

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जी,मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री रमित कोचर, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ramit Kochar, Accountant Member**

**ITA NO.2391/Mum/2017
Assessment Year: 2009-10**

Shri Sunil Chimanlal Shah, 4/402, Odyssey-1, Hiranandani Garden, Powai Mumbai-400076	vs	Income Tax Officer, Ward-26(3)(3), C-11, Pratayakshkar Bhavan Bandra Kurla Complex, Bandra (East), Mumbai-400051
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No. ABFPS0623M		

निर्धारिती की ओर से / Assessee by	Shri Ketan L. Vajani
राजस्व की ओर से / Revenue by	Chaudhary Arun Kumar Singh-DR

सुनवाई की तारीख / Date of Hearing :	11/10/2018
आदेश की तारीख /Date of Order:	11/10/2018

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated
28/12/2016 of the Ld. First Appellate Authority, Mumbai,

confirming the penalty of Rs.3,88,000/- imposed under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing, the ld. Counsel for the assessee, Shri Ketan L. Vajani, Ld. counsel for the assessee, claimed that the quantum addition was sent back to the file of the ld. Assessing Officer by the Tribunal, the copy of the order dated 25/09/2018 (ITA No.59/Mum/2014) was furnished the by the assessee. The ld DR, did not controvert this factual matrix that the quantum addition was remanded back.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above, we are reproducing hereunder the relevant portion from the aforesaid order of the Tribunal dated 25/09/2018 for ready reference and analysis:-

“The assessee has filed the present appeal against the order dated 03.10.2013 passed by the Commissioner of Income Tax (Appeals)-22, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2009-10.

2. The assessee has raised the following grounds: -

1. The Ld. Assessing Officer has erred in Disallowing the commission paid of Rs.11,40,008/- & it's reasonableness to various parties on sales and making charges. The Ld. A.O has not appreciated the commission paid is vital for carrying on Business particularly in proprietorship. The Ld. CIT (A), has also confirm the same without considering the submission of an assessee,

2. The Ld. AO as well as Ld. CIT (A), failed to appreciate the fact that the commission and Brokerage is the essential element of the business and it is required to pay many time according to market condition. And the volume of payment is also reasonable.

3. The Id. AX) as well as the Ld. CIT (A), failed to appreciate the fact that the commission paid us parties are less than the G.P. Margin of the business. The payment made to the parties are by Account payee / Cross Cheque and the TDS where ever applicable was properly deducted and paid to the government treasury time to time. And the TDS return was also tiled time lo time,

4. The Ld. A.O as well as Ld. CIT (A), failed to appreciate that the details called for was submitted along with the documentary evidence i.e. Sales Invoice, making charges voucher, Bank book, Ledger Account of the commission paid, more over the information asked for U/s.133(6) directly to the various parties were also presented. Response to the summonsed the various parties presented personally with their return of Income Bank statement, computation of Income and Identity proof also provided to the Ld. A.O.

5. The Ld. Income Tax Officer has erred in disallowing 1/5th of depreciation on motorcar Rs.16,804/-. The Ld. CIT(A) has also not appreciated with the submission.

6. The order of Ld. AO is Excessive, Arbitrary, and against the Law of Natural justice and Equity.

7. The Ld. ITO failed to pass a speaking order and consider various citations, which are similar to the nature of the claim of the commission and Brokerage payment and Disallowance of Depreciation on motor car.

8. The Ld. AO has erred in levying of Interest u/s 234B, 234C and 234D, and has wrongly initiated penalty proceedings u/s 271(1)(c) of the I.T. Act, 1961.

