

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, KOLKATA

Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member

I.T.A. No.1360/Kol/2016
(Assessment Year: 2009-10)

Sheetal G Desai.....Appellant
[PAN : ADOPD 0128 M]

Vs.

ACIT, Circle-36, Kolkata..... Respondent

Appearances by:

Shri S.S. Gupta, FCA, appearing on behalf of the appellant.

Shri Robin Choudhury, Sr. DR, Addl.CIT, appearing on behalf of the Respondent.

Date of concluding the hearing : April 9th, 2019

Date of pronouncing the order : May 10th, 2019

O R D E R

Per J. Sudhakar Reddy :-

This appeal by the assessee directed against the order of the Id. Commissioner of Income Tax (Appeals)-10, Kolkata (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dated 04.03.2016 for Assessment Year 2009-10.

2. The assessee is an individual and derived income from salary and from the business of marketing consultancy. He filed his return for the Assessment Year 2009-10 on 29.09.2009 declaring total income of Rs.32,09,940/-. The assessee carried on a business under the name and style of 'GFF Aroma' and he received commission income in this business. Out of commission income received of Rs.64,08,867/-, the assessee debited a sum of Rs.38,00,000/- towards commission expenditure. The Assessing Officer examined this claim and came to the conclusion that the assessee could not prove the genuineness of the claim and identity of the commission agent. He further observed that the expenses were booked on the last day of the financial year 2008-09 by way of journal entries. He was of the view that the assessee had inflated expenses to

evade taxes. Hence he disallowed the entire claim of commission payment of Rs.38,00,000/-. Furthermore, the claim of assessee of writing off of bad debts of Rs.6,35,158/- was also disallowed for the reason that the assessee could not produce the requisite ledger for the year ending 1990 on the ground that, these are very old debts. The A.O held that the nature of credit, steps taken to recover the debts are not known. He also noted that the assessee was 20 years old at the time of debt in question and not matured enough to run her business. He disallowed the claim.

3. Aggrieved, the assessee carried the matter in appeal. The ld. first appellate authority for the various reasons given in his order allowed the appeal of the assessee in part after calling for remand report. He allowed the commission payment made to Kamna Mago of Rs.2,00,000/- but had disallowed the commission payment of Rs.36,00,000/- to Sri D.R. Shah. He also disallowed the claim of write off of bad debt.

4. Further aggrieved, the assessee is in appeal before us. The ld. Counsel for the assessee filed a paper book consisting of 58 pages and submitted that the assessee has produced sufficient evidences before the Assessing Officer as well as the ld. CIT(A) in support of the fact the assessee had paid commission to its sub-agent for services rendered. The ld. Counsel for the assessee submitted that the assessee had earned commission from few Chinese customers for selling of their products in India and in order to achieve the targets, she entered into a MOU with one Mr. D.R. Shah and commission income received by the assessee was shared with him and that the commission was paid on various dates in accordance with this MOU. He pointed out that, in the bills, debit notes raised by the agency of Mr. D.R. Shah, specific reference was given to the bill numbers/order numbers of the sales of goods of the foreign parties and purchases made of these goods by the Indian customers. He submitted that the following evidences were filed before the A.O in support of the claim of genuineness of commission payment:

- (a) Copies of the MOU with Mr. D.R. Shah
- (b) Copy of PAN card of Mr. D.R. Shah
- (c) Copies of bills/debit notes raised by the parties mentioning the name of Mr. D.R. Shah

- (d) Money receipts issued by Mr. D.R. Shah and
- (e) Certificate issued by banker confirming payments made to Mr. D.R. Shah.

5. On the findings of the revenue authorities that they could not find Mr. D. R. Shah at the address as provided, he submitted that the assessment of Mr. D.R. Shah was completed by the Department and that under those circumstances, his existence of Mr. D.R. Shah cannot be doubted. He submitted that as per remand report, the Assessing Officer acknowledges that the address given by the assessee was true and correct and tallies with the address in the PAN card. The fact that Mr. D.R. Shah was not available at the address given after substantial lapse of time, as he might have changed his address and hence this cannot be the ground for holding that the assessee has not discharged his onus as the assessee cannot keep track of the changes in address of these persons over a period of time. He relied on the number of case laws in support of his contention.

6. On the issue of write off of bad debts, he submitted that the Assessing Officer asked the assessee to furnish ledger copies of the F.Y 1990 and submitted that the law does not require any assessee to maintain books of accounts beyond the period of six years. He relied on the decision of the Hon'ble Supreme Court in the case of TRF Ltd. vs. CIT (2010) 323 ITR 397(SC) and argued that the amount once written off should be allowed and that the disallowance should be deleted. Alternatively, he submitted that the amount should be allowed as a business loss u/s 28 or as business expenditure u/s 37(1) of the Act. He relied on a number of case laws in support of these contentions which we would be referred to as and when necessary.

7. The Id. Departmental Representative, on the other hand, vehemently controverted the submissions of the assessee and argued that the Revenue has made every effort to trace Mr. D.R. Shah at the address furnished by the assessee but it failed to do so. He pointed out that the notice issued u/s 133(6) at the address given by the assessee had been returned back and the assessee did not produce this Mr. D.R. Shah for examination before the Assessing Officer. He submitted that the assessee could not justify the payment of commission by specifying the services rendered by Mr. D.R. Shah. He submitted that 50% of the commission received was shown as payments without any basis and is not genuine. He further pointed out that the amount, in question, was

outstanding at the end of the year and under those circumstances, the findings of the Id. CIT(A) has to be upheld.

