

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘SMC’
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 2593/Ahd/2017

निर्धारण वर्ष/Assessment Year: 2014-15

Kemit Chemicals P.Ltd. 78/12, GiDC, Vatva, Phase-I Vatva Ahmedabad 382 445. PAN : AAACK 5879 N	Vs	ITO, Ward-2(1)(2) Ahmedabad.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri S.N. Divetia, AR
Revenue by :		Shri T.C.Meena, Sr.DR

सुनवाई की तारीख/Date of Hearing : 25/03/2019

घोषणा की तारीख /Date of Pronouncement : 26/03/2019

ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER : Assessee is in appeal before the Tribunal against the order of the Id.CIT(A)-2, Ahmedabad dated 16.10.2017 passed for the Asstt.Year 2014-15.

2. The assessee has taken three grounds of appeal alongwith sub-grounds. However, its grievance revolves around a single issue viz. the Id.CIT(A) has erred in confirming the disallowance of Rs.26,33,008/- which was added by the AO by making disallowance out of foreign agent commission.

3. Brief facts of the case are that the assessee has filed its return of income on 25.11.2014 declaring total income at Rs.9,02,910/-. The case of the assessee was selected for scrutiny assessment and notice under

section 143(2) was issued and served upon the assessee. The assessee company at the relevant time was engaged in manufacturing various chemicals. It has made exports of these chemicals and paid commission to foreign agents. The ld.AO has disallowed the commission claimed by the assessee at Rs.26,33,008/-. On appeal, the ld.CIT(A) has followed order of her predecessor in the Asstt.Year 2012-13. Verbatim same finding has been recorded in this year. For reference, we take note of para 3.7 which reads as under:

"3.7. Having considered the facts and submission, it is noticed that the AO has pointed out various discrepancies in respect of the claim of commission payments to foreign agents which have not been met out by the appellant through submission of details and evidences in support. The appellant has not given any reasons for not making any undertaking in Form No. 15CA & obtaining the certificate in Form No. 15CB from the accountant in view of the RBI guidelines and provision of section 195 r.w. Rule 37BB of the I. T. Rules. Without furnishing of such certificates, the foreign remittances are not permissible. Further, the appellant has not provided copies of any agreements made with the agents specifying the terms and conditions of their scope of work and rate of commission and payment of such commission to them. It is needless to mention that in international transactions such kind of written documents becomes mandatory to avoid any kind of litigations. In the instant case, having -: agreement becomes more important in view of the fact that the rates of commission payment to each of agents were different. Further, the appellant's contention that the payments to them have been made through banking channels cannot be said to conclusive evidence in view of the judgment of Hon'ble Apex Court in the case of CIT Vs. P. Mohanakala (2007) 291 ITR 278 (SC). Thus, the identity of the agents have not been established and the appellant has also not been able to prove that any services have actually been rendered by these agents.

3.8. Foreign commission was paid to these two parties in the A. Y. 2012-13 & CIT(A)-2, Ahmedabad has confirmed the disallowances. In view of the aforesaid discussion the disallowance of the commission payments made by the AO for the reasons discussed in the assessment orders is found correct and justified and thus, the same is confirmed. The related grounds of appeal are dismissed."

4. The ld.counsel for the assessee at the very outset submitted that in the Asstt.Year 2012-13, the Tribunal has set aside this issue to the file for AO for re-adjudication. He prayed that in view of order of ITAT in the Asstt.Year 2012-13, this issue also be set aside to the file of for re-adjudication. On the other hand, the ld.DR relied upon the order of the ld.CIT(A).

5. We have duly considered rival contentions and gone through the record. We find that the ld.CIT(A) has not recorded any finding in this year, rather followed finding of the ld.CIT(A) in the Asstt.Year 2012-12. That finding did not meet approval of the ITAT. Therefore, order of the ld.CIT(A) is not sustainable. Discussion made by the Tribunal on this issue reads as under:

3. To adjudicate on this appeal, only a few undisputed material facts need to be taken note of. The assessee is a manufacturer of chemicals, and it has exported its products to various countries. It is in this connection that the assessee is said to have paid sales commission, to non-resident agents, aggregating to R.36,79,799/-. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that neither the assessee has furnished information, as required under rule 37BB, in respect of these foreign remittances, nor the assessee has furnished satisfactory details about the nature of services, complete details of agent and evidences to prove bonafides of claim. It was also noted that there is no consistent or reasonable basis, such as relationship to exports, in respect of these payments, and that there was no evidence, such as agreement or exchange of letters, to substantiate the agency arrangements. The fact of bank payment, according to the Assessing Officer, could not be treated as proof of bonafides. It was, inter alia, in this backdrop that the commission of Rs.36,79,799/- was disallowed. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without any success. While confirming the disallowance, learned CIT(A) observed as follows :-

“3.7 Having considered the facts and submission, it is noticed that the AO has pointed out various discrepancies in respect of the claim of commission payments to foreign agents which have not been met out by the appellant through submission of details and evidences in support. The appellant has not given any reasons for not making any undertaking in Form No.15CA & obtaining the certificate in Form No.15CB from the accountant in view of the RBI guidelines and provision of section 195 r.w. Rule 37BB of the I.T. Rules.

Without furnishing of such certificates, the foreign remittances are not permissible. Further, the appellant has not provided copies of any agreements made with the agents specifying the terms and conditions of their scope of work and rate of commission and payment of such commission to them. It is needless to mention that in international transactions such kind of written documents becomes mandatory to avoid any kind of litigations. In the instant case, having agreement becomes more important in view of the fact that the rates of commission payment to each of agents were different. Even the declarations made by the agents namely; M/s Te Hui Trading Co. & M/s. Perfect Pvt. Ltd. both were found on plain papers with the same language that also created a suspicion over the genuineness of the claim and to remove such suspicion the appellant has not provided any further details/evidences. Furthermore, in the case of M/s Te Hui Trading Co., even the email address was provided with regard to a different company situated at USA and as per appellant's connection, it was the associate concern of M/s. Te Hui Trading Co., then also the necessary evidences in support would have been submitted. But the assessee has failed to rebut the contention of the AO by filing any supporting evidences. Further, the appellant's contention that the payments to them have been made through banking channels cannot be said to conclusive evidence in view of the judgement of Hon'ble Apex Court in the case of CIT vs. P Mohanakala (2007) 291 ITR 278 (SC). Thus, the identity of the agents have not been established and the appellant has also not been able to prove that any services have actually been rendered by these agents. 3.8 In view of the aforesaid discussion the disallowance of the commission payments made by the AO for the reasons discussed in the assessment orders is found correct and justified and thus, the same is confirmed. The related grounds of appeal are dismissed.”

4. *The assessee is not satisfied and is in further appeal before us.*

5. *We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.*

6. *We find that there is no contemporaneous evidence about rendition of services by the non resident agents – no agreements, no letters, not even exchange of emails or any other contemporaneous evidence whatsoever, which could demonstrate that these agents had rendered any services to the assessee. We have also noted that even the rate of commission is not consistent or uniform. All these factors hardly help the assessee to claim bonafides of commission expense. The onus of discharging genuineness of commission, which is on the assessee, has not been discharged. When we put our this understanding to the learned counsel, he submitted that the assessee was not given sufficient opportunity to discharge this onus as central point discussions before the authorities below was technicalities regarding non-compliance with rule 37BB and nuances of taxation of income in the hands of non-resident agent. His stand that the assessee was never even called upon to produce contemporaneous evidence for rendition of services, this plea is correct to a fair extent. The question of examining taxation in the hands of nonresident, and resultant tax withholding obligations, or the compliance with rule 37BB, whatever be it's relevance, is a much later stage. When the assessee is not specifically asked to give evidence for rendition of services, that fact cannot be put against the assessee. Having said that, it is also necessary to bear in mind that rendition of service, and evidence to establish that fact, is a fundamental aspect. We, therefore, deem it fit and proper to remit the matter to the file of the Assessing Officer for fresh adjudication after giving yet another opportunity of hearing to the assessee, in accordance with the law and by way of a speaking order. We order so.*

7. *In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 1st day of November, 2018."*

6. A perusal of the above would indicate that the finding recorded by the Id.CIT(A) in the Asstt.Year 2012-13 and in this year are verbatim same. Therefore, the following the order of the ITAT in the Asstt.Year

2012-13, we allow this appeal and set aside this issue to the file of the AO for fresh adjudication.

Needless to mention, the AO shall provide reasonable opportunity of hearing to the assessee in accordance with law, and assessee shall be at liberty to produce any evidence in support of his case.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Pronounced in the Open Court on 26th March, 2019.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**