

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

**(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S. S. Viswanethra Ravi, Judicial Member)**

**ITA No. 1442/Kol/2017  
Assessment Year: 2014-15**

**Assistant Commissioner of Income Tax, Circle-34, Kolkata.....Appellant**

**Vs.**

**M/s. Eastern Distributors Pvt. Ltd.....Respondent  
3, Mangoe Lane  
Kolkata - 700 001  
[PAN : AADFE 5901 B]**

**Appearances by:**

*Shri S.S. Gupta, FCA, appeared on behalf of the assessee.*

*Shri A.K. Nayak, CIT, Sr. D/R. appearing on behalf of the Revenue.*

Date of concluding the hearing : February 6<sup>th</sup>, 2019

Date of pronouncing the order : March 15<sup>th</sup>, 2019

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax (Appeals)-10, Kolkata, (Id. CIT(A)) passed u/s. 250 of the Income Tax Act, 1961, (the 'Act'), dt. 27/03/2017, for the Assessment Year 2014-15.

2. The assessee is a partnership firm. It is a commission agent of Havells India Ltd. During the year in question, the assessee received commission income from Havells India Ltd. to the tune of Rs.9,52,35,470/-. It has claimed that it has paid commission to M/s. Dhanaseth Mercantile Pvt. Ltd. and M/s. Delight Vincom Pvt. Ltd. amounting to Rs.4,77,94,965/- exclusive of Service tax on the same. The gross amount of commission comes to Rs.5,37,02,422/- when this Service tax @ 12.36% is added. It filed its return of income declaring total income of Rs.80,38,990/-, for the Assessment Year 2014-15, on 11/09/2014. The Assessing Officer completed the assessment u/s 143(3) of the Act, on 21/11/2016 determining the total income at Rs.9,69,00,116/- *inter alia* disallowance of expenditure claimed on commission paid of Rs.5,37,02,422/- (inclusive of service tax) and disallowance of freight/delivery charges of Rs.3,45,52,872/-, on the ground that these are bogus expenditure amongst others.

Aggrieved the assessee carried the matter in appeal. The Id. First Appellate Authority granted part relief in his detailed order dt. 27/03/2017. He deleted the disallowance made on account of commission payments as well as disallowance made on account of freight/delivery charges claimed on the ground that these are genuine claims.

3. Aggrieved the revenue is in appeal before us on the following grounds:-

*"1. On the facts and circumstances of the case, the CIT(A) has erred in holding that the commission paid to Delight Vincom Pvt. Ltd. and Dhanaseth Mercantile Pvt. Ltd. for a gross sum of Rs. 5,37,02,422/- as genuine business expenditure.*

*2. On the facts and circumstances of the case, the CIT(A) has erred in accepting assessee's claim of freight and delivery charges amounting to Rs. 3,45,52,872/ - as genuine business expenditure.*

*3. The appellant craves leave to make any addition, alteration, modification etc. of the grounds at the appeal stage."*

4. The Id. D/R, Mr. A.K. Nayak, submitted that the entire expenditure on commission relates to payments made to two enterprises i.e., M/s. Dhanaseth Mercantile Pvt. Ltd. and M/s. Delight Vincom Pvt. Ltd. He submitted that notice u/s 133(6) of the Act, was issued to both these parties on 09/09/2016, but these were not complied with. He submitted that summons u/s 131 of the Act was issued on the parties and the departmental inspector was deputed to serve the same but the summons could not be served. Thereafter the assessee was given an opportunity to produce eligible persons from the above two enterprises for examination. He submitted that, the assessee sought time to give reply but has not produced the parties. He further submitted that the DDIT(Inv.) has also enquired into the transactions in the case of M/s. Dhanaseth Mercantile Pvt. Ltd. and the enquiries revealed that this party does not have the creditworthiness and lacks identity, genuineness and hence it was an entry provider. He referred to para 1.9 of the order of the Assessing Officer and submitted that a perusal of the table which is prepared from the database of Ministry of Corporate Affairs, it is clear that M/s. Delight Vincom Pvt. Ltd. is a shell company as it has zero assets, zero loans and negligible revenue for four years continuously but has trade

receivable of Rs.3.56 Crores and trade payables of Rs.3.59 Crores. Similarly, he referred to para 1.10 of the assessment order and argued that in the case of M/s. Dhanaseth Mercantile Pvt. Ltd. is a paper/shell company. He vehemently contented that the assessee failed to discharge the onus that lay on him to prove the genuineness of the transactions. He contended that merely because service tax is paid, and because transactions are through banking channels and because all the Income-tax provisions have been complied with, does not make the commission paid genuine transactions. He disputed the findings of the Id. CIT(A) at para 23 onwards of his order and submitted that this issue may be restored to the file of the Assessing Officer for fresh adjudication, in accordance with law and the assessee directed to produce the parties before the Assessing Officer.