8. On the issue of bad debts, the Id. DR argued that the nature of the amount is not known. He argued unless the nature of the amount is now known the criterion specified u/s 36(1)(vii) of the Act that the amount should have been routed through the account would not be fulfilled and submitted that the same be upheld. He relied on the order of the Id. CIT(A).

9. We have heard Shri S.S. Gupta, Id. Counsel for the assessee and Shri Robin Choudhury, Id. Senior DR, on behalf of the Revenue. On a careful consideration on the facts and circumstances of the case, perusing the papers on record and orders of the authorities below, we hold as follows.

10. The first issued is the disallowance of commission payment to Mr. D.R. Shah. The assessee in this case has furnished following documents in support of his claim:

- (a) *Copies of the MOU with Mr. D.R. Shah*
- (b) *Copy of PAN card bearing PAN No.BPPPS1003A of Mr. D.R. Shah finds mentioned.*
- (c) *Copies of bills/debit notes raised by the said parties where the name of Mr. D.R. Shah*
- (d) *Money receipts issued by the Parties*
- (e) *Certificate issued by banker of the assessee confirming payments to Mr. D.R. Shah.*

11. In each of the debit notes, the bills raised by Mr. D.R. Shah, the details as to Indian customers to whom the goods were sold is furnished. Hence revenue had the details as to who are the Indian customers that came due to Mr. Shah's services. All the payments were made by account payee cheques after following due process. The assessee has earned a commission income of Rs.64,08,867/- for services rendered by her to the foreign parties. She had availed similar issues by entering into a MOU with Mr. D.R. Shah. The nature of services is mentioned in the MOU. In our view, the assessee has furnished sufficient evidence in support of its claim that commission has been paid to Mr. D.R. Shah for services rendered. The main objection of the Revenue is that Mr. D.R. Shah could not be found at the address provided by the assessee during remand proceedings, during the month of July 2015. The transactions, in question, relate to F.Y 2008-09 while so, a verification during the month of July 2015 cannot give the

correct fact as to whether Mr. Shah was at that address. He would have shifted. The assessee is right when she says that she cannot keep track of the person with whom she had done transactions. The Assessing Officer in the remand report confirms that the address given by the assessee is same that which was given by Mr. Shah in his PAN card. The Assessing Officer also confirms that Mr. D.R. Shah has filed his return of income for that particular assessment year. This confirms the identity of Mr. D.R. Shah. The genuineness of the transactions is proved by the fact an MOU was entered and that in each of the bills/invoices raised, the details of services rendered, the details of transactions for which commission was paid, was mentioned. Under these circumstances, we are of the considered view that the disallowance in question is bad in law. We direct the A.O to allow the claim of assessee of payment of commission. In the result, the ground of the assessee is allowed.

12. Ground No.2 is on the issue of written off of bad debts. The assessee was not able to substantiate to the revenue authorities, as to whether the amount, in question, was taken into account in computing income of the assessee in any of the previous years. Thus, we hold that the amount was rightly disallowed u/s 36(1)(vii) of the Act. Be as it may, the assessee had written off this amount as recoverable. This amount was held as a current asset by the assessee and has been written off in books of accounts after a number of assessment years on the ground that the same had been irrecoverable.

13. The Hon'ble Delhi High Court in the case of *Mohan Meakin Ltd. vs. CIT (2012) 348 ITR 109 (Delhi HC)* held as follows:

“The assessee advanced sums to a supplier in order to obtain regular supplies. As the supplier failed to deliver the goods or to refund the advance, the assessee claimed the loss as a bad debt u/s 36(1)(vii). The AO rejected the claim though the CIT (A) allowed it. On appeal by the department, the Tribunal upheld the stand of the AO on the ground that the conditions of s. 36(2) were not satisfied. In the High Court, the assessee conceded that s. 36(1)(vii) was not applicable but pleaded for the first time that the loss should be allowed u/s 37(1) as a business loss. HELD upholding the claim:

*(i) U/s 28 r.w.s. 29, computation of income has to be in accordance with the provisions contained in s. 30 to 43 which includes s. 37(1). **If a loss of a debt does not come within s. 36(1)(vii), a claim can be made u/s 37(1).** There is a clear distinction between a business expenditure and a business loss, the former is indicative of a volition but in loss it comes upon him so to speak as ab extra. Non-capital expenditure incurred for the purpose of business can be deducted u/s 37(1). The advances made by the assessee were not capital in nature and were of a type which would be within the contemplation of the words “laid out or expended wholly and exclusively for the*

purposes of the business". S. 37 (1) is a residuary section extending the allowance to items of business expenditure and not of business losses which are deductible on the ordinary principles of commercial accounting (Chenab Forest Co 96 ITR 568 (J&K) & Mysore Sugar Co 46 ITR 649 (SC) followed)

(ii) Merely because the claim was made under one provision of the Act and not under another provision does not debar the assessee from claiming deduction u/s 37(1) even if it was not raised before the lower authorities."

14. Applying the propositions of law laid down in this case laws to the facts of this case, we are of the considered opinion that the amount, in question, has to be allowed as the business loss u/s 37(1) of the Act. The Assessing Officer is directed to do so.

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

Kolkata, the 10th May, 2019.

Sd/-
[S.S. Godara]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated :10.05.2019
(RS, Sr. PS)

Copy of the order forwarded to:

1. Sheetal G. Desai, 402, Raheja Regency, Plot No.106, Road No.29, Sion(East), Mumbai-400022.
2. ACIT, Circle-36, Kolkata.
3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches