

आयकर अपीलीय अधिकरण “E” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 1283/Mum/2016

(निर्धारण वर्ष / Assessment Year 2010-11)

The Asst. Commissioner of Income Tax-Circle-20(3) Room No.615, 6 th Floor, Piramal Chambers, Parel, Mumbai-12	Vs.	Shah Steel Corporation 101/102, Joshi Chambers, Ahmedabad Street, Carnac Bunder, Mumbai-400 009
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAIFS6257M		

अपीलार्थी की ओर से / Appellant by	:	N.V. Nandkarni, DR
प्रत्यर्थी की ओर से / Respondent by	:	Anil Thakrar, AR

सुनवाई की तारीख / Date of hearing:	11-09-2018
घोषणा की तारीख / Date of pronouncement :	28-09-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal of the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-32, Mumbai [in short CIT(A)], in appeal No. CIT(A)-32/IT-134/ACIT-17(3)/13-14, dated 18.12.2015. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle-17(3), Mumbai (in short 'ACIT/ AO') for the A.Y. 2010-11 vide order dated 13.03.2013 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').



2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance made by AO on account of payments made to family concern on account of cutting, loading and unloading charges by invoking the provisions of section 40A(2)(b) of the Act. For this Revenue has raised the following ground No. 1 and 2: -

"1. On the facts and in the circumstances of the case and in law, the 14. CIT(A) has erred in deleting Rs.46,82,759/- towards payment made u/s.40A(2)(b) to family concern oil of cutting, loading and unloading charges without appreciating the fact that no satisfactory explanation with supporting evidences has been offered by the assessee in this respect and also the business expediency which requires inquiry as regards to the maximum and minimum charges that would be payable to other service providers has not been done by the assessee."

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting Rs.46,82,759/- towards payment made u/s.40A(2)(b) to the family concern oil of cutting, loading and unloading charges without appreciating the fact that the onus lies on the assessee to establish that the payment made u/s.40(2)(b) was at fair market value and not excessive and the same, was not discharged."

3. After hearing the rival contentions and gone through the facts and circumstances of the case, we have gone through the order of CIT(A) on this issue and noticed that the CIT(A) has relied on earlier year decision



of CIT(A) in AYs 2007-08, 2008-09 and 2009-10. The CIT(A) following earlier years' decision deleted the disallowance by observing in Para 5.1 as under: -

"5.1 Grounds 1 to 5: All these grounds directed against the action of the AO in disallowing 50% of the charges paid to Anmol Steel Processors Pvt. Ltd are disposed together for the sake of convenience. I find that this is a recurring issue right from AY 2007-08 onwards. For the AYs 2007-08, 2008-09 & 2009-10, the CIT(A) has consistently ruled in favor of the appellant. I have perused the orders of the CIT(A) on this issue. I find that in AY 2007-08, the CIT(A)-34 vide his order dated 26/07/2012 has held as under: -

'3.9 There is no doubt that the appellant is a specified person as per section 40A(2)(b). To invoke the provisions of 40 A(2)(b), the first requirement of the 40 is to form an opinion that the payment made to Ails. Anmol is excessive or unreasonable having regard to the FMV in respect of the cutting, Job works, loading and unloading carried out. This opinion can only be formed by the AO after he makes proper enquiry in the market on the prevailing rates and brings out materials to show that similar services are available at a rate lesser than what the appellant pays for the related concern.



3.10 *The Assessing Officer did not bring any material on record to show that the appellant is paying much more than what is available in the market. As per the provisions of Sec. 40 A(2)(b), the unreasonableness should be based on the subjective perception of the Assessing Officer and it should be based on cogent material on record which is not there in the case of the appellant. The Assessing Officer in the present case has not proved that the appellant has derived any benefit out of the above job work in this regard, I would like to rely on the following decisions in this regard.*

(1) *CIT vs. Forbes T. Brokers reported ITR 404 (Madras High Court). The head note is as under.....*

(2) *Ali Dhara Texpo Engineers Pvt. Ltd. reported in 43 SIT 1, the head Note is as under:.....*

(3) *Coronation Flower Mills vs. ACIT 188 Taxmann 257(Gujarat High Court).....*

(4) *DCIT vs. MGS Hospitalities ITAT (Delhi) (ITA Nos. 2415 and 2416 (Del)/ 2010 dt. 19.11.2010). The relevant portion of the finding is as under:.....*



(5) *ITO vs. MM Textiles reported in 31 SOT 207 ITAT (Mum). The head Note and the finding of the Hon'ble ITAT in para 18 as under:*

3.11 What emerges out of the above decisions is that the onus is on the Assessing Officer to prove that the payment made to a related concern is excessive of unreasonableness to invoke provisions of Sec. 40A(2)(b) of the I.T. Act. As mentioned already, since the Assessing Officer has not made any enquiries in the market regarding the FMV and no material was gathered, there is no whisper in the order about presence of any one of the following three ingredients to show that the payment is unreasonable or excessive having regard to:

(1) FMV of the services rendered by M/s Anmol

(2) Benefit derived by or accruing to the appellant because of such payment

(3) Legitimate needs of the business of the appellant

Addition can be made if any one of the above ingredient is present.