He argued that the Id. CIT(A) has based his findings on irrelevant material and case-law and submitted that there is not proof regarding the services rendered by these two parties to the assessee.

4.1. He once again submitted that the issue should be restored to the file of the Assessing Officer and the assessee be directed to produce the parties before the Assessing Officer or in the alternative to confirm the order of the Assessing Officer and reverse the order of the Id. CIT(A) on this issue.

4.2. On Ground No. 2, which is on the disallowance of delivery and freight charges, he referred to para 2.3. of the assessment order onwards and submitted that here also as in the case of commission payments, notice could not be served on the parties to whom freight and delivery charges were paid. The Id. CIT, D/R, submitted that all the arguments made in cases of payments to commission agents are applicable *mutatis mutandis* to the payment of freight and delivery charges and that this issue also may be restored to the file of the Assessing Officer for fresh adjudication, in accordance with law or in the alternative the order of the Id. CIT(A) be confirmed.

5. The Id. Counsel for the assessee, Shri S.S. Gupta, on the other hand, vehemently controverted the arguments of the Id. D/R and submitted that the Id. CIT(A) has considered each and every aspect on facts and has come to a conclusion that the payments for commission made to these enterprises are genuine. He submitted that commission payments for the very same services was paid to the very same parties for

the earlier Assessment Years and that this was allowed by the Assessing Officer in an order passed u/s 143(3) of the Act. He submitted that the assessee is a commission agent and the entire income is commission received and the Assessing Officer did not doubt the service rendered by the assessee for receiving this commission but only doubts the sub-commission payments for the same services. He referred to the paper books filed before him and submitted that both the companies to whom commission has been paid have rendered services and this is evident from the documents filed. He pointed out that the assessee company has filed agreements with M/s. Havells India Pvt. Ltd. for commission received, computation of total income, copy audited accounts, copy of bank statements evidencing payments, copy of commission paid to M/s. Dhanaseth Mercantile Pvt. Ltd. and M/s. Delight Vincom Pvt. Ltd., copies of Form No. 26AS, evidence of service tax paid and confirmations from parties to prove the genuineness of the transactions. He relied on the order of the Id. CIT(A) and submitted that the assessee has discharged the onus that lay on it and the Assessing Officer merely disallowed the commission payments on the sole ground that the parties have not responded to notice u/s 133(6) of the Act. He relied on the decision of the Hon'ble Calcutta High Court in the case of *Mather & Platt (India) Ltd. vs Commissioner Of Income-Tax reported in 168 ITR 493 (Cal HC)*, for the proposition that the assessee cannot be held responsible if a person is not found in an address after a gap of four years and it cannot be held that such person is non-existent. He further relied on the following case-law:-

- *Diagnostics vs. CIT; ITA No. 153 of 2004; Hon'ble Calcutta High Court*
- *Manoj Seth, Kolkata vs. Department of Income Tax; ITA No.843/Kol/2013,Kolkata 'C' Bench; order dt. 20/01/2016*
- *CIT vs. Alpha Hydronics Pvt. Ltd.; ITA No. 549/Kol/2004; Hon'ble Calcutta High Court; judgement dt. 10/11/2014*
- *PCIT vs. Chawla Interbild Construction Co. Pvt. Ltd.; 50A BCAJ 223; May 25<sup>th</sup>, 2018.*

5.1. He took this Bench through the findings of the Id. CIT(A) and relied on the same and prayed that the same be upheld.

5.2. On the issue of disallowance of payments of freight and delivery charges, similar arguments were advanced by the Id. Counsel for the assessee and reliance was placed on the order of the Id. CIT(A). He pointed out that in the case of each of the parties who

transported goods and received the payment, the following documents were filed in support of the genuineness of the transaction.

- a) Trade license
- b) Letter to postmaster
- c) Professional tax challan
- d) Sample bills
- e) ITR Acknowledgements
- f) Computation of income
- g) Profit and loss account
- h) Ledger accounts of the parties
- i) Copy of the bank statements evidencing payments

5.2.1. He relied on the same case-law as in the case of the first ground and submitted that just because the parties were not traceable after a long period of time i.e., three years it cannot be concluded that such parties did not exist nor that the transactions are not genuine, when such overwhelming evidence is filed.

5.3. On the submissions of the Id. D/R that the assessee has weak financials, he submitted that these companies have substantial income and turnover and it is factually incorrect to say that they are shell companies. He argued that the business of these companies is in the nature of commission agents and for this a huge asset base is not required and loans are not required but would require other specific set of skills for acting as sub-agents. Referring to the report of the Investigation wing, the Id. Counsel for the assessee submitted that neither a copy of the report was given to the assessee nor copy of the statements allegedly recorded by the investigation wing, was furnished to the assessee. He prayed that the order of the Id. CIT(A) be upheld.

6. 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:-

7. The assessee in this case is a commission agent of M/s. Havells India Pvt. Ltd. It received commission in pursuance to an agreement with M/s. Havells India Pvt. Ltd. The assessee firm sells electrical goods for its principal for commission. It also gets re-

imbursement of part of the freight charges incurred by it on submission of the invoices to its "principal company" i.e., M/s. Havells India Pvt. Ltd. These recoveries are credited to the freight account and only the net amount is debited. The assessee has two sub-commission agents i.e., M/s. Dhanaseth Mercantile Pvt. Ltd. and M/s. Delight Vincom Pvt. Ltd. These two sub commission agents were paid commission. In support of the genuineness of these payments, the assessee furnished agreements entered into by the assessee with these sub agents, copy of bank statements, copy of trade licenses issued by the Howrah Municipal Corporations to these two agents, copies of acknowledgement of ITR filed, audited accounts etc., of these parties as proof. It also filed professional tax registration certificate and copies of acknowledgement of letters sent to the parties of the above addresses. We find that the Assessing Officer has made the disallowance for this current Assessment Year for the sole reason that notice issued by him could not be served on these parties. We find that similar payments were made to these very parties for the earlier Assessment Year i.e., 2013-14 for the very same services and the Assessing Officer in an order passed u/s 143(3) of the Act, dt. 31/03/2016 allowing similar claims of the assessee. The Id. CIT(A) has at page 30 para 3 of his order held as follows:-

*"3. I have carefully examined the factual matrix of the case and the action of the Ld. AO as made during the scrutiny proceedings and the conclusions drawn by him. I have also carefully examined the submissions made by the Ld. A.R of the appellant as well as the documentary evidence provided by the paper book at the pages indicated. I have carefully considered the reasons recorded and the findings given by the Ld. AO1, as also the submissions and defense of the assessee/ Ld. A.R. I have also called for and examined the assessment record, and perused the various documents submitted by the appellant-assessee during the scrutiny proceedings. It is apparent from the profit & Loss account of the assessee-firm that it is a "del credere" commission agent, and it received different rates of commission from the Principal M/s Havells India Ltd in this case. These rates have been listed in the agreement entered by the assessee-appellant with the Principal as brought out at pages 39 to 49 of the Paper Book submitted by the appellant during appeal. During the year under consideration, it has received a commission amount of Rs.9,52,35,470/-, and has made payments of Rs.4,77,94,965/- to Commission agents. Further an amount of Rs.59,07,457/- has been paid as service tax on account of commission paid @12.36%. The brief fact of the matter is that the Ld. AO has held that the commission payments were bogus or make believe, and therefore has disallowed both, i.e., the impugned commission payments as well as the service tax paid on that account. The reasons for holding the commission payments as bogus have been summarized supra, and do not require repetition. It is the contention of the appellant, in appeal that the Ld. AO has disregarded and totally overlooked the evidence provided during the course of the scrutiny proceedings and has acted in an arbitrary and predetermined manner to disallow*

*the genuine, payments which were supported with proper documentation and third party verifiable documents such as bank accounts, TDS, service tax and filing of returns by the two commission agents. It is the contention of the appellant-firm that it was also willing to produce the Commission Agents, but for the Ld. AO not having given adequate time to do so. On careful examination, I find that the assessee has submitted a fair amount of details and documentary evidences before the Ld. AO during the scrutiny proceedings. In the said matter, it is worthwhile to record that all the relevant details, supported with documentary evidences have been filed by the appellant before the Ld.AO such as all the tax invoices of the commission and the proof of payment. TDS certificate and the Profit & Loss account of the parties had also been submitted. In the said Situation, I find myself in agreement with the Ld. A.R for the appellant that, from the factual matrix it is apparent that the commission agent also paid taxes on the income earned by them, and therefore the Ld. AO was not entirely correct in saying that the services rendered was not proved. Further during the course of the appeal proceedings, the appellant has also submitted the copies of the assessment orders of the two Commission Agents namely M/s Delight Vincom Pvt Ltd and M/s Dhanaseth Mercantile (Pvt) Ltd, both for the A.Y 2014-15, the impugned year under consideration."*

The ld. CIT(A) has not found any of the payments made to these parties to be non-genuine and that this is not a case where payments were made to related parties. The ld. CIT(A) has relied on several case-law including the decision of the Hon'ble Jurisdictional High Court in the case of *Commissioner of Income tax, Kolkata-III versus M/s. Dataware Private Ltd. ITAT No. 263 of 2011 GA No. 2856 of 2011; judgement dt. 21st September, 2011*, wherein it is held that if the returns of income filed by the creditors are accepted by the Assessing Officer assessing those entities, then the genuineness of the transactions have to be accepted.

8. We find no infirmity in this order. The ld. CIT D/R, pleads that the issue may be restored to the file of the Assessing Officer for fresh adjudication and that the assessee be directed to produce those parties. We do not see merit in such submissions, when similar payments, to the very same parties have been made in the earlier years, the department accepted the same as genuine. The assessee, in our view, has discharged the burden of proof that lay on it by producing all necessary evidence. The assessee has filed copy of the assessment orders of both these firm passed u/s 143(3) of the Act. In fact, huge payments of service tax of Rs.59.07 Lakhs/- has been made on this sub-commission payments. Both the sub-commission agents have filed their return of income and no adverse observations were made with the Assessing Officer assessing these parties.

The Hon'ble Jurisdictional High Court in the case of *Mather & Platt (India) Ltd. vs Commissioner Of Income-Tax (supra)* held as follows:-

**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 Mintop Corpn. but on that ground, the genuineness of Mintop Corpn. 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. Hastimal v. 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.”*

The Hon'ble Jurisdictional High Court in the case of *CIT vs. Dataware (supra)*, held as follows:-

*“In our opinion, in such circumstances, the Assessing officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence. So long it is not established that the return submitted by the creditor has been rejected by its Assessing Officer, the Assessing officer of the assessee is bound to accept the same as genuine when the identity of the creditor and the genuineness of transaction through account payee cheque has been established. We find that both the Commissioner of Income Tax(Appeal) and the Tribunal below followed the well-accepted principle which are required to be followed in considering the effect of Section 68 of the Act and we thus find no reason to interfere with the concurrent findings of fact recorded by both the authorities. The appeal is thus devoid of any substance and is summarily dismissed.”*

9. Applying the proposition of law laid down in these two case-law, we uphold the order of the Id. CIT(A) and dismiss this ground of the revenue.

10. On Ground No. 2, which is on the disallowance of freight and delivery charges, we find that the disallowance was made only on the ground that the notice issued to these parties have returned unserved. The Id. CIT(A) at para 3, 4 & 5 of his order held as follows:-

*“3. I have carefully considered the factual and legal matrix emanating from the action of the Ld. AO in making the impugned disallowance of Rs.3,45,52,872/- on account of freight charges. Here again, I find that the prime reason for doing so is that the parties did not respond to the summons issued by the Ld. AO, or that they were not present at the address stated by the assessee-firm. I find that one party did respond, but the Ld. AO was disinclined to believe this party also, as it responded from a different premise, and not from the one to*

