

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 782/Kol/2016
Assessment Year: 2011-12

Tirumala Seven Hills Pvt. Ltd. (PAN: AA ACT9861F)	Vs.	Joint Commissioner of Income-tax, Range-4, Kolkata.
Appellant		Respondent

Date of Hearing	05.09.2018
Date of Pronouncement	22.11.2018
For the Appellant	Shri Miraj D. Shah, FCA
For the Respondent	Md. Usman, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order dated 25.02.2016 passed u/s 250/143(3) by the Ld. Commissioner of Income-tax (Appeals)-6, Kolkata ('Ld. CIT(A)) for the Assessment Year 2011-12.

2. The main grievance of the assessee in this appeal is against the Ld. CIT(A)'s action of confirming the disallowance of commission and annual maintenance expenses amounting to Rs.1,92,65,164/- and Rs.4,40,58,520/- made by the AO. Briefly stated the facts of the case are that the assessee is engaged in the business of sale & providing maintenance services of imported telecommunication equipment. The assessee imports foreign telecom equipments from Japan, China, Finland, France & USA. The assessee also provides agency services to reputed foreign telecom equipment manufacturing companies. The customers of the assessee comprised of both private players such as Tata Teleservices, Reliance etc. and as well as government companies such as BSNL & MTNL etc. In the course of its business

the assessee had appointed liaison agents to provide marketing services, for soliciting orders, ensuring timely delivery of goods, collection of payment etc., to the customers who were located across India and also render after sale services to its telecom customers. The assessee had also appointed service partners to render end-to-end annual maintenance services in respect of the telecom equipment sold to the customers. In the course of assessment proceedings the AO required the assessee to explain the business response the assessee filed a detailed note explaining its modus operandi of the business and the nature of these payments. The AO issued notices u/s 133(6) to the two commission agents as well as the three service providers, who were appointed by the assessee and the notices went un-complied. Having regard to the fact that the notices went un-served, the AO disbelieved the genuineness of the payments made by the assessee and accordingly disallowed the commission expenditure and annual maintenance expenses of Rs.1,92,65,165/- and Rs.4,40,58,520/- respectively. Aggrieved by the assessment order, the assessee preferred an appeal before the Ld. CIT(A)-6, Kolkata, who confirmed the action of the AO.

3. At the time of hearing, the Ld. AR of the appellant vehemently objected to the disallowance of expenses made by the AO. The Ld. AR took us through the extensive documentation furnished before the lower authorities, which was placed before us in the paper book to substantiate the genuineness of the expenditure. The Ld. AR first explained the modus operandi of the business of the assessee. He submitted that the assessee procured and supplied telecommunication equipments to premier telecom companies in India. The major products dealt with by the assessee were as under:

- 1) Devices RTX/Transceiver RTX various Model
- 2) Drive Test Tool Kit
- 3) NemoOutdoor Kit
- 4) SMPS30A
- 5) OTDR various Models
- 6) Power Meter
- 7) Splicing Machine
- 8) Optical Line Protection Switch
- 9) Nemo Outdoor 10
- 10) Converter etc.
- 11) E1Tester (Sender)

4. It was submitted that the orders for such equipments were not easily procurable. The assessee was required to continuously liaise with purchase departments of the respective telecom companies, participate in tender process, price negotiations and thereafter ensure timely delivery and installation of technically sophisticated equipments and thereafter provide after sale services. In order to cater to such premium customers and that too across India, it was not possible for the in-house personnel of the assessee to market its products and render host of ancilliary services. Considering the nature of business and the technical complexities of the product, the assessee appointed marketing consultants who liaised on their behalf and build the reputation of the company with these telecom companies. They would also negotiate the price of the products with the private players to ensure that best prices are finalized and assist in the tendering process with the PSU customers. The tendering process would entail both technical and commercial bids and hence it was imperative to ensure that these processes were duly executed so as to successfully obtain the orders. Once the orders were received, the agents would liaise to get the technical drawings approved and thereafter coordinate with the logistics to ensure that the equipments are delivered in a time bound manner. They would also coordinate its installation, commissioning and render after sales support. Apart from the foregoing, the marketing agents would also ensure that the payments were timely collected from these telecom customers. Having regard to the range of marketing services provided by them, in lieu thereof the assessee would pay a fixed rate of commission for each product successfully marketed and sold by them. The terms and conditions of these arrangement as well as the obligations of the assessee as well as the customers were agreed in writing vide a duly executed agreement, copy of which was placed in the paper book.

5. The Ld. AR further drew our attention to the several correspondence exchanged between the company and the agents and also the subsequent revision in the commission rates due to the enhanced scope of work. The Ld. AR further invited our attention to the tax invoices raised by the agents, which contained the detailed description of the equipments marketed by them and the commission charged in terms of the signed agreement. The tax invoices contained the details of PAN and Service Tax Registration Number. He further referred to the confirmations obtained from the payees in respect of the aggregate

expenditure paid to them. He further drew our attention to the lower tax deduction certificates u/s 197 issued by the Income-tax Department to the payees. He therefore submitted that the TDS was deducted on the payments at the appropriate lower rates as certified by the income-tax authorities and all the payments were made through proper banking channel. It was thus submitted that the assessee company had provided all the relevant documents & evidences which it was required to ordinarily maintain in the course of business to substantiate the genuineness of the payments and the mere non-compliance by the payees to the notices issued by the AO u/s 133(6) could not ipso facto make these payments bogus.

6. Similarly with regard to the payment of annual maintenance service fees, the Ld. AR of the appellant drew our attention to the following evidences furnished before the lower authorities in support of the payments made by the assessee.

1. Copies of the appointment letters;
2. Copies of acceptances furnished;
3. Copies of the relevant correspondences;
4. Copies of the tax invoices;
5. Confirmation of Accounts;
6. Certificates u/s 197(1) provided by payees;
7. TDS certificates issued to the payees;
8. Service tax Registration certificates

7. The Ld. AR submitted that the authorities below did not bring on record even an iota of material or evidence to prove any defect or falsity in the documentary evidences submitted by the assessee but harped on the alleged non-compliance of notices by the payees. It was submitted that the assessee had placed the copies of each and every agreement entered into with the payees in respect of each payment made along with copies of the tax invoices & relevant supporting. The payees had charged service tax @ 12.36% on the invoices and furnished their service tax registration certificates to the assessee company. The bank account of the assessee further established that the payments were made through proper banking channel. Furthermore, each payee had had furnished lower withholding tax certificate obtained u/s 197 from the Income-tax Department and it is in terms of that certificate the assessee had withheld lower TDS on the payments. The Ld. AR submitted

that neither the AO nor the Ld. CIT(A) disputed the correctness and genuineness of the certificate issued by the Department u/s 197 of the Act. In view of these evidences the Ld. AR submitted that the sole premise on which the lower authorities justified the impugned disallowance i.e. non-service of notices u/s 133(6), was unjustified and unsustainable on facts & in law and prayed that the orders of the lower authorities be reversed and the disallowance be deleted. In support of its claim, the Ld. AR relied on the judgments of the Hon'ble Calcutta High Court in the case of Inbuilt Merchants Pvt. Ltd. (G.A. No. 3825 of 2013) and Gujarat High Court in the case of CIT Vs. Nangalia Fabrics Pvt. Ltd (40 taxmann.com 206).

8. On the other hand the Ld. DR vehemently supported the order of the lower authorities. He submitted that the AO had confronted the assessee about the non-service of notices and even thereafter the assessee was unable to provide any cogent explanation regarding the whereabouts of these payees. The Ld. DR also furnished a written note in support of the order of the lower authorities, wherein he pointed out that some of the payees had been struck off by the Registrar of Companies and were no longer in existence, which proved the non-genuineness of the payments made by the assessee. He also drew our attention to the fact that although the tax invoices were recognized and booked by the assessee during the relevant year but the payments were actually made after an unusually time gap of one year which further raised serious doubts over the genuineness of the payments. The Ld. DR thus submitted that the orders of the lower authorities be upheld.

9. We have carefully considered the submissions of the rival parties and perused the material placed on the record. We note that the assessee is engaged in the business of sale and servicing of imported telecommunication equipments. Additionally the assessee is also acting as commission agent for foreign principals. Telecommunications being a technically complex and challenging segment, the assessee maintains a dedicated service infrastructure to market its products and also provide maintenance services to the customers. Apart from its own marketing & servicing team, the assessee company has also appointed external marketing consultants to aggressively pursue orders, tender processes, conduct negotiations and ensure delivery of products as well as collection from customers. The assessee has also engaged companies who provide annual maintenance services for all service maintenance

contracts of the assessee. From perusal of the material placed on record, it is noted that the assessee company caters to reputed telecom companies which comprises of both private telecom companies such as Tata Teleservices, Reliance etc. and government entities such as BSNL & MTNL. Accordingly the assessee arranges and procures telecommunication equipments required by these customers and thereafter supplies to them. In order to procure orders from the customers named in the foregoing, it is undeniable that the assessee would be required to undertake substantial marketing efforts to be able to solicit orders for their telecom equipment requirements across India. Further, the very technical nature of these products as well as the fact that most of these equipments are imported from abroad, would necessitate professional servicing & maintenance; which is also provided by the assessee. Considering the nature and modus operandi of the business of the assessee, the profile of the customers and the quantity and value of the products supplied by the assessee to them, the role of external marketing agents and maintenance service providers in their line of business cannot be denied. The facts on record clearly show that the assessee had indeed supplied imported equipments to its customers and also executed service maintenance contracts entered into with them. In these circumstances we cannot be persuaded to hold that in this entire value chain, the assessee was not required to put in any efforts or for that matter need not have engaged third parties to assist in procuring orders as well as to provide annual maintenance services.

10. We find that for marketing the telecommunication equipments the assessee had engaged the services of services of two agents viz. M/s. Bhumi Financial Consultants Pvt Ltd & M/s Passionate Agencies Pvt Ltd. We note that the payments were made to them by account payee cheques and TDS was deducted at the rates specified in the lower withholding tax certificates provided by the department. We note that the sale price of the telecommunication equipments sold through them was also received through account payee cheques and it is only when the agents were able to realize the payments from the customers that as per the terms agreed, the assessee remitted their commission on such sales. The terms & conditions of the agreement entered into with M/s Passionate Agencies Pvt. Ltd. is as follows:

1. *TSHPL is selling their goods in India. Primarily in the equipment of all or most of the goods such as use for measuring –checking and testing instrument/instruments and some parts of optical fibre communication etc.*
2. *TSHPL takes the help of other Indian Companies/firms for procurement of Purchase Orders, in connection to the sale of goods in Indian Market.*
3. *PAL has sufficient influence on and connection with the Indian Buyers Private and Government Sectors, primarily in the requirement of an or most of the goods use for measuring checking and testing instrument/instruments and spare parts of optical fibre telecommunication etc.*
4. *TSHPL is in the requirement to secure bulk order(s) for the supply of goods in Indian and is in PAL position and willing to procure the order(s) for TSHPL.*
5. *TSHPL has agreed to take the services of PAL for the procurement of Purchase Order for the supply of goods, subject to the terms and conditions as enumerated herein below:*

NOW IT IS MUTUALLY AGREED BETWEEN THE PARTIES:

1. *This agreement shall take effect from the 1st April, 2010 and shall remain in force for the next one year that is till 31st March, 2011,*
2. *All Purchase Order(s) procured by the PAL will be forwarded to TSHPL and will not be binding until acceptance is communicated by TSHPL to the PAL, TSHPL has the right, in its sole discretion, to accept or reject all or any of tilt' purchase orders procured and forwarded by the PAL, No commissions are payable on any purchase order not accepted and executed by TSHPL.*
3. *It is agreed and understood between both the parties that this is not an exclusive Contract. Either of the party to this agreement is free to give services to or take Services from any other party.*
4. *In consideration of services rendered by PAL, the TSHPL will pay the fixed rate commission on the items of instrument and spare parts. Purchase Order of the goods, as per Annexure-A procured by PAL. The claim of PAL will arose only of the items actually supplied by TSHPL.*
5. *Except as provided in this agreement PAL, is and at all times will be an independent body. Nothing contained in this agreement is to be constructed as constituting the PAL as a partner or employee or agent of TSHPL or foreign Company or authorizing the PAL to create and assume any obligation or liability in the name of TSHPL.*
6. *Any of the parties may terminate this agreement by serving a notice of three months to the other party. The accounts between the parties will be settled and adjusted finally within the aforesaid period of three months.*
7. *PAL will not be held liable for any claims arising due to shortages, inferior quality etc for goods supplied by the TSHPL.*
8. *In case of any dispute between the parties out of or in connection with the agreement, the same shall be referred to sole arbitrator, who may be appointed by the parties by mutual agreement. The proceeding held by the arbitrator in making the award will be in accordance with the provisions of India Arbitration and Conciliation Act, 1996*

or any statutory modification thereof. The award of Arbitrator shall be final and binding on the parties. /

IN WITNESS WHEREOF the parties hereto have executed this agreement.

*PASSIONATE AGENCIES PVT. LTD For TIRUMALA SEVEN HILLS(P) LTD
Sd/- Sd/-*

11. Thereafter, the assessee company has made some additional tasks also with the Passionate Agencies Pvt. Ltd. the terms and conditions are as under:

This is to inform you that as per agreement you were appointed as selling agents in Indian markets for our foreign principals. However there are certain terms and conditions that are required to be added before commencement of any transaction between us though some of them were already mentioned in the correspondence date 01-04-2010.

The Terms & Conditions are as follows:

1) PAL will be using our trade name and representing our company name while performing the service on behalf of us. PAL will not only market our products but also market our brand. While performing service on behalf of us PAL will not use its own company name at any point of time.

2) PAL will be responsible for procuring the purchase orders either through tenders published all over India or through direct marketing and will inform us about the various tenders with respect to demand of the products of our foreign principals.

3) PAL will collect Tender documents on our behalf and send to us.

4) PAL will give us full details like rate quoted by various vendors to them and name of the bidders.

5) PAL not only engage for procuring the purchase order for supply of goods, but also will be responsible for any clarification if any required in regard to orders procured and send the same to us to forward the same to our foreign principal.

6) PAL will be responsible for getting confirmation of the material delivered & properly installed with the parties.

7) PAL will be responsible for proper communication with us with respect to any issue with regard to the delivery or installation of goods & performance of any service.

8) After execution of order we will send invoice to parties with a copy to you for follow up.

9) PAL will further responsible for follow up with the parties. PAL will be chasing Indian telecommunication player to make payment in entirety to our foreign principal's.

10) PAL will be responsible for giving us the feedback of supplied Telecom Equipment all over the India

11) PAL is required to give us all the documents and correspondence which are required to deliver to foreign principals.

12) finally you are also responsible to collect Form C (i.e. concessional rate of tax on CST sales) from the party and also making us available the same.

We make it clear to you that this aforesaid job which were not mentioned in agreement is part and parcel of same job. The earlier agreed remuneration will remain same as this is not additional extrajob.

We are pleased to appoint you as our Liaison work partner. Your scope of work is as follows:

A. You will be responsible for taking the feedback of requirement of Telecom Equipment in all over India.

B. From time to time you will give us feedback of Tenders floated by the party. If possible, even requirements of even small parties will be forwarded to you.

C. You will not involve where parties are interested in Direct Import of Telecom Equipment as we have appointed some other party.

D. You will collect Tender documents on our behalf and send to us.

E. If any clarification is needed in tenders, you have to get feedback and send it to us.

F. We will try to send tenders directly to parties in case it is not possible we will send it to you for onward submission.

G. At the time of opening you will represent on our behalf and you will give us full details like rate quoted by various parties and name of the bidders.

H. After executing the order we will invoice to parties with a copy to you for follow up.

I. You will follow up the payment and "C" Forms.

As we have agreed and decided mutually, we will pay you out after completing the full transaction.

12. Similar terms & conditions were agreed with Bhumi Financial Consultants Pvt Ltd. These facts having not been disputed by the lower authorities, we note that the role of agents for sale and purchase of goods cannot be ignored and for the services rendered they are entitled to be compensated as per agreement. We are therefore unable to agree with the AO's assumption that commission could not have been paid by the assessee for selling the telecommunication equipments.

13. We further note that the assessee had entered into annual maintenance contracts with its customers. Following are the major services provided by TSHPL:-

- a. Annual Maintenance of Telecom equipment.
- b. Annual Maintenance of Air conditioning equipment.
- c. Technical Life Analysis of the equipment
- d. Assessment of Heat Load Factor
- e. Gas Charging

14. The assessee therefore acted as their service partners and provided maintenance services to ensure that the equipments supplied by them performed well and upto the specifications required by the customers. From the facts on record it is evident that the assessee had generated substantial revenues in the form of annual maintenance service fees from the customers. For instance, the annual maintenance fees from BSNL itself was in excess of Rs.100 lacs for the year. Considering the nature of assessee's business and the profile of the customers, the assessee was required to provide the servicing solutions at various places and premises of the customers which were located across India. We therefore appreciate the assessee's contention that their in-house service team could not have been sufficient to meet the servicing needs of the clients and that they had sub-contracted some of their annual maintenance contracts to external service providers to execute the annual maintenance contracts at economical rates. We note that the assessee had appointed three service providers, M/sBhumi Financial Consultants Pvt Ltd, M/s Greenview Projects Pvt Ltd & M/s Intimate Construction Pvt Ltd. for providing servicing solutions to their clients. The assessee had entered into agreements with each of these entities having similar terms & conditions. The extracts of one of the terms & conditions of the appointment letter with M/s. Greenview Projects Pvt Ltd entered into on 13.07.2010 is reproduced below:

To
Greenview Projects Pvt. Ltd.
Arrah, Bidhan Park, Bidhan Nagar
West Bengal-713212

Dated: 13/07/2010

Dear Sir,

Re: Appointment for Assessment of Head Load Factor.

We have received order from Reliance Infratel Ltd. Maharastra for assessment of Head load factor of Air-conditioners installed at each site.

As discussed with you and relying on your infrastructure availability, we hereby appoint you for the same job.

Your Job will be as follows:-

A. Check Each and Every PAC and give us your report who to minimize head of the PAC.

B. If you think that PAC is old and not in a position to reduce the head by any changes than your report should be for replacement.

C. Any other major changes required to be made.

D. If you think that PAC is OK but some parts of PAC can be replace and it will work as per our requirement.

E. You will give us report for Each PAC along with site details.

F. Job must be completed by End of October 2010.

The whole idea of doing this exercise is to reduce the cost of recurring maintenance and also at the same time to ensure the PAC must work smoothly so that break down of PAC will be minimized.

For this you will get remuneration of Rs.12101-(Rupees One Thousand two hundred ten Only.) per site plus service tax and TDS deductible as applicable.

Details of the site along with PAC will be given to you separately.

Further, this is for your information and it is being the part of the terms and conditions that you will use our trade name and represent our company name as principal while performing the service on behalf of us. You will not use the identity of your company at any point of time. For this we will issue an authorization letter for representing our company as principal.

We will monitor your worth from time to time and our men will go and visit the site and check the recommendation given by you. Based on your recommendation we will forward the report to Reliance Infratel Ltd.

If we find there is any lapse on your part we will be compelled to deduct twice of the amount given to you per PAC.”

15. From the above terms and conditions of the agreement, the nature of services being provided by the service providers is abundantly clear. The fact that the services were indeed provided is evident from the fact that the assessee was able to generate corresponding revenues in the form of annual maintenance service fees from their customers. We note that

before the lower authorities the assessee had sufficiently demonstrated the linkage between the revenues earned and the payments made to the service providers. On these facts and circumstances, we find that even in respect of the payments made to the service providers, the assessee had duly substantiated the commercial as well as business expediency of such expenses before the lower authorities. We thus agree with the Ld. AR of the assessee that when the revenues derived in the form of income from sale of telecommunication equipments and annual maintenance fees were accepted and not disputed by the Revenue then it was unjustified on their part to disbelieve the corresponding expenses incurred to derive such income.

16. From the above facts we hold that when the entire sequence of transactions starting from importing of telecommunication equipment, soliciting of orders, tendering process, delivering products, after sales support provided to customers, annual maintenance services provided to the customers, realization of payments etc. has not been disputed nor disbelieved by the lower authorities, then they could not disbelieve or doubt the genuineness of the commission and service fees paid to the agents & service providers respectively and treat it as bogus expenses only because the notices issued to the payees went un-served.

17. We note that the assessee had discharged the onus cast by law in proving identity and creditworthiness of the payees as well as the genuineness of the agreements entered into with them. The Ld. AR of the assessee has placed all the relevant details & documents, which the assessee was required to maintain in the ordinary course of its business. Like any other item of expense, the relevant details such as copies of the agreements, tax invoices, service tax registration certificates, confirmation of accounts, details of payments, details of tax deducted along with the lower withholding tax certificates provided by the payees etc. were furnished before the lower authorities, which sufficiently proved the genuineness of the payments made. It is further noted that the assessee had also demonstrated the linkage between the revenues earned from the customers and the commission paid to the agents as well as service fees paid to annual maintenance service providers. The extracts of bank statement of the assessee and the confirmation furnished by the payees are also available on record. Furthermore, we note that the parties to whom the payments were made were not associates or related enterprises of the assessee. Nothing has been brought on record that the

payments made by the assessee had come back to it. In the circumstances even the creditworthiness of the customer and the genuineness of the transaction was duly established by the appellant.

18. From the documents on record we find that the commission was paid to for procuring sales orders and the service fees was paid towards the annual maintenance contracts obtained from telecom companies sub-contracted to the payees. We note that the copies of invoices provide the complete details of orders for which the payments were made. The payees had also set out its PAN & STRN in the invoices, which was duly signed & stamped. The service tax registration certificate of M/s Bhumi Consultants Pvt Ltd established that they were in the business of providing business auxillary services, and therefore it had charged service tax @ 12.36% on the commission as well as service fees billed to the assessee. We note that similar information about the nature of business is also discernible from the service tax registration certificates of other payees which corresponded with the services rendered by them to the assessee. The service tax liability charged by the payees was also duly paid & discharged by the assessee. We further find that the assessee has furnished its relevant bank statements which substantiate the actual payment of commission & service fees was received by the payees through normal banking channel.

19. We particularly note that the assessee deducted & deposited TDS in accordance with withholding tax certificates provided to the payees u/s 197 of the Act by ITO (TDS) at Kolkata. The correctness and/or genuineness of the certificates issued by the Department u/s 197 of the Act has not been denied or disputed by any of the lower authorities. We understand that the payees had made the applications u/s 197 of the Act. It is after due examination of their accounts, estimate of income, past history etc. that the lower withholding tax certificates were issued by the TDS Department. This certificate is therefore an important piece of evidence, which clearly substantiated the identity, and creditworthiness of the payees. The copy of the certificate issued by the Department u/s 197 of the Act to Passionate Agencies Pvt. Ltd. is as under:

*OFFICE OF THE INCOME TAX OFFICER (TDS), WARD 59(3), KOLKATA
10B, MIDDLETON ROW (8TH FLOOR), KOLKATA-
NO. WD 59(3)/197(1)/10-11/32 Dated 06.05.2010
CERTIFICATE UNDER SECTION 197(1) OF THE LT .ACT, 1961*

(READ WITH SECTION 28AA OF THE INCOME TAX RULES, 1962)

Name and address of the assessee: *Passionate Agencies Pvt. Ltd.*
1 H, Madan Mohan Burman Street
Kolkata - 700 007

PAN *AAFCP4215Q*

Financial Year *2010-11*

Assessing Officer's Circle / Ward *New Case*

In pursuance of Section 194C' (Payment made on account of Contract/ Sub contract), Section 194-H (Payment made on account of Commission/Brokerage) and Section 194J (Payment made on account for making payments towards Prof (Tech.Services), the undersigned hereby authorise the Principal Officers of the parties. responsible for making payment's towards Contract, Commission/Brokerage' and Technical Services, respectively. to make payment after deducting of T.O.S. @0.01% (at the rate or zero point zero one per cent) at the time of payment Of credit thereof.'

The Certificate shall remain valid upto 31.03.2011 from the date of issue until it is cancelled or withdrawn by the undersigned with intimation to the deductee assessee.

Sd/-
(SOVAN BANDYOPADHYAY
INCOME TAX OFFICER(TDS)
WARD-59(3) KOLKATA

20. The assessee acted on the certificates provided by the payees and accordingly deducted tax at the lower rates as specified therein. On query from the Bench, we were informed that the TDS returns were processed u/s 200A and the TDS Wing has not drawn any adverse inference against the assessee. Accordingly the genuineness and correctness of the withholding tax certificates are not in doubt. These facts, in our view, establish that the payees were regular income-tax assessee engaged in business and their identity and genuineness has been accepted in their respective tax assessments by the tax authorities.

21. From the orders of the lower authorities, it emanates that the only reason for making the impugned addition is that the notices issued to the payees went un-served. We are however of the considered view that mere non-service of notice could not lead to adverse conclusion that the expenditure was bogus or in-genuine. The non-service of notice alone was not a sufficient and decisive factor to disallow the payments in the given facts of the present case. It may have raised suspicion in the mind of the AO but it was not reason enough to disallow the expenditure. We agree with the Ld. AR of the assessee that the identity, creditworthiness and genuineness of the transaction cannot be proved only by

producing the payer concerned for personal examination by the AO. We also find that the TDS department had issued certificates u/s 197 of the Act to the payees which fact established their identity. We also note that the addresses of the parties appearing in these certificates corroborated with the addresses provided before the lower authorities. In the circumstances if for the purpose of issuing certificates u/s 197, the Department had accepted the genuine existence of these parties then in the assessment proceedings of the payer, the Department could not disbelieve the existence of these parties and hold the payees to be non-existent. As noted above, the assessee had placed on record sufficient evidence and documents to substantiate the genuineness of expenses. In these circumstances, without pointing out or establishing any infirmity or falsity, it was not proper for the lower authorities to out-rightly reject the claim for expenses.

22. We further note that the parties to whom the payments were made were not associates or related enterprises of the assessee. Unlike the relationship of a company & shareholder or the relationship of a lender-borrower; the relationship of a service provider-customer is not a continuing one. The relationship exists only till the transaction is in progress. Once the transaction is complete the relationship comes to an end. Further it is also not necessary that the agent or the service provider has to be a known associate of any director or shareholders of the assessee-company, unlike share applicants in private placement or any lenders. It is therefore not a case where as a result of the transaction, there was a creation of creditor-debtor relationship on long term basis. The assessee, particularly given the scale of its business, cannot be expected to know and/or continue maintaining relationship and be informed about the whereabouts of each entity with whom it had conducted transactions in earlier years. At the point of transaction, the agents & service providers rendered the services, their invoices were issued, payments were made and account confirmations were exchanged. We agree with the Ld. AR's contention that apart from the foregoing, no other act was required to be performed either by the payer or the payee. It is purely a case of two unrelated entities that conducted a service transaction and the considerations were exchanged at the same time. We further find that the AO also did precious little to bring on record any conclusive evidence to prove that the payments made to the payees had come back to the assessee to substantiate his allegation that the

expenditure was bogus. On query from the Bench, we were further informed that the assessee did not have transactions with these bodies corporate in any of the financial years subsequent to the relevant FY 2010-11. Accordingly there was no continuing relationship with the payees. For the reasons set out in the foregoing we hold that no adverse inference be drawn against mere non-service of notice upon the payees.

23. We note that the AO relied on the decision of the Hon'ble Supreme Court in the case of Lachminarayan Madanlal Vs CIT(86 ITR 439) to justify his action of disallowing the commission. In the facts before the Hon'ble Apex Court, the assessee firm made payment of commission to another firm, which was not at all in existence when the commission agreement was entered into. Moreover, in the payee firm, the minor children and spouse of the partners of the payer firm (ie assessee firm) were partners. These facts were duly appreciated by the Hon'ble Apex Court and thereafter the Hon'ble Court held that the commission agreement is only a device to shift the profits from the payer firm to payee firm and accordingly upheld the disallowance of commission payment. In the instant case, there is no such finding recorded by the AO in his order. The revenue had not brought any material on record to prove that the payees were the related concerns of the payees or that there were not in existence. Their CIN details, PAN numbers, Service tax registration certificates and more particularly the lower withholding tax certificates issued u/s 197 by the Income-tax Department abundantly established the identity of the payees. Hence the reliance on the decision of the Apex Court by the revenue is totally misplaced and is not applicable to the facts of the instant case before us.

24. As far as the contention of the Ld. DR that the payments were made after unusual gap of almost a year from the date of invoices that raised suspicion on the genuineness of expenses, we find that the assessee has sufficiently demonstrated the linkage between the revenues earned from the telecom companies with the payments made towards commission & service fees. We note that the assessee had made the payments only when the customers had released their payments towards the corresponding services rendered by the agents & the service providers. The Ld. AR of the assessee explained that it is a well-known commercial practice that only when the payments for the orders executed through the agents are realized that their commission is actually released. Similarly in case of service providers,

it is only when the customer is satisfied with the maintenance services and pays the annual maintenance fees that the corresponding payments are released to the sub-contractors. Accordingly in the facts of the present case we note that since the collections were realized after the gap of time from the customers that the assessee also cleared the payments of the service providers accordingly. We thus do not find any infirmity in this action of the assessee.

25. The Ld. DR also dwelled on the fact that name of M/s Bhumi Financial Consultants Pvt Ltd was under the process of striking off by the Registrar of Companies, which showed that this company was not in existence. According to him, these features are commonly found in shell companies and therefore he argued that all the payments made were bogus. In this regard, it is noted that the name of M/s Bhumi Financial Consultants Pvt Ltd was under the process of striking off but has not yet been struck off. Furthermore, the Master Data of the companies provided by the Ld. DR, show that the process of striking off began much after the year of transaction with the assessee. Nothing has been brought on record to show that these entities were not in existence during the relevant financial year 2010-11. Instead the extracts from ROC website furnished by the Ld. DR shows that the entities were very much in existence in the relevant financial year 2010-11 and hence the genuineness of the payments made to them could not be doubted

26. It is noted that identical issue came up for consideration before the Hon'ble Calcutta High Court in the case of M/s. Inbuilt Merchants Pvt. Ltd. (G.A. No. 3825 of 2013) dated 14.03.2014. In the instant case, the assessee had made commission payments to certain North Eastern Indian residents. In the course of assessment the AO had issued notices u/s 133(6) to the brokers, which were returned unserved. The AO thus observed that the assessee could not establish the identity of the brokers and accordingly disallowed the commission payments. On appeal the High Court held that mere fact that the broker were not found at the address furnished by the assessee did not prove the fact that the payments were ingenuine. The Court observed that in this modern era it may not be possible for the assessee to know the brokers personally or be aware about their whereabouts. The High Court noted that whatever addresses was furnished to the assessee by the brokers, had been disclosed to the Income-tax Department. The Court noted that the payments were admittedly

made by cheque after deduction of tax. In this background the Court rejected the Revenue's case and held that when the payment of commission is properly recorded in the books maintained by the assessee in the ordinary course of business, the payments are made by account payee cheques after deduction of tax, then such commission payments could not be disallowed. The relevant extracts of the judgment is as follows:

"The views expressed by the Assessing Officer are erroneous in law. The Assessing Officer has overlooked the importance of the books of accounts maintained in the ordinary course of business. Reference in this regard may be made to sub-section (2) of [Section 32](#) of the Indian Evidence Act, 1872. The books of accounts maintained in the ordinary course of business are relevant and they cannot be discarded in the absence of appropriate reasons. The mere fact that recipient did not reply in some cases or they were not found at the address furnished by the assessee does not in the least prove the fact that they were non-existent or that the payments shown to have been made by the assessee were imaginary. With the advancement of technology, it has become possible to sell goods throughout the country through the internet. For that purpose, agents are required throughout the country. The mechanism in that regard has been disclosed by the assessee and has been recorded in the order of the CIT (Appeals). For the purpose of carrying on its business, the assessee has to recruit the agents. It may not be possible for the assessee to know them personally. Whatever address was furnished to the assessee, has been disclosed to the Income-tax Department. Payments were admittedly made by cheque after deduction of tax. The tax deducted at source has duly been deposited. The judgment in the case of [CIT vs. Precision Finance Pvt. Ltd.](#) reported in 208 ITR 465 relied upon by Mr. Bhowmick does not really assist him. The aforesaid judgment is an authority for the proposition that mere payment by account payee cheque cannot establish that the transaction was genuine, but in the case before us, besides the fact that payment was made by cheque, there are other pieces of evidence available which are as follows:

- a) Books of Accounts maintained by the assessee in the ordinary course of business;*
- b) Deduction of Tax at source;*
- c) Deposit of the money deducted at source;*
- d) Particulars of the recipient were duly furnished;*

We are, as such, of the opinion that the views expressed by the learned Tribunal are unexceptionable. We, therefore refuse to admit the appeal. The appeal is thus dismissed."

27. We further find that the judgment of the Hon'ble Calcutta High Court in the case of Mather & Platt (I) Ltd Vs CIT (167 ITR 493) is also of much relevance in the facts of the present case. In the instant case as well the assessee had paid commission to two agents and in the course of assessment the notices issued by the AO u/s 131 had come back un-served. The AO therefore disallowed the commission treating it to be in-genuine. On appeal the Hon'ble Calcutta High Court deleted the impugned disallowance by observing as under:

“2. The facts which are material and the proceedings leading up to this reference are as follows:

Mather & Platt (India) Ltd., the assessee, carries on the business of manufacture and supply of, inter alia, food processing and other machinery. In the year 1974, the assessee sold and supplied to Punjab State Co-operative Supply & Marketing Federation Ltd., Cannors (India) Ltd. and the United Co-operative Distillery Ltd., Parite certain machinery. The said transactions were effected by the assessee respectively through three commission agents, viz., MintopCorpn. of New Delhi, C.S. Singh of Lucknow and Vandana Sales Corpn. of Bombay. The assessee paid commission to the said commission agents. The MintopCorpn. was paid Rs. 1,89,980, C.B. Singh was paid Rs. 20,038 and Vandana Sales Corpn. was paid Rs. 17,832.

3. For the assessment year 1975-76, the accounting year ending on 31-12-1974, the assessee was assessed to income-tax. In its assessment, the assessee claimed deduction of the said amounts paid to the commission agents. The IAC who made the assessment examined in details the said three transactions made by the assessee through the commission agents. Summons under section 131 of the Income-tax Act, 1961 ('the Act') were issued to each of the said commission agents calling upon them to confirm the payments of the said commission and the details of the services rendered by them. All the summons came back with the remark 'not known' from the postal authorities. The IAC thereafter called upon the assessee to explain the payments in respect of such commission with evidence. The assessee submitted its explanation in writing and filed the relevant correspondence and records.

4. In respect of the commission paid to MintopCorpn. it was held by the IAC that the assessee had engaged MintopCorpn. with the object of exercising influence on the Co-operative which was an undertaking of the Punjab Government. The said contract between the assessee and the MintopCorpn. was held to be opposed to public policy and illegal and on that ground the IAC disallowed the deduction of the commission paid.

5. In respect of commission paid to C.B. Singh and Vandana Sales Corpn. it was held by the IAC that as the assessee had failed to trace them the correspondence filed by the assessee was not sufficient to establish the genuineness of the payments. It was noted that the income-tax file numbers of the said two agents had not been disclosed and, therefore, the assessee had failed to discharge its primary onus of establishing the identity of the agents or genuineness of the payments. He disallowed the deduction of the amounts paid to the said two agents by way of commission.

6. Being aggrieved, the assessee preferred an appeal before the Commissioner (Appeals) from the order of the IAC. The Commissioner (Appeals) held that the contract with the MintopCorpn. was not void or illegal and as such the commission paid to the said MintopCorpn. was allowable for deduction. In respect of the commission paid to C.B. Singh and Vandana Sales Corpn. the Commissioner (Appeals) noted that the payments had been made in the case of the former by a bank draft on the State Bank of India, Lucknow and in the case of the latter by an account payee cheque which was encashed through a bank account of the commission agent. He also noted that the assessee had furnished the addresses of the said two commission agents from its records. The contentions of the assessee in respect of the said two commission agents were also accepted and the deduction as claimed by the assessee was allowed.

7. Being aggrieved, the revenue preferred a further appeal before the Tribunal. The Tribunal accepted the case of the assessee so far as the payment of commission to MintopCorpn. was concerned. The Tribunal held that the assessee had entered into a contract

with the said State Co-operative on the basis of an open tender. It was held that the transaction was purely commercial and it could not be said that it had been brought about by undue influence. The decision of the Commissioner (Appeals) was confirmed. The Tribunal noted that the IAC was otherwise satisfied that the MintopCorpn. was an existing organisation and had proceeded on that basis.

8. In respect of C.B. Singh and Vandana Sales Corpn. the Tribunal noted that the IAC had found that the said two commission agents were not in existence and the assessee had not discharged the burden of proving their identities. The Tribunal held that in order to claim deduction of the commission paid to the said agents the assessee was required to establish their identity and that mere payment by an account payee cheque could not establish such identity. The Tribunal set aside the order of the Commissioner (Appeals) and restored the order of the IAC in respect of the said commission agents, disallowing the deduction of the commission paid to them.

9. At the hearing, the learned advocate for the assessee submitted that the assessee had brought on record sufficient evidence to establish the identity of the said two commission agents as also the genuineness of the payments. He submitted that the transactions in respect of which commission had been paid were not disputed by the revenue and the same had been taken into account in making the assessment; The assessee had also established its practice to effect transactions through the commission agents on payment of commission. Contemporaneous correspondence had been produced by the assessee to show that the said two commission agents were in existence. Payments had been made by a bank draft to C.B. Singh and by an account payee cheque to Vandana Sales Corpn. The cheque had been encashed through the bank account of the commission agent.

10. The mere fact that the summons under section 131 were returned unserved in 1978 when the assessment was being made, did not establish that the said two commission agents were not in existence in 1974 when the transactions took place. He submitted that summons had come back unserved also in the case of MintopCorpn. but on that ground, the genuineness of MintopCorpn. had not been questioned.

11. The learned advocate for the assessee submitted further that considering the volume of the business of the assessee which showed in its return an annual income of over Rs. 37 lakhs, there was no reason to doubt the genuineness of the two payments of commission amounting only to about Rs. 37,000.

12. In support of his contentions, the learned advocate for the assessee cited S. Hastimalv. CIT [1963] [49 ITR 273](#) (Mad.). In this case, the assessee was called upon to explain the source of an amount credited in his books. The assessee contended that he had borrowed the amount from a party at Bikaner which had been paid by the agent of the creditor by a bank draft. The assessee supported his explanation by other documentary evidence. The explanation of the assessee was rejected by the Tribunal on the ground that the draft was not sent by the creditor but by some other person and it had not been possible to contact either the creditor or his agent.

13. On these facts, it was held by the Madras High Court that the assessee had established the source of the said amount of credit and its explanation could not be rejected on the ground of disability of the revenue to ascertain further facts. There was no evidence to hold that the said amount of credit was the assessee's income from undisclosed source. Addl. CIT v. Bahri Bros. (P.) Ltd. [1985] [154 ITR 244](#) (Pat.) was also cited. In this case, two deposits in the account of the assessee were claimed to have been obtained on loan. The assessee established that the amount had been paid by an account payee cheque. The assessee also established that it had repaid the amounts also by account payee cheques with interest

and brokerage. Subsequent letters addressed to the creditors for confirmation came back with the postal remark 'the addressee left'.

14. On these facts, the Patna High Court upheld the order of the Tribunal and laid down that in the facts that the assessee had discharged its primary onus by disclosing the identity of the creditors and also the source of income. The onus shifted thereafter to the revenue to verify. As the alleged advance had been paid and repaid through a bank account it could not be said that the creditors were fictitious persons.

Jha, J. observed in his judgment that as all the transactions were had through account payee cheques the question of identity of the creditors became irrelevant.

15. The learned advocate for the revenue contended to the contrary and submitted that it was for the assessee to establish the identity of its commission agents. In the facts, it was submitted that the assessee had failed to discharge the primary onus cast upon it.

16. On a consideration of the facts and circumstances, it appears to us that by taking an overall view it is found that the assessee had been entering into transactions in its regular course of business through the commission agents and paying the agents commission on the basis of the transaction had entered. In respect of commissions paid to the two commission agents which are in dispute the assessee had established that in 1974 the assessee was in correspondence with the said agents. The assessee had entered into the transactions through the said agents and that the assessee had paid commission to the said agents, in one case by bank draft and in the other case by an account payee cheque which was encashed through a bank account of the agent. It stands established that at the material time at least one of the commission agents was maintaining a bank account.

The only fact on which the Tribunal has proceeded is that four years after the transactions, summons served on the commission agents had come back unserved. On the entirety of the evidence it cannot be held that if a person is not found in an address after four years he is nonexistent. In our view, the assessee discharged its primary onus and established the identities of the said two commission agents and no evidence had been brought on record by the revenue to rebut the case of the assessee. On the entirety of the evidence, it would be unreasonable to hold that the assessee had failed to establish the identity of the said two commission agents and that payments to the said commission agents were not genuine.

17. For the reasons as above, we answer the question referred in the affirmative and in favour of the assessee. There will be no order as to costs."

28. We find that similar issue was also involved in the judgment rendered by the Gujarat High Court in the case of CIT Vs. Nangalia Fabrics Pvt. Ltd (40 taxmann.com 206). In the instant case the assessee had made purchases and also paid commission to brokers for sales. According to the AO the suppliers were untraceable and the customer to whom sales was made was unaware of the broker. The AO therefore disallowed the purchases as well as the commission holding it to be bogus. On appeal the Tribunal delete the addition, which was upheld by the High Court. The relevant observations are as follows:

"3. The question pertains to the purchases made by the assessee-respondent. On account of unverifiable purchases, the Assessing Officer made additions to the tune of Rs. 1.27 crores. He was of the opinion that none of the parties could be located and therefore, such purchases were held to be bogus. When it was challenged before the CIT(A), the CIT(A) was of the opinion that they could not be held bogus as the corresponding sales had been effected by the respondent in the next year. In subsequent year also and in the past, such purchases were made which were never questioned. When challenged before the Tribunal on the basis of the facts presented before us, it held that these purchases could not be held bogus by holding thus:

"13. We have considered the rival submissions and the materials placed on record. The purchases are supported by bills, entries in the books of account, payment by cheque and quantitative details Assessing Officer did not find any inflation in purchase price or inflation in consumption or suppression the production. The addition had been made only on the ground that the parties are not traceable. Assessee had made payment through crossed cheques and assessing officer did not find that payment made came back to assessee. Assessing Officer has made addition in respect to the outstanding amount as on 31.3.2001 which has been cleared in the succeeding years. The ratio of the creditor to the purchases is normal considering the past records of the assessee. The creditors were outstanding owing to liquidity as assessee is also required to get credit in respect of sales also. Even otherwise provision of section 68 is not attracted to amounts representing purchases made on credit as held in the case of Panchan Dass Jain cited supra. The addition for bogus purchases cannot also be sustained in full or in part in view of the various cases laws cited by the assessee and in view of the facts that the decision of Vijay Proteins Ltd. and Sanjay Oil Cake Industries are not applicable to the facts of the assessee's case. Assessee's case is covered by the decision of Hon'ble Gujarat High Court in case of Kashiram Textile Mills. In view of the matter, addition made by the assessing officer is deleted. Ground No.1 of Assessee's appeal is allowed and ground No.1 of Revenue's appeal is dismissed."

4. The issue is essentially based on facts. The Tribunal, having been satisfied by genuineness of the purchases as also specially considering the payments made through the cheques, was of the opinion that such addition could not be sustained. Issue, essentially and pre-dominantly based on facts, requires no consideration as no question of law arises.

5. The second question pertains to brokerage commission of Rs. 72,37,808/- disallowed by the Assessing Officer. The Assessing Officer disallowed the commission on the ground that M/s. Shree Shantinath Silk Industries did not maintain its record and its name did not appear on sale bill. When it was challenged before the CIT(A) it was of the opinion that the only one party had been examined by the Assessing Officer and the person examined for and on behalf of such party in fact was not dealing with sales, and therefore, would not be having any knowledge of the brokerage. After dealing with the issue at length, it sustained addition of Rs. 36.18 lacs (rounded off).

6. When CIT(A)'s order was challenged before the Tribunal, the Tribunal deleted the entire addition by observing thus:

"23. We have heard the rival submissions and the materials placed on record. We are inclined to agree with the submission made on behalf of the assessee and find that no evidence had been placed on record that the commission expense is bogus. Assessee made payment of commission expenses is bogus. Assessee made payment of commission through account payee cheques for sales canvassed by the party and also in consideration of the collection recovered from purchaser. Payments cannot be unreasonable particularly when M/s. Shree Shantinath Silk Industries is not related to the assessee and so even disallowance made by CIT(A) is not proper. We therefore delete the full disallowance of Rs. 72,37,808/- made by the assessing

officer. Hence assessee's ground of appeal is allowed and revenue's ground of appeal is allowed and revenue's ground of appeal is dismissed."

7. This issue is again based on facts. Essentially, the Tribunal has, with cogent reasons dealt with the issue, no question of law, much less any substantial question of law arises. The Tax appeal is, resultantly, dismissed."

29. We are of the considered view that the above judgments of the jurisdictional Hon'ble Calcutta High Court and also the Hon'ble Gujarat High Court are squarely applicable to the facts involved in the present case. In the present case the assessee has furnished complete details with regard to the commission & service fees paid to the payees. The assessee has furnished complete details of payees including copies of invoices, PAN, ST certificate, confirmation and certificate u/s 197 of the Act. We note that the AO was unable to point out any specific defect or infirmity in the details furnished by the assessee. In our considered view, mere non-service of notice u/s 133(6) does not make an assessee bogus or an entry operator. Further the fact that the correctness & genuineness of the certificate u/s 197 has not been doubted by the AO, it cannot be said that certificate u/s 197 was issued by the Department to bogus or non-existent entities. Instead it went on to establish the identity of the payees, and that they were regular income-tax assesseees. We therefore note that the assessee had duly discharged its onus of substantiating the genuineness and business expediency behind the payments as well as the identity & creditworthiness of the payees.

30. For the reason set out above we therefore hold that the lower authorities were not justified in disallowing the expenses incurred towards commission and annual maintenance fees of Rs.1,92,65,164/- and Rs.4,40,58,520/- respectively. The AO is directed to allow the deduction for the expenses incurred towards commission and annual maintenance fees in arriving at the profits of the business. Accordingly the grounds raised by the assessee are allowed.

31. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 22/11/2018

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 22nd November, 2018

RS.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Tirumala Seven Hills Pvt. Ltd., C/o D. J. Shah & Co. Kalyan Bhavan, 2, Elgin Road, Kolkata-700 020.
- 2 Respondent – JCIT, Range-4, Kolkata.
- 3 CIT(A)-6, Kolkata. (sent through e-mail)
- 4 CIT, Kolkata.
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,
Sr. Pvt. Secretary