ITA Nos. 1283/Mum/2016

In the absence of the same and in view of the above discussion. I have to hesitation in deleting the 50% disallowance made towards cutting loading & unloading charges made by the Assessing Officer. This ground of the appeal is allowed.

I also find that in the later AYs 2008-09 & 2009-10, the CIT(A) have consistently followed this order and allowed relief to the appellant. The facts and issue are identical to this year also. As such there is no reason for me to deviate from the decision of my predecessors. Respectfully following the decisions of the CIT(A) in the appellants own case for the AYs 2007-08, 2008-09 & 2009-10, the disallowance made by the AO u/s 40A(2)(b) is deleted. Grounds 1 to 5 are allowed in favor of the appellant.”

4. Now, before us, the learned Counsel for the filed Tribunal's order in ITA Nos. 2540/Mum/2013, 6060, 6580/Mum/2012 for AY 2009-10, 2007-08 & 2008-09 respectively vide order dated 11.03.2016, wherein Tribunal in all the three years has confirmed the order of CIT(A) deleted the addition and dismissed the Revenue's appeal vide Para 13 as under: -

“13. We have considered the submissions of the parties and perused the material available on record. As seen from the assessment order, the Assessing Officer has disallowed 50% out of the payment made to M/s Anmol Steel Processers Pvt. Ltd. on account of cutting, loading and unloading charges primarily for the following reasons: -



(i) Payment made to M/s Anmol Steel Processers Pvt. Ltd. is higher compared to similar payments made to other parties;

(ii) Invoices raised in case of M/s Anmol Steel Processers Pvt. Ltd. do not mention the detail of width, thickness of H.R. Coil; and

(iii) Gross profit and net profit declared by the assessee is extremely low compared to other assessee in the same line of business.

However, it is evident that before the first appellate authority, the assessee had brought on record credible evidence to establish that the payment made by the assessee to its sister concern M/s Anmol Steel Processers Pvt. Ltd., is lower than the prevalent market rate as well as payment made to other parties. In this context, assessee has relied upon a circular issued by certain traders dealing with similar products as per which the rate of cutting, loading and unloading charges varies from ` 280 per M.T. to ` 750 per M.T. depending upon thickness of steel. The said circular further specifies that on an average up to 5mm thickness, the cutting charges is around ` 300 whereas cutting charges towards thickness charges from 20mm to 35mm is ` 750 M.T. As against the aforesaid market rate, the assessee has got the work done through its sister concern M/s Anmol Steel Processers Pvt. Ltd., at a fixed rate of ` 200 per M.T. irrespective of thickness and size of the coil. Further, it has been proved on record by the assessee through cogent evidence



that payment made towards cutting, loading and unloading charges to outside parties for similar kind of job work is much more than the payment made to sister concern. Though, the Assessing Officer has tried to deflect this fact by observing that the invoices raised in case of M/s Anmol Steel Processers Pvt. Ltd. do not specify the width and thickness, however, assessee's explanation that there is no need to mention such details in the invoice as the sister concern has agreed to do the job work at the fixed rate of ` 200 per M.T. irrespective of the thickness of size of the coil appears to be a valid explanation. Moreover, the assessee has also proved on record that gross profit and net profit rate declared by it in the impugned assessment years is not only comparable to its own gross profit and net profit for the preceding and subsequent assessment year but also comparable to other assessee's in similar line of business. Learned Commissioner (Appeals) having examined all these evidences which were also sent for examination of the Assessing Officer on remand has found none of the reasons of the Assessing Officer for holding the payment made to be high & excessive as valid. The aforesaid factual finding of the learned Commissioner (Appeals) arrived on the basis of documentary evidences produced on record by the assessee have not been controverted by the Department by bringing on record any contrary evidence to justify the conclusion reached by the Assessing Officer. In the aforesaid circumstances,



when the material brought on record clearly demonstrate that payment made by the assessee to its sister concern M/s Anmol Steel Processers Pvt. Ltd. is not in any way higher to similar payment made to third parties or even the prevalent market rate the decision of the learned Commissioner (Appeals) in deleting the addition made by the Assessing Officer by disallowing 50% out of the payment made to M/s Anmol Steel Processers Pvt. Ltd., in our view, does not call for any interference. Accordingly, upholding the decision of the learned Commissioner (Appeals), we dismiss ground no.3, raised by the Department.”