which the summon had been sent by the Ld. AO. In the matter of production of the parties, I find that the appellant-firm had requested for more time to produce the parties, but the Ld. AO was not inclined to allow the same. From the assessment record, I find that the notice u/s 143(2) and 142(1) had been issued on 19.09.2015, whereas the assessment was completed on 21.11.2016, and therefore it is to be observed that there was adequate time available with the Ld. AO to make enquiries and confront the assessee-firm. Even after the transfer of the case to the jurisdiction of the Ld. AO, the matter was first heard from 29.07.2016 onwards. In the said situation, it does appear that the final stages were expedited by the Ld. AO, shortening the time allowed for compliance to the appellant. Here again, like the previous ground, I find that the assessee-firm has submitted the necessary details during the course of the scrutiny in the case of all the transporters, and these include the copies of the Returns filed with PAN, copy of the professional tax challan, computation of total income, copies of confirmations relating to freight payment, copy of the bank accounts and Bank statement showing the address of the parties, and the copies of enlistment with the Municipal Authorities about carrying on the business of transportation. In the emergent situation, I find myself in agreement with the Ld. A.R for the appellant-firm that from the factual matrix it is apparent that the transporters also filed returns and paid taxes on the income earned by them, and therefore the Ld. AO was not correct in saying that they were non-existent or bogus.

4. In the two other cases of M/s City Express Service and M/s Everest Carriers, the facts are slightly different from the four cases discussed in the earlier paragraph. The facts are that the assessee-firm had also made payments in aggregate, being a sum of Rs.94,99,170 towards freight charges to these aforementioned parties, and these were also disbelieved and disallowed by the Ld. AO. The Ld. AO made observations that these parties were non-existent. However, I find that in the Order, the Ld. AO has mentioned even while disallowing the freight charges paid to M/s City Express Service that the party had replied to the notice u/s 133(6) of the Act, but the said reply was from a different premise, and not the one where the notice has been sent by the Ld. AO. I find merit in the contention of the appellant that the said transporter is a recognized transporter and therefore the Postman delivered the notice to it inspite of the fact that the same was addressed with wrong or incorrect address. In any case, the matter remains that the notice was replied to, and therefore the allegation of the Ld. AO about non-existence of the said party does not stand to reason. After examining the reply submitted before the Ld. AO from the said transporter M/s City Express, as available in the records, I find that there was no reason for the Ld. AO to summarily reject the reply of this transporter along with the details submitted. The Ld. AO similarly disallowed another sum of Rs.65,31,560/- paid by the appellant-firm to M/s Everest Carriers on grounds that only the ledger was submitted, and this by itself does not establish the genuineness of the transaction. In my considered view of the matter at least the submission of the ledger cannot be an adverse finding to summarily reject even the existence of this Transporter. In any case, the appellant was being given a certain percentage by the Principal M/s Havells India Ltd, for purposes of transportation. For the case at hand, I find that there were huge turnovers procured by the appellant, so there was no way there would not be any expenses towards transportation; therefore, in my considered view of the extant situation, the Ld. AO was on an entirely wrong

footing while rejecting virtually the entire claim of transportation in the face of the overwhelming evidence submitted by the assessee-firm. The appellant has also contested the disallowance of Rs.10,45,890 (included in total disallowance of Rs.3,45,52,872) which had been incurred by the appellant predominantly towards payment made to Coolies / labour for loading and unloading of goods. I find that the Ld. AO has disallowed the expenses on the grounds that the impugned payments were made in cash, and that TDS has not been done in any of the cases.

5. In this matter, I have carefully considered the arguments advanced by the appellant-firm that before the Ld. AO, the audited books of accounts had been produced, and it had been explained that labour are paid in cash only as a matter of practice in the trade. It was pleaded during the appeal, that even the ledger copy of payments of Rs.10,45,890 was filed with the Ld.AO and that the Ld. AO has not considered the same. I have examined the ledger relating to freight, as submitted in the Paper Book at pages 334 to 476. It is to be observed that most of the payments were by cheque in this ledger and the names and addresses of the parties have been recorded, making such payments amenable for verification, had the Ld. AO desired to do so. In respect of cash payments, I find that in the ledger the narration contains the names of the parties, and proof of payments as mentioned in the slips attached. After examination, I find myself in agreement with the contention of the Ld. A.R for the appellant that it is seen that cash payments were for labour and coolies, and it would be neither practical nor possible to demand and obtain receipts from them. That said, it is also true that none of the payments appear to be in excess of the threshold for attracting the TDS provisions, and therefore there appears to be no requirement to deduct TDS. I find that whatever be the situation, there cannot be any dispute that the goods were transported through Lorries and Trucks and that the goods are required to be loaded and unloaded by employing manual labour, as is the practice. Therefore, I find myself in agreement with the argument advanced by the appellant that in the facts and circumstances of the case the Ld. AO was not justified in making this addition of Rs.10,45,890 /-. It is also a fact that in the immediate preceding A.Y. 2013-14, which had also been subject to scrutiny, the freight charges were acceptable to the Ld. AO and considered to be in order. In this situation also, I find that the judgement of the Hon'ble jurisdictional High Court rendered in the case of Dataware Ltd. (referred earlier) wherein the Hon'ble Court held that the Assessing Officer of the Assessee had no jurisdiction to decide the creditworthiness of the Creditors of the Assessee would be applicable in the described situation. The Assessee Firm has also relied on the judgment of the Hon'ble Jurisdictional Calcutta High Court in the case of M/s Diagnostics vs. CIT in ITA No.153/2004 (judgment dated 04.03.2011), reported in [ 2012] 20taxmann.com 692(Calcutta) as under [ head notes]

**[2012] 20 taxmann.com 692 (Calcutta)**

**HIGH COURT OF CALCUTTA**

**Diagnostics**

**v.**

**Commissioner of Income-tax\***

**BHASKAR BHATTACHARYA AND SAMBUDDHA CHAKRABARTI, JJ.**

IT APPEAL NO. 153 OF 2004  
[ASSESSMENT YEAR 1998-99]

MARCH 4, 2011

***I. Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payments - Assessment year 1998-99 - Where assessee took care to purchase materials for business by way of account payee cheques from a third party and after three years said third party did not appear before Assessing Officer pursuant to notice or even had stopped business, claim of assessee on that account could not be discarded as non-existent [In favour of assessee]***

*If an assessee took care to purchase materials for his business by way of account payee cheques from a third party and, subsequently, three years after the purchase, the said third party did not appear before the Assessing Officer pursuant to the notice or even had stopped the business, the claim of the assessee on that account could not be discarded as non-existent.*

*Overall, after considering the factual matrix, I am of the considered view that the Ld. AO was not justified in making the disallowance of Rs.3,45,52,872/- on account of claims of transport, and the same are not sustainable. Therefore, such addition is ordered to be deleted, and the ground **are allowed** in favour of the appellant-firm"*

11. The factual findings given by the ld. CIT(A) in this case is that, it cannot be disputed that goods were transported through lorries and trucks and that the goods were required to be loaded and unloaded by employing manual labour. This fact could not be controverted by the ld. D/R. The evidences given by the assessee in support of the transactions, leads to a conclusion that the assessee has discharged the primary onus that lay on it. It has filed the copies of the professional tax challans of each of the transporters, copy of income-tax return acknowledgements, copy of computation of income, balance sheets, copy of confirmation letter of the transactions from the transporters, copy of the bank statements reflecting the transactions with the assessee, copy of the certificate of enlistment issued to the transporter Howrah Municipal Corporation and copy of the letter written by the transporter to the Howrah Post Office informing about their new addresses and requesting to make all correspondences to that address. The entire disallowance was made simply because notice could not be served on these parties. The assessee in this case had received re-imburements of some of this expenditure from its principal company i.e., M/s. Havells India Pvt. Ltd.

11.1. As we have already held while disposing off Ground No. 1, by relying on the decision in the case of *Mather & Platt (India) Ltd. vs Commissioner Of Income-Tax (supra)*, that if a person is not found after a long period of time at a particular address, it cannot be concluded that such person is non-existent. In this case many documents were filed to prove the existence of these parties. Hence for the very same reason given by us while disposing off Ground No. 1, we uphold the order of the Id. CIT(A) and dismiss Ground No. 2 of the revenue.

12. Ground No. 3 is general in nature.

13. In the result, appeal of the revenue is dismissed.

***Kolkata, the 15<sup>th</sup> day of March, 2019.***

Sd/-

**[S.S. Viswanethra Ravi]**

Judicial Member

Dated : 15.03.2019

{SC SPS}

Sd/-

**[J. Sudhakar Reddy]**

Accountant Member

*Copy of the order forwarded to:*

1. ***M/s. Eastern Distributors Pvt. Ltd***  
***3, Mangoe Lane***  
***Kolkata - 700 001***

2. ***Assistant Commissioner of Income Tax, Circle-34, Kolkata***

3. CIT(A)-

4. CIT- ,

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

True Copy  
By Order

Assistant Registrar  
ITAT, Kolkata Benches