

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 1030/JP/2017
निर्धारण वर्ष / Assessment Years : 2012-13

| | | |
|---|-------------|------------------------------------|
| Shri Anil Kumar Gupta Prop. Shree Shyam Steel Exchange, S/o Shri Shiv Prasad Gupta, Near Shanta Press, Modi Road, PO- Jhunjhunu (Raj) 333001. | बनाम Vs. | The ITO, Ward- 7(4), Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AECPG 1337 G | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Shri R.S. Poonia (C.A.)
राजस्व की ओर से / Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 04/09/2018
उदघोषणा की तारीख / Date of Pronouncement : 15/10/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-3, Jaipur dated 12.10.2017 for the Assessment Year 2012-13 wherein the assessee has taken the followings ground of appeal:-

"1. Under the facts & circumstances of the case and in law, the Ld. CIT(Appeal) erred to confirming the order of Ld. AO by disallowing of Rs. 4,80,240/- in respect of commission paid on purchases, resultantly addition of Rs. 4,80,240/- need to be deleted.

2. Under the facts & circumstances of the case and in law, the Ld. CIT (Appeal) erred to confirming the order of Ld AO by disallowing of Rs. 4,32,187/- in respect of commission paid on sales, resultantly addition of Rs. 4,32,187/- need to be deleted."

2. In ground No. 1, the assessee has challenged the sustenance of disallowance of Rs. 4,80,240/- in respect of commission paid on purchases during the year and in ground No. 2, the assessee has challenged the sustenance of disallowance of commission of Rs 4,32,187 paid on sales affected during the year.

3. The assessee in the business of wholesale trading of Iron Steel and is the proprietor of M/s Shri Shyam Steel Exchange. Briefly, the facts of the case are that during the course of assessment proceedings, the AO observed that the assessee has debited a sum of Rs. 4,80,240/- on account of commission on purchase expenses and an amount of Rs. 4,32,187/- on account of commission on sales. The commission on purchase has been paid to Shri Sanjay Gupta who is the brother of the assessee and the commission on sales has been paid to Smt. Annu Gupta who is wife of the Shri Sanjay Gupta. The AO has referred to the provisions of Section 40A(2)(a) r.w.s. 40A(2)(b) of the Act and a show cause was issued to the assessee to explain the genuineness of the said commission paid and to produce these persons for necessary examination. However, the assessee did not produce these persons for examination and has filed written submissions which were considered by the Assessing Officer. On the said examination, the Assessing Officer observed that the statement of purchase and sales which have been submitted by the assessee along with submissions are only abstract of

his own ledger having no evidence from third parties or having any correlation from the supplier or buyer to determine whether any efforts were actually made by Shri Sanjay Gupta or Smt. Annu Gupta during the procurement or sale of goods. Hence, the assessee failed to justify these expenses. The Assessing Officer further raised doubts regarding shifting of the assessee and the other persons from Jhunjhunu to Bangalore and related language issues. It was accordingly held by the AO that in absence of examination of these persons, such type of questions remained unexplained and the assessee has deliberately and intentionally not produced them for examination. It was held by the AO that the assessee has failed to satisfy that these payments were genuine and reasonable for its business. It was further held by the AO that these expenses were credited to the recipient on the last day of accounting year i.e. 31.03.2012 and not actually paid to them. Accordingly, commission on purchase and commission on sales were disallowed treating them as unreasonable and excessive and added to the returned income of the assessee.

4. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the said addition made by the Assessing. Now, the assessee is in appeal before us

5. Before us, the Id AR submitted that during the year under consideration, assessee paid commission to Mr. Sanjay Gupta of Rs. 4,80,240/- in consideration of service rendered by him to business at agreed rate. It was submitted that most of purchases were made by Mr. Sanjay Gupta as he was having active involvement in business. He

has contributed in purchase of 2824.96 MT. out of total purchases of 2906.93 MT. As per agreed terms, commission was credited in the account of Mr. Sanjay Gupta at the end of the year after deduction of TDS @ 10%. Mr. Sanjay Gupta is regular income tax payer and he disclosed the same commission in his Income Tax Return and offered for taxation. The Assessing Officer has invoked the provision of section 40A(2)(a) for making entire disallowance of commission paid to Mr. Sanjay Gupta, brother of assessee. A plain reading of section 40A(2)(a) of the Act indicates that the Learned Assessing Officer is entitled to disallow only so much of the quantum of the expenditure which he holds to be excessive and unreasonable and not the entire expenditure. Therefore it appears that the said disallowance is not in accordance with the provisions of section 40A(2)(a) of the Act. Once the A.O. has crossed the Section 37(1), it assumes the expense is genuine and allowable. The A.O. can invoke section 40A when the expense is otherwise allowable under Section 30 to 37 and for disallowance of excessive or unreasonable portion the Section 40(A) can be invoked. Similar contentions were raised in respect of commission to Smt. Annu Gupta amounting to Rs. 4,32,191. It was submitted that most of sales were made Mrs Annu Gupta as she was having active involvement in business. She has contributed in sale of 2788.33 MT. out of total sales made of 2860.74 MT. She was paid commission @ Rs. 155/- per MT for services rendered by her. As per agreed terms, commission was credited in the account of Mrs. Annu Gupta at the end of the year after deduction of TDS @ 10%. Mrs. Annu Gupta is regular income tax payer and she disclosed commission received from M/s Shri Shyam Steel, in her income tax return and offered for taxation. It was

submitted that the Assessing Officer has wrongly invoked the provision of section 40A(2)(a) for making entire disallowance of commission paid to Mrs Annu Gupta, spouse of brother of assessee as she is neither relative nor having substantial interest in the business.

6. The Id DR is heard who has vehemently argued the matter and relied on the findings of the lower authorities. He submitted that the assessee has failed to satisfy the initial onus cast on it to justify the genuineness of the commission expenditure so claimed on the purchases and then on sales. Further, he submitted that the Id CIT(A) has rightly confirmed the disallowance so made by the AO and his findings are at para 5.3 which is reproduced as under should be confirmed:-

"I observe the record I find that the A/R of the appellant himself stated that commission is a remuneration for their full time engagement in the business. It proves that commission is an adjustment entry only. The A/R of the appellant failed to file any evidence which established that the commission payment to Mr. Sanjay Gupta and Smt. Annu Gupta is genuine. The A/R of the appellant neither filed any agreement nor filed any evidence and terms and condition on which the purchases and sales made. The onus on the appellant to establish the commission payment but in that the appellant failed.

The appellant also not produced Shri Sanjay Gupta and Smt. Annu Gupta before the Assessing Officer to examine the issue of commission. The A/R of the appellant taken the argument that the commission paid to Shri Sanjay Gupta in the A.Y. 2013-14 accepted by

the Assessing Officer. This argument had no value because the A/R of the appellant failed to file any evidence which established that what type of service rendered by him and he also not submitted the details that how Mr. Sanjay Gupta's service benefited to firm. The facts of the each year are different it is also worthwhile that these expenses were credited to the recipient on the last day of account year i.e. 31.03.2012 and not actually paid.

Therefore considering the above observation I am of the view that commission paid to Mr. Sanjay Gupta of Rs. 4,80,240/- on purchases and Rs. 4,32,187/- to Smt. Annua Gupta on sales are adjustment entry. Hence I confirm the addition made by the Assessing Officer of Rs. 4,80,240/- commission paid to Sanjay Gupta and Rs. 4,32,187/- commission paid to Smt. Annu Gupta. These grounds are not allowed."

7. We have heard the rival contentions and perused the material available on record. In his trading and profit and loss account, the assessee has debited a sum of Rs. 4,80,240/- as commission on purchases and an amount of Rs. 4,32,187/- as commission on sales. It is not in dispute that both Shri Sanjay Gupta and Smt. Annu Gupta have been working full time with the assessee proprietorship concern at Bangalore. It is also not disputed that they have not been paid any salary or other consideration by the assessee during the impugned assessment year. The assessee's contention is that they have been paid remuneration in the form of commission with respect to the purchases and the sales affected by Shri Sanjay Gupta and Amt. Annu Gupta respectively and it is only because of their efforts that the assessee's