5. From the above, it is clear that the issue is fully covered by assessee's own case of Tribunal's earlier years' order, respectively following the same we dismiss this issue of Revenue's appeal.

6. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of interest expenses of ₹ 46,57,113/- for diversion of interest bearing borrowed funds for non-business purposes by accepting additional evidences in violation of Rule 46A of the IT Rules, 1962 (hereinafter the 'Rules'). For this Revenue has raised the following ground No. 3: -

“3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of interest expenditure of Rs. 46,57,113/- towards diversion of interest bearing borrowed funds for non-business purpose by accepting additional evidences in violation of Rule 46A as during the assessment proceedings the



assessee had not claimed that it had also made sales to its sister concern.”

7. Briefly stated facts are that the AO on perusal of the account of the assessee noted that the assessee has diversified certain funds on which interest was paid or claim have been paid or payable for the purpose other than for which the same was paid. According to AO, the assessee has advanced an amount of ₹ 4,31,86,159/- to Anmol Steel Processers Pvt. Ltd. and the following five parties: -

a)	<i>Amar D. Shah</i>	₹ 28,98,529/-
b)	<i>Bharat Thakkar</i>	₹ 10,00,000/-
d)	<i>Paras D. Shah</i>	₹ 30,33,000/-
e)	<i>Shailesh Shah</i>	₹ 1,00,000/-
	<i>Total</i>	₹ 1,02,73,041/-

8. According to AO, these were interest free advances on which no interest has been received. According to AO, the assessee has taken interest bearing loan of ₹ 2.30 crores from Champaklal Motilal Steel Co. Ltd. and Topworth Steels P. Ltd.. According to AO, these were interest from advances on which no interest has been received. According to AO, the proportionate amount of ₹ 2,14,59,200/- have gone into advancing interest free loans. Accordingly, the AO disallowed proportionated interest at ₹ 46,57,113/-. Aggrieved, assessee preferred the appeal before CIT(A).

9. The CIT(A) after going through the submissions of the assessee and considering the aspects that Anmol Steel Processers Pvt. Ltd. is a debtor and from ledger account it was verified by the CIT(A) that it is



running account and which is for business purpose. In view of the above, he deleted the addition by observing in Para 5.2 as under: -

“5.2 Grounds 6 to 9 are against the action of the AO in disallowing interest as not for business. I find that the AO has proceeded on erroneous appreciation of facts. Admittedly as per the AO, the appellant has availed interest free loans of Rs 320 lakhs. while interest free loans have been advanced to 5 individuals amounting to Rs 102 lakhs. The AO also held that the appellant has given an interest free loan to Anmol his sister concern. Based on this arithmetic, the AO held that the excess of interest free loans advanced and availed is sourced out of interest bearing funds. I find that the AO has not actually examined the cash flow statement to see if in reality the interest bearing funds have been diverted. I also find that the so called loan to Anmol is not actually a loan but Anmol is a debtor to the appellant to the tune of Rs 431.86 lakhs. The appellant not only gets services from Anmol, but also makes sales to Anmol. The combined account of Anmol in the books of the appellant reveals that Anmol is a debtor to the appellant. Clearly, the debit balance of Rs 431.86 lakhs is on account of a business relation and not a loan. The logic of the AO therefore falls on this single count. After removing the figure of Rs 431.86 lakhs from the interest free loans advanced, the arithmetic of the AO fails as the appellant has availed interest free loans of Rs 320 lakhs against which he has advanced Rs. 102 lakhs to 5 individuals. The very basis of making this



disallowance is therefore misconceived. In the circumstances, I have no hesitation in deleting the disallowance of Ps 46,57,113 made by the AO on this issue. Grounds 6 to 9 are allowed.”

Aggrieved, now Revenue is in appeal before us.

10. Before us, the learned Sr. Departmental Representative heavily relied on the assessment order. On the other hand, the learned Counsel for the assessee supported the order of CIT(A).

11. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the CIT(A) has given a categorical finding that Anmol Steel Processers Pvt. Ltd. is a sister concern but it has running trading account with the assessee and doing the work of cutting, loading, unloading, accepting the charges from the same. Once, Anmol is a trade creditor, it has business connection and there is a business expediency. The amount advanced is not on account of interest bearing loan diverted for interest free advances. It is being a business transaction, the CIT(A) has rightly deleted the addition and we confirm the same. This issue of Revenue's appeal is dismissed.

12. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 28-09-2018.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 28-09-2018

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai