

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC": NEW DELHI**

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.:- 1127/Del/2018
Assessment Year: 2014-15

Shri Sanjeev Kumar Sharma, S/o Shri Shiv Kumar Sharma, Prop. M/s. Star Enterprises, 17-B, New Super Market, Pul Jogian, Saharanpur, Uttar Pradesh	Vs.	JCIT Range-3 Saharanpur PAN AILPS3445C
(Appellant)		(Respondent)

Assessee by:	Shri Sanjay Kumar, CA, Shri Akarsh Garg, Advocate
Department by :	Shri S.L. Anuragi Sr. DR
Date of Hearing	30/01/2018
Date of pronouncement	31/01/2019

ORDER

The aforesaid appeal has been filed by the assessee against impugned order dated 14.11.2017, passed by Ld. CIT(Appeals) Muzaffarnagar for the quantum of assessment passed u/s 143(3) for the assessment year 2014-15. In the grounds of appeal assessee has challenged disallowance of Rs. 20,33,762/- out of commission expenditure paid on purchases made by the assessee; and disallowance of salary paid by the assessee under the head incentives of Rs. 62,000/- to an ex employee on the ground that no TDS was deducted by the assessee.

2. The facts in brief are that assessee is a trader in chemicals which are used in paper industries. During the relevant financial year,

assessee has shown sales of Rs. 2,67,45,976/- and purchases of Rs. 1,73,06,954/-.The assessee has debited sum of Rs. 26,50,000/- under the head Commission account, which according to Ld. AO the rate of commission paid was more than 10%. In response to show cause notice, the assessee submitted that the commission was paid to various persons on purchases made on account of introduction of party to enter into contract of purchase. It was further explained that the nature of product is so sensitive and there is a huge risk of failure in trial of product, therefore commission agent has to ensure quality and is bound by terms and agreement to ensure the success of the product. In case the product is failed by the paper mill in trial, then the same are bound to be rejected and even the agent also loses his reputation. During the year assessee has paid following commission with the parties:-

S.No.	Name	%age of commission	Amount of commission	Name of the seller	Amount of purchases made
1.	Rajat Associates	15.36%	6,00,000/-	S.R. Impex International, Star Chem Industries	39,05,783/-
2.	Satish Kumar Sharma	15.09%	9,00,000/-	Mahesh agro foods industries, Barmer praval creative starch	59,64,832/-
3.	Perfect solution	14.43%	9,00,000/-	Advance Inorganics Noida, DVS Chemicals Ludhiana, Raj Gelative Industries, Ludhiana	62,36,611/-
4.	Anuj Kumar Sharma	13.63%	1,50,000/-	Khurana Enterprises, Rajeev Chemicals, Reinol Obs	11,00,491/-
5.	Vinayak Vinod Sharma	2.86%	1,00,000/-	Against sales to Aryan paper mills	35,00,000/-

3. Ld. AO held that, such a payment of commission appears to be excessive and unreasonable because commission is paid on material which common and largely prevalent and the items purchased are non-monopolistic and its availability is not limited. The assessee has paid commission @ 2.86% on the sales, whereas on the purchase commission has been paid @ 13% to 15% which itself is illogical. He had summoned u/s 131(1) to three persons, out of which, one, Shri Anuj Sharma appeared and his statement on oath was recorded. In his statement, he gave the nature of services provided to the assessee and how he has introduced the purchasers for procuring good quality material to be used in the paper industry and the manner in which he has to coordinate between the two parties. However, the Ld. AO without finding any discrepancy in his statement observed that, his statement/submission cannot be relied upon. Accordingly, he held that commission payment of three persons of purchases is reasonable and balance he disallowed and thereby making a disallowance of Rs. 20,33,762/-.

4. He further observed that assessee has debited sum of Rs. 1,78,000/- on account of incentives on sales, out of which one amount of Rs. 62,000/- was paid to Shri Amit Kumar, who was not an employee of the assessee. Accordingly he held that such a payment is in the form of commission for which for which assessee was liable to deduct at tax at source u/s 194H; and accordingly, he made the disallowance u/s 40A(ia).

5. Ld. CIT (A) too has confirmed the addition made by the AO on these two points holding that AO has made inquiries u/s 131 to find out the nature and genuineness of the services rendered by the four persons, out of which some of them did not comply and some of them

only filed copy of their account with their income tax return. He further observed that, from the statement of Shri Anuj Kumar Sharma nothing is borne out to substantiate the claim of the assessee that any kind of technical services have been rendered by them to substantiate such a heavy commission @ 13 to 15%. Further, there was no such written agreement as stated by Shri Anuj Sharma, hence agreements produced by the assessee in support of services for commission are not genuine. Accordingly, he confirmed the disallowance by the AO holding that 3% commission has been allowed by the AO is reasonable.

6. Regarding disallowance u/s 40(a)(ia) of Rs. 62,000/-, Ld. CIT (A) held that, since Shri Amit Kumar was not an employee, therefore, such incentive on sales is in the nature of commission for which TDS was required to be deducted.

7. Before us, Ld. Counsel for the assessee, Shri Sanjay Kumar, submitted that, first of all, these parties are not related to the assessee in any manner and do not fall in the category of 'persons' as specified in section 40A (2)(b). Secondly, similar payment of commission on purchases were made in the earlier years and in scrutiny proceedings passed us/143(3) such a quantum and rate of commission on purchases have been allowed. He also drew our attention to the related figures of turnover, purchases, gross profit, commission and net profit for year in appeal and immediately preceding year which is reproduced at page 3 of the appellate order as under :-

S.No.	Particulars	For the year ending 31.3.2014	For the year 31.3.2013
1	Sales	2,67,45,976.00	1,87,01,484.00
2.	Purchases	1,73,06,954.00	1,33,35,417.00
3.	Gross Profit	76,98,999.00	46,66,429.00

4.	Commission	26,50,000.00	12,00,000.00
5.	Net Profit	9,90,747.00	6,42,111.40
6.	%Gross profit to sales	28.78%	24.95%
7.	% net profit to sales	3.70%	3.43%

7.1 He submitted that, because of such high payment of commission on purchases, assessee's gross profit and turnover has increased. Regarding payment of commission at a high rate, he submitted that the chemicals supplied by the assessee are for the use in paper industry which has a very critical role in the product of paper for which quality and strength of the paper depends upon the chemicals supplied by the assessee. The paper industry cannot afford to use chemicals which may not produce the desired results as it would result in defective paper and, therefore, reliability of quality has to be ensured while procuring the chemicals; and these chemicals are tested by the expert and have to be approved by the individual paper mills. That is the reason why the commission agents have to ensure that the quality of chemicals procured has to be of high quality and survives the quality test. It is for this reason that assessee has to rely upon these commission agents who ensure that technical quality of material supplied. In any case, such kind of expenditure has to stand the test of commercial expediency and it is only businessman who can decide, whether any expenditure has to be incurred or not and if such an expenditure was wholly and exclusively for the purpose of business, then reasonableness of the expenditure has to be judged from the point of the businessman.

8. In so far as the disallowance of Rs. 62,000/- u/s 40(a)(ia), Sri Sanjay Kumar submitted that, Shri Amit Kumar was earlier employee

of the assessee and this year, he has left the job and as and when his services were required for the purpose of promoting the sales, he was given the payment which in fact falls in the category of salary only and not in the nature of any commission. Since his salary payment was only Rs. 62,000/- and his income is below taxable limit, therefore, no TDS was required to be deducted.

9. On the other hand, Ld. DR strongly relied upon the order of the Ld. CIT(A) and submitted that assessee could not substantiate such a high rate of commission paid to the agent especially when assessee was paying commission of less than 3% on sales. He also drew our attention to the relevant observation of the AO for rejecting the assessee's claim. On the issue of disallowance of Rs. 62,000/- he submitted that, once the person was not an employee of the assessee and payment has been made as an incentive, then it falls in the nature of commission for which assessee was liable to deduct u/s 194H.

10. I have heard the rival submissions, perused the relevant finding given in the impugned order as well as material referred to at the time of hearing. It is an undisputed fact that assessee has made payment of commission to four parties, ranging between 13.63% to 15.33%. The case of the revenue is that, payment of commission is too high and excessive and, therefore, according to the AO and Ld. CIT(A) the reasonable payment of commission should be 3% . First of all, I am unable to appreciate such an approach and reasoning, because, once it is not in dispute that payment on commission is genuine transaction and it is a regular feature in the line of the assessee's business, then how Revenue can decide or disallow on the ground that expenditure incurred is excessive. Here as pointed out by Ld. Counsel that similar rate of commission was paid in the earlier year

also which has been accepted by the AO in the scrutiny proceedings for immediately preceding assessment year. It is not the case of the revenue that payment made to these commission agents falls in the category of 'persons' as defined in section 40A(2)(b), wherein expenditure has to be seen with regard to fair market value of services provided for which payment is made to such related persons. In terms of section 40A (2)(b), admittedly all these agents are unrelated persons and, therefore, without any evidence or material on record to show that these payments are excessive, the department cannot disallow the said payment by holding that the expenditure incurred is not reasonable. Once it is established that there was a nexus between the expenditure for the purpose of the business, then it is not open for the Revenue to hold that only certain amount of expenditure should have been incurred. It is trite proposition that while deciding the test of commercial expediency whether expenditure incurred was wholly and exclusively for the purpose of business, the revenue cannot decide the reasonableness of the expenditure and sit in the arm chair of the businessman. Here in this case, the assessee has explained the circumstances and the reason for which such a high rate of commission is paid for the purchase of chemicals as discussed in the earlier part of the order. No material has been brought on record by the AO by bringing any comparable case that other suppliers of similar chemicals in the paper industry were not paying any commission or the payment of commission or very less. The yardstick of whether payment is excessive or reasonable can only be seen, where there is some kind of colourable transaction to suppress the profit by claiming inflated expenditure and if no such material is brought on record, then the quantum of expenditure spent cannot be questioned. Not only that, here in this case statement of one commission agent has been recorded who has categorically explained the entire nature and

process of the chemicals procured; how he has introduced purchases for providing quality material used in the paper industry; what is the effect if material fails during the trial period; and how the responsibility for losses is to be owned. He has also explained that there is high risk of failure of the product on the basis of quality and why he has paid high commission for the assured quality so that the risk of failure is minimum. Without their being any discrepancy or any inconsistency in his statement, AO cannot discard the said statement and proceeded to make the disallowance of such a claim of payment of commission. Under the facts and circumstances the reasoning given by the authorities below cannot be upheld and accordingly, the disallowance of Rs. 22,33,762/- is deleted. In the result ground Nos. 1 and 2 are allowed.

11. Lastly, in so far as disallowance of Rs. 62,000/- on the ground that no TDS has been deducted before us, the Ld. Counsel has submitted that Shri Amit Kumar was an employee of the assessee till last year and in this year he was not employee for the whole time. Assessee has decided to pay him performance based salary instead of regular salary and the salary was paid in the form of incentive based on his support provided to the assessee by visiting the industries on behalf of the assessee during use of the products by the paper industry. The AO has held that such an incentive has to be treated as commission and therefore, assessee was liable to deduct TDS u/s 194H. How the said incentive has been treated to be as 'commission' is not clear, because once assessee has said that the incentive given to his ex employee was in the nature of salary, then simply rejecting the contention without any basis cannot be sustained. Even if any commission is paid in addition of any salary or wages that also falls in the category of 'Salary' in terms of clause (iv) of section 17. Since the assessee has only made payment of Rs. 62,000/- to Shri Amit Kumar

and his income was below taxable limit, therefore, there was no requirement to deduct TDS. Accordingly, in these facts the disallowance u/s 40(a) (ia) cannot be made and thus, addition of Rs. 62,000/- is directed to be deleted.

12. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 31st January, 2019.

Sd/-

**(AMIT SHUKLA)
JUDICIAL MEMBER**

Dated: 31 /01/2019

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR

ITAT, New Delhi