

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member]

I.T.A. No. 1266/Kol/2016

Assessment Year: 2010-11

M/s. Sudarshan Paper & Board Pvt. Ltd.....Appellant

Room No. 311

27, Brabourne Road

Kolkata - 700 001

[PAN : AAHCS 1241 F]

Deputy Commissioner of Income Tax, Circle-4, Kolkata.....Respondent

I.T.A. No. 316/Kol/2016

Assessment Year: 2011-12

Deputy Commissioner of Income Tax, Circle-4(2), Kolkata.....Appellant

M/s. Sudarshan Paper & Board Pvt. Ltd.....Respondent

Room No. 311

27, Brabourne Road

Kolkata - 700 001

[PAN : AAHCS 1241 F]

Appearances by:

Shri S.M. Surana, Advocate, appeared on behalf of the assessee.

Shri Sankar Halder, Addl. CIT, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : October 25th, 2018

Date of pronouncing the order : November 9th, 2018

O R D E R

Per J. Sudhakar Reddy :-

ITA No. 1266/Kol/2016; Assessment Year 2010-11, is an appeal filed by the assessee and ITA No. 316/Kol/2016; Assessment Year 2011-12, is an appeal filed by the revenue.

2. As the issues arising in both these appeals are common, for the sake of convenience, they are heard together and disposed off by way of this common order.

3. The assessee is in the business wholesale trading in paper and paper board. The issue arising in both these appeals, is the disallowance of claim of payment of commission by the Assessing Officer. The assessee has claimed that during the course of business, he has paid commission to a number of parties for the purpose of business. In support of the genuineness of payment of commission, the assessee filed copies of, bills which contained the details of the parties to whom sales commission was paid and the details of the sales made through them, confirmation letter from the parties, agreements with the parties for rendering of services and payment of commission and income tax details of the commission agents i.e. their PAN Numbers. Tax was deducted at source for the commission paid and details of the same were furnished before the Assessing Officer. The Assessing Officer issued notice u/s 133(6) of the Act, to the commission agents and for the Assessment Year 2011-12, the commission agents have received the same. In reply to these notices, these parties have directly confirmed to the Assessing Officer, that they have received commission for the sales done through them. Thereafter, the Assessing Officer issued notice u/s 131 of the Act, summoning the parties for personal appearance. Some of these notices were returned unserved. Thereafter the Assessing Officer directed the assessee to produce these commission agents before him for examination. All the parties except one were produced before the Assessing Officer for, the Assessment Year 2011-12. The party which could not appear before the Assessing Officer was Sugam Vinimay Pvt. Ltd. The Assessing Officer disallowed the commission made on the ground that the assessee could not prove the services rendered by these commission agents. He relied on the following judgments:-

- a) *Vishnu Agencies P. Ltd.; Calcutta High Court (117 ITR 823)*
- b) *Assam Pesticides and Agro Chemical; Gauhati High Court (1997) (227 ITR 846)*
- c) *Lachminarayan Madanlal; Hon'ble Supreme Court (1972) (86 ITR 439)*

3.1. On appeal, for the Assessment Year 2011-12, the ld. CIT(A) deleted the addition by observing as under:-

"7.4. All the commission agents barring one appeared before the AO confirmed about receipt of commission and filed details of services rendered; bills were raised by them including service taxes etc. and assessee made the payments through account payee cheques after deduction of TDS; there was agreement with each party by which the agents had the right to receive commission; the

commission agents were assessed to tax and filed their returns showing the commission income. The AO has not alleged that the parties to the transactions are related to each other or that the payments were not genuine or that the payments having been made by the assessee to the recipients have found their way back to the assessee some way or the other. These being the issues, I find that case laws referred by the AO are distinguishable on facts. It is a well settled legal position that every case depends on its own facts. Even a slightest change in the factual scenario alters the entire conspectus of the matter and makes one case distinguishable from another. The crux of the matter is that the ratio of any judgment cannot be seen divorced from its facts. In view of such, I do not find merit in the addition made by the AO so far as payments of commissions to eleven parties, totaling to Rs.92,61,790/- (Rs.1,14,51,971/- minus Rs.21,90,181/-). Therefore, this addition of Rs.92,61,790/- is deleted."

3.2. For the Assessment Year 2010-11, the ld. CIT(A), confirmed the findings of the Assessing Officer, wherein, the sales commission paid to one party i.e. Sugandhi Sales Pvt. Ltd. of Rs.9,05,612/-, was disallowed on the ground that the notice issued to the party was returned unserved and the assessee did not produce the party before the Assessing Officer. The ld. CIT(A) at page 3 last para of his order held as follows:-

*"I have considered the submissions of the AR of the appellant. The notice as issued by the AO was returned unserved. The existence of the party has not been proved by the assessee. Mere filing the confirmation letter from the commission agents along with their PAN, bills evidencing the sale of goods through them mentioning therein the names of the parties to whom the goods were sold through the said commission agent; the evidence of payment by cheque, the Tax deducted, service tax charged and the bank statements and producing the copy of the agreement with the commission agent does not prove that the service was actually rendered. Hence, the action of the AO is confirmed. **This ground of appeal is dismissed.**"*

3.2.1. For the Assessment Year 2011-12, the revenue has filed this appeal and for the Assessment Year 2010-11, the assessee filed this appeal on the issue of allowability of commission paid. The other issues raised by for the Assessment Year 2010-11 in the assessee's appeal pertain to ad-hoc disallowance of certain expenses. The revenue has raised one more ground for the Assessment Year 2011-12 related to disallowance u/s 40(a)(ia) of the Act.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5. We first take up the issue of disallowance of claim of payment of commission on sales. The Assessing Officer for the Assessment Year 2010-11 has allowed the claim of payment of commission made by the assessee amounting to Rs.1,14,51,971/-, paid to 11 parties. Only in the case of one party i.e. Sugam Vinimay P. Ltd., the commission paid was disallowed. For the Assessment Year 2011-12, the Assessing Officer chose to disallow the very same claim of the assessee of having incurred expenditure towards sales commission. The assessee has filed, in our view, all the required evidence to discharge the burden of proof that lay on its. The Id. CIT(A), in our considered opinion has rightly appreciated the factual position and at para 7.4. of his order for the Assessment Year 2011-12 (supra) has rightly decided the issue in favour of the assessee.

In the case of Sugam Vinimay P. Ltd., the Id. CIT(A) for the Assessment Year 2011-12 at para 7.5. has held as follows:-

*"7.5. So far as Sugam Vinimay Pvt. Ltd. is concerned, AO issued summon U/s. 131 and the same came back unserved. The assessee also could not produce the party before the AO. However, like other agents, it also responded to the AO's notice issued u/s. 133(6) of the Act and filed all details asked for by the AO viz., (i) Nature and amount of transaction made with the above assessee company during the relevant year. (ii) Name of the parties for whom sales were arranged with quantity and consideration of sales, (iii) Opening and closing balance and payment made during the year, (iv) Ledger copy of accounts with the assessee company, (v) Bank Account details in which transactions is reflected and (vi) Copy of acknowledgement or filing of Income Tax Return and PAN. By filing these details, the assessee and M/s. Sugam Vinimay Private Ltd. had squarely discharged the primary onus cast on them. In this case also, bill was raised by including service taxes etc. and assessee made the payments through account payee cheque after deduction of TDS. There was an agreement also between the assessee company and its agent Sugam Vinimay Pvt. Ltd by which the agent had the right to receive commission and Sugam Vinimay also filed the return showing the commission income. The AO also has not alleged that assessee company and Sugam Vinimay are related to each other or that the payments were not genuine or that the payments having been made by the assessee to the recipient have found their way back to the assessee some way or the other. This being the case, AO cannot summarily reject the commission payment to Sugam Vinimay as 'shyam transaction', even though the agent did not respond to his summon. It is well settled law that once the assessee has discharged the primary onus, AO cannot hold a transaction bogus without bringing any material evidence on record to the contrary. **In view of such, balance addition of Rs.21,90,181/- is also deleted.**"*

5.1. The Id. D/R, could not point out any infirmity in these findings of the Id. CIT(A), hence we uphold the same. For similar reasons for the Assessment Year 2010-11, the disallowance of Rs.9,05,612/-, made for the sole reason that the party has not been produced before the Assessing Officer, is hereby deleted. The assessee filed all the requisite details referred above in support of the genuineness of the claim and identity of the party. No disallowance can be made merely because the party has not appeared in person before the Assessing Officer.

5.2. The Kolkata 'D' Bench of the Tribunal in *ITA No. 141/Kol/2016 & C.O. No. 11/Kol/2016; Assessment Year 2012-13; Madhusudan Rungta & Sons (HUF) vs. ITO* at para 6, held as follows:-