proprietorship concern has been able to almost double the turnover to Rs. 12 Crore from 5.90 Crores in the last year and the commission is therefore, commensurate with the efforts made by them. In order to appreciate the said contention, we refer to the ledger account of Shri Sanjay Gupta in the books of the assessee for the period April, 2011 to 31st March, 2012 and on perusal of the ledger, it is noted that on 31st March, 2012, the assessee has passed a journal entry where interest on borrowings amounting to Rs. 3,08,033/- and commission on purchases amounting to Rs. 4,80,240/- has been credited to the account of Shri Sanjay Gupta. Further, it is observed that there is opening balance of Rs. 24,75,021/- and deposit of Rs. 1 lacs and payment of Rs. 54,746/-. Further, there are entries regarding TDS deducted on interest and on the commission on purchases and then, with closing balance of Rs. 3,29,721/-. We, therefore, note that the assessee has provided for the commission on purchases on the last year of the financial year and there are no withdrawals commensurate to the commission so credited by the assessee in the account of Shri Sanjay Gupta. It appears that specially going by the opening and closing balances, the amount of low withdrawals vis-à-vis the commission and the fact that interest on borrowings has also been credited to the account of Shri Sanjay Gupta that the commission on purchases which is credited to his account is not actually paid to him and the same is being accumulated and shown as outstanding at the year end. The said outstanding amount is then shown as borrowing by the assessee from Shri Sanjay Gupta and interest on such borrowings have also been credited to the account of Shri Sanjay Gupta. The scenario, which therefore emerges is that for the involvement of Shri Sanjay Gupta in the assessee's business on full

time basis, he has not been actually paid either the commission or the interest on the borrowings and the said accumulated commission and earnings thereon remain invested in the assessee's proprietorship concern. Towards the close of the financial year, accounting entries are passed showing the commission and interest expenditure and the same are claimed as expenditure in the profit/loss account and subsequently, in the return of income. In substance, the involvement of Shri Sanjay Gupta in the business of the assessee's concern is not just by way of his full time involvement but also financially whereby his so called commission and interest income remain invested in assessee's concern and not withdrawn at any point in time. In effect, it seems that he is an active partner in the business of the assessee's concern. However, we may add that what we have examined are the fact pertaining to financial year 2011-12 relevant to impugned assessment year, however, whether the same facts are found repeated year on year basis, it will conclusively led to belief that Shri Sanjay Gupta is not employed with the assessee concern as any other employee who is being paid remuneration in the form of commission, rather he is a partner in the assessee's concern and it is their mutual understanding/decision among the partners not to withdraw the share of profit from the assessee's concern rather the same remained invested in the assessee's concern. No doubt, Shri Sanjay Gupta has reported both the commission on purchases and the interest on borrowings as part of his taxable income in his return of income. However, mere fact that the recipient has offered the amount as his income doesn't necessarily lead to a conclusion that the same will be allowed as an eligible expense in the hands of the payer. In our view, merely crediting the account of Shri

Sanjay Gupta at the year end and in absence of commensurate withdrawal or the payment by the assessee and where the same facts hold good even for past and the subsequent years, the instant transaction is in essence a transaction of share in profits though termed and reflected as commission for services. Similarly, we note that similar fact pattern emerges in respect of Smt. Annu Gupta for the instant year. However, we have said above, we have noted and examined the facts only for the instant year and it is important to examine whether similar fact pattern emerges for the other years where there is involvement of these two individuals in assessee's business and in absence of that, the matter cannot be decided conclusively. In light of the same, the various other contentions so raised by the Id AR are therefore not commented upon and are thus kept open. We deem it appropriate to remand these two matters relating to commission back to the file of the Assessing Officer who shall examine the matter a fresh taking into consideration the above discussion after giving reasonable opportunity to the assessee.

In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 15/10/2018.

Sd/-

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member
जयपुर / Jaipur

दिनांक / Dated:- 15/10/2018.

(विक्रम सिंह यादव)

(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

***Santosh**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Anil Kumar Gupta, Jhunjhunu.
2. प्रत्यर्थी / The Respondent- ITO, Ward-7(4), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 1030/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar