

**आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**  
**श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

**आ.अ.सं./I.T.A No.1213/AHD/2015/SRT**  
**निर्धारण वर्ष/Assessment Year : 2010-11**

Kshtiji Marine Services Pvt. Ltd., O-2, Office Floor, Madhulika Apts, Bhatar Road, Surat.  <b>[PAN: AABCK 9924 E]</b>	<b>Vs.</b>	The Commissioner of Income Tax, Surat – 1, Surat.
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

निर्धारिती की ओर से /Assessee by	Shri Rasesh Shah - CA
राजस्व की ओर से /Revenue by	Shri Srinivas T.Bidari - CIT-DR
सुनवाई की तारीख/ Date of hearing:	25.09.2018
उद्घोषणा की तारीख/Pronouncement on	04.10.2018

**आदेश /O R D E R**

**PER O. P. MEENA, ACCOUTANT MEMBER:**

1. This appeal filed by the Assessee is directed against the order of learned Commissioner of Income tax, Surat-1, Surat(in short “the CIT (A)”) dated 12.03.2015 pertaining to Assessment Year 2010-11.

2. Ground raised by the assessee read as under :

“1. On the facts and in circumstances of the case as well as law on the subject, the learned CIT has erred in passing the order u/s.263 although the assessment order passed u/s.143(3) of the I.T.Act was neither prejudicial to the interest of thoe revenue nor erroneous.

2. *On the facts and in circumstances of the case as well as law on the subject, the learned CIT has erred in directing assessing officer to modify the assessment order by disallowing the claim of "Commission" by an amount of Rs.5,19,422/-.*

3. *It is therefore prayed that above order passed by CIT u/s.263 or direction to make the addition of Rs.5,19,422/- may please be quashed."*

**3.** Ground No.1 relates to validity of passing order u/s.263 by the Id.CIT(A) which has become infructuous in the light of discussion in respect of ground no.2 & 3 below, nor pressed before us, therefore same is treated as dismissed.

**4.** Ground No.2 & 3 states that Id.CIT has erred in directing the AO to modify the assessment order by disallowing the claim of commission by an amount of Rs.5,19,422/-.

**5.** Short facts are that the assessee had claimed amount of Rs.58,71,410/- under the head commission in the Profit and Loss Account. During the course of proceedings u/s.263 of the Act, it was explained to be work contract entered into with M/s.Paras Petrofills Limited. It was claimed that as per Clause 2.1 of the work order, commission was to be paid @ 45% of the total bill amount which was stated to be Rs.1,18,29,266/-. It was also submitted that as per clause 2.2 of the works contract, service tax on the commission amount was to be paid @ 10.30% over this amount. The working of the amount was given as under :

<i>Commission amount @ 45% of Rs.1,18,29,226/-</i>	<i>Rs.53,23,128/-</i>
<i>Service Tax @ 10.30%</i>	<i>Rs.5,48,282/-</i>
<i>Total amount debited to Profit and Loss Account</i>	<i>Rs.58,71,410/-</i>

**6.** During the course of proceedings, the assessee has furnished the amount received as commission and amount collected as service tax from the customers in the amount of Rs.1,18,29,266/- as under :

<i>Commission received</i>	<i>Rs.1,07,82,689/-</i>
<i>Service Tax on the above</i>	<i>Rs.10,46,537/-</i>
<i>Credited to Profit and Loss Account</i>	<i>Rs.1,18,29,266/-</i>

**7.** From the above, it is clear that the assessee has, while calculating the commission payable to the agent, included the service tax calculated from the customers. The assessee was, therefore asked to explain how the commission can be allowed on the amount of service tax collected from the customers on behalf of the Government. It was explained that as per Clause 2.1 of the work order the commission is to be paid @ 45% of the total bill amount which is in the case of gross bill amount. It was further submitted that TDS has been deducted on the gross bill including service tax and the same has been confirmed by the recipient i.e. M/s.Paras Petrofills Limited. However, the Commissioner of Income Tax (CIT) was of the view that service tax collected by no

stress of imagination be said to be part of total invoices / billed amount. The assessee was not obliged to pay any part of the service tax collected from the customers to its agent as commission, especially when he is paying the amount of service tax separately to his agent. The method of calculation adopted by the assessee is not supported by the works order executed. The argument of the assessee that the amount has been confirmed by M/s.Paras Petrofills Limited the recipient does not help the case of the assessee. In view of this matter, the CIT(A) has worked out commission payable @ 45% at Rs.48,52,210/- on the total billed amount of Rs.1,07,82,869/- on which calculated service tax at @ 10.30% at Rs.4,99,778/-. Thus, according to CIT, the total amount payable to agent was worked out at Rs.53,51,988/- (48,52,210 + 4,99,777) as against actually paid amount of Rs.58,71,410/-. Accordingly, excess commission is inadmissible being the difference of aforesaid amount at Rs.5,19,422/- was directed to be disallowed in the assessment order by restricting the claim of commission payment.

**8.** Being aggrieved, the assessee has filed this appeal challenging the proceedings initiated u/s.263 of the Act, as well as direction to disallow the commission payment by an amount of

Rs.5,19,422/-. The Id.Counsel for the assessee took us through para 2.1 of the works contract order in which it was mentioned that your remuneration shall be 45% of the total invoices / billed amount receivable. The Id.Counsel further referred Clause 2.2 of the works order in which it is mentioned that service tax and education cess on service tax shall be paid etc., at the prevailing rates at actual on presentation of proper cen-vatable invoices. It was further submitted that the assessee has given the amount to M/s.Paras Petrofills Ltd. as per the working including service tax which has been agreed by the assessee that the party as per the work order and therefore the commission payment of service tax portion of the receipts earned by the assessee is also allowable. It was further argued that the representative commission is fixed in a categorical term which takes care of involvement of time and expenses, physical and mental involvement risk involvement handling of entry cases and various other factors. The rate is fixed is a mode of calculation on the basis of same concrete figure. The gross bill amount is taken for working out the commission amount payable towards services. Even the TDS is deducted on the gross bill amount including the service tax paid to the Government. The CIT has accepted the commission paid to M/s.Paras Petrofills Limited, but she hold that the amount paid did not justify

quantum. According to her, the quantum on payment was the amount which the assessee was obliged to pay. In this case, the assessee was obliged to pay 45% of commission even on the service tax portion of the bill for work order. Further, the AO has made due enquiry during the assessment proceedings u/s.143(3) and allowed the payment of commission after due scrutiny and application of mind. Therefore, the order passed u/s.263 is not tenable in law and direction for disallowing the payment of commission of Rs.5,19,422/- is bad in law and should be deleted.

**9.** On the other hand, the ld.CIT-DR supported the order of the CIT.

**10.** We have heard the rival submissions and perused the material on record and we find that as per Clause 2.1 of the works order the remuneration was fixed @45% of the total invoices / billed amount receivable. Accordingly, the assessee has calculated the payment of commission @45% on gross amount invoices / bill including service tax payable which worked out at Rs.58,71,410/-. Accordingly, said amount was claimed as actually paid which has also been duly confirmed by M/s.Paras Petrofills Ltd. the recipient. Therefore, it is the method of calculation of commission payment as per the agreement entered into by the

assessee and other party whereas the CIT is of the view that payment of commission @45% is excluding service tax. We are not persuaded with this argument as it is between the parties as how to calculate the payment of commission on the basis of works order entered into. Further, the recipient party has also confirmed the receipt of the said amount of commission. Therefore, we are of the considered opinion that disallowance of Rs.5,19,422/- worked out by CIT for disallowing the same from commission is not in accordance with the intention and payments made by the assessee, hence, the same is directed to be deleted.

**11.** In view of these facts, Ground No.2 and 3 of the appeal is allowed.

**12.** In the result, appeal of the assessee is treated as partly allowed.

**13.** The order pronounced in the open Court on 04-10-2018.

**Sd/-**

(सी.एम.गर्ग / **C.M. GARG**)

न्यायिकसदस्यतथा/JUDICIAL MEMBER

**Sd/-**

(ओ.पी.मीना/**O.P.MEENA**)

लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत/ **Surat**, दिनांक **Dated:** 4<sup>th</sup> October, 2018/ S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

/ / **TRUE COPY** / /

**Assistant Registrar, Surat**