"6. We have heard the rival submissions. We find that the primary reason for disallowance of this commission by the Ld. AO is due to the fact that the Ld. AO was of the opinion that the assessee had not proved the nature and factum of services rendered by these three commission agents to the assessee. Hence, according to the Ld. AO, the payment of commission, though subjected to deduction of tax at source is merely a book entry to reduce the taxable profit of the assessee. But we find that the assessee had duly furnished the bill raised by those commission agents on the assessee which clearly contained the list of parties i.e. customers of the assessee, to whom sales were made by the assessee. This clearly proves that these parties were introduced to the assessee by the concerned commission agents. We also find that the assessee had furnished the details of sales above Rs 50,000/- before the Ld. AO for the whole year which admittedly contained sales made to the various parties mentioned in the commission bill raised by commission agents. We have also cross verified from the details of sales furnished by the assessee before the Ld. AO with the commission bill raised by commission agents wherein the total sales made to these parties also tally. We also find that the said commission agents even though did not respond to the summons issued by the Ld. AO by making their personal appearance, but had furnished the requisite details to the Ld. AO and had also given confirmation that they had indeed included the subject mentioned commission in their returns and paid taxes thereon. All these facts clearly proved the services rendered by the commission to the assessee achieving the payment of commission. There could be more than one justifiable reason for commission agents for not appearing before the Ld. AO in response to the summons issued thereon. The Ld. AO is empowered under the law to take necessary action against these commission agents for non-compliance to the summons issued to [Section 131](#) of the Act. The Statute provides for relevant remedial measures thereon. The Id AO without resorting to such measures, cannot proceed to disbelieve the claim of commission paid by the assessee when the same are supported by various documents and confirmed by the said parties. In the instant case, the primary onus has been duly discharged by the assessee proving the claim of commission payments made by the assessee. There is absolutely no reason for the Id AO to doubt the veracity of the said transactions. Admittedly none of the commission agents were relatives of the assessee or interested parties with the assessee so as to allege some mala fide on the part of the assessee. Hence, in our considered opinion, there is no case made out by the Id AO to treat the commission transactions as ingenuine transactions in these facts and circumstances. We hold that mere non- appearance of the said commission agents in person before the Ld. AO would

not make the transaction of payment of commission as ingenuine. Hence, we hold that the Ld. CIT(A) had rightly deleted the disallowance of commission made by the Ld. AO. Accordingly, ground nos. 2 to 4 raised by the Revenue are dismissed."

6. Applying the propositions of law in this case law to the facts of the case, we dismiss the revenue's appeal on this issue for the Assessment Year 2011-12 and allow the ground of appeal of the assessee for the Assessment Year 2010-11.

7. We now take up Ground Nos. 3 & 4, for the Assessment Year 2010-11.

This disallowance pertain to sales promotion, telephone expenses and motor car and travelling expenses. The Id. Counsel for the assessee vehemently contends that no disallowance can be made on the ground that there is an element of personal use of telephone and motor car in the case of a Limited Company as there cannot be any personal use. Reliance in this regard was placed on the judgment of the Hon'ble Gujarat High Court in the case of *Sayaji Iron and Engg. Co. vs Commissioner of Income-Tax* 2002 253 ITR 749 Guj.

7.1. After hearing the submission, we confirm the disallowance was made on an estimate basis of sales promotion expenses. We find that the Assessing Officer has disallowed the expenditure on an ad-hoc basis simply because there is a rise in the quantum of expenditure as compared to the expenditure incurred in earlier years. He estimated the expenditure at 60% and 40% of the claim and the balance was disallowed. This, in our view is arbitrary and without any basis. Thus, Ground Nos. 3 & 4 of the assessee is allowed as the disallowance, in our view, is not made on sound basis. In the result, **ITA No. 1266/Kol/2016, is allowed.**

8. **ITA No. 316/Kol/2016.**

Ground No.1, is on the issue of disallowance u/s 40(a)(ia) of the Act. We find that the Id. CIT(A) has specifically held that in case of conversion charges, the assessee had deducted income tax at source @2% of such contractual payments and deposited the TDS in the Government A/c. On facts he held that there is no valuation of Section 194C of the Act and hence and no disallowance can be made u/s 40(a)(ia) of the Act. This factual

finding of the ld. CIT(A), could not be controverted by the ld. D/R, hence we uphold the same. In the result, **ITA No. 316/Kol/2016, is dismissed.**

9. In the result, **ITA No. 1266/Kol/2016, is allowed.**

ITA No. 316/Kol/2016, is dismissed.

Kolkata, the 9th day of November, 2018.

Sd/-

[S.S. Viswanethra Ravi]
Judicial Member

Sd/-

[J. SudhakarReddy]
Accountant Member

Dated : 10.10.2018
{SC SPS}

Copy of the order forwarded to:

1. M/s. Sudarshan Paper & Board Pvt. Ltd
Room No. 311
27, Brabourne Road
Kolkata - 700 001

2. Deputy Commissioner of Income Tax, Circle-4, Kolkata

3. Deputy Commissioner of Income Tax, Circle-4(2), Kolkata

4. CIT(A)-

5. CIT- ,

6. CIT(DR), Kolkata Benches, Kolkata.

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By order

Assistant Registrar
Head of Office/ D.D.O. ITAT, Kolkata Benches