9 Your honours appellant prays as under

a) That Commission disallowed of Rs.11.40,008/- should be deleted.

b) *That Depreciation disallowed of Rs.16,804/- also to be deleted. Or some other relief may be given as your honour think most proper and appropriate."*

3. *The brief facts of the case are that the assessee filed his return of income on 21.09.2009 declaring total income to the tune of Rs.18,97,450/-. The return was processed u/s 143(1) of the I.T. Act, 1961. Thereafter the case was selected for scrutiny, hence, notice u/s 143(2) of the Act dated 20.08.2010 and notice u/s 142(1) of the Act dated 24.06.2011 were issued and served upon the assessee. The assessee is the proprietor of M/s. C.M. Jewellers and engaged in the business of trading and gold & Diamond jewellery and has declared his income from business & other sources. On verification, it was found that the assessee has debited the commission to the tune of Rs.11,40,008/- in his P&L Account. Notice was given and finding no justifiable reason to allow the same, the said commission was added to the income of the assessee. The assessee has also claimed the depreciation to the extent of 1/5th in motor car but the same was also disallowed and the income of the assessee was assessed to the tune of Rs.30,54,260/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the addition raised by the AO, therefore, the assessee has filed the present appeal before us.*

ISSUES Nos. 1 to 4:-

4. *Under these issues the assessee has challenged the confirmation of the disallowance of commission in sum of Rs.11,40,008/-. The contention of the Ld. Representative of the assessee is that the claim of the assessee has not been examined properly because the evidence given in support of the claim was not examined by the AO as well as the CIT, therefore, in the said circumstances and in view of the evidence adduced before them as well as before the ITAT, the claim of the assessee is liable to be allowed in the interest of justice. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. We have heard argument and advanced by the Ld. Representative of the parties and perused the record available on the file in connection with the payment of commission. The assessee has produced the debit notes before the AO which lies at page no. 25 to 33 of the paper book. The assessee has also produced the confirmation letter of the*

parties who received the commission which lies at page no. 43 to 53 of the paper book. The assessee has also deducted the TDS upon the payment and in this regard the copy of Form no. 16A has been produced on record which lies at page no. 34 to 42 of the paper book. On appraisal of the order passed by the authority below, we nowhere find any discussion about these documents for the consideration of the claim of the assessee. Further, we noticed that the claim of the assessee has been allowed in the subsequent assessment year i.e. 2010-11. The evidence given by the assessee nowhere verified and considered, therefore, in the said circumstances, we are of the view that the finding of the CIT(A) is not justifiable, therefore, we set aside the same and restore the issue before the AO to decide the matter afresh in view of the evidence discussed above and by giving an opportunity of being heard to the assessee in accordance with law. Accordingly, these issues are decided in favour of the assessee against the revenue.

ISSUE NO. 5:-

5. Under this issue the assessee has challenged the confirmation of disallowance to the extent of 1/5th upon the depreciation of motor car of Rs.16,804/-. On appraisal of the record, we noticed that in this regard the AO has allowed the claim of the assessee against subsequent year also and copy of which has been lies at page no. 62 of the paper book. The claim of the assessee in this regard is also required to be examined at the end of AO, therefore, in this regard, we set aside the finding of the CIT(A) on this issue and restored the issue before the AO to decide the issue afresh in accordance with law by giving an opportunity of being heard to the assessee. Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NOs. 6 & 7:-

6. Issue nos. 6 & 7 are generally in nature which nowhere required for any adjudication.

ISSUE NO. 8:-

7. Issue no. 8 is consequential in nature which nowhere required for adjudication.

8. *In the result, the appeal filed by the assessee is hereby ordered to be allowed for statistical purpose.”*

We find that the Tribunal vide aforesaid order dated 25/09/2018 considered the factual matrix and set-aside the issue of quantum addition to the file of the ld. Assessing Officer to decide afresh. Since, the penalty is offshoot of the quantum addition, which has been remanded back to the file of the ld. Assessing Officer, therefore, the penalty will be dependent upon the outcome of the order of the Ld. Assessing Officer, therefore, this penalty appeal is also sent to the file of the ld. Assessing Officer for fresh adjudication/consideration. Thus, the penalty appeal is allowed for statistical purposes.

Finally, the appeal of the assessee is allowed for statistical purposes.

This order was pronounced in the open court in the presence of the ld. representatives from both sides at the conclusion of the hearing on 11/10/2018.

Sd/-

(Ramit Kochar)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : **11/10/2018**

Shekhar, P.S. नि.स.

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

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

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

आदेशानुसार/ BY ORDER,

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