mumbai

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