

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA Nos. 609, 610 & 611/JP/2019

निर्धारण वर्ष/Assessment Years: 2009-10, 2010-11 & 2011-12

A.C.I.T., Circle-2, Jaipur.	बनाम Vs.	M/s Gehlot Enterprises Pvt. Ltd., National Motors Building, M.I. Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACG 8950 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by: Shri Kailash Mangal (Addl.CIT)
निर्धारिती की ओर से / Assessee by: Shri P.C. Parwal (CA)

सुनवाई की तारीख / Date of Hearing: 24/07/2019

उदघोषणा की तारीख / Date of Pronouncement : 26/07/2019

आदेश / ORDER

PER: BENCH

These are the appeals filed by the revenue are directed against the separate orders dated 19/02/2019 of Id. CIT(A)-I, Jaipur for the A.Ys. 2009-10 to 2011-12 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act).

2. All these appeals were heard together and for the sake of convenience, a consolidated order is being passed.

3. Common grievance of the revenue in all the years under consideration relating to restricting the disallowance so made by the

A.O. to the extent of 20% on account of financial services charges debited by the assessee in its P&L account but found by the A.O. as not borne by the assessee.

4. At the outset, the Id AR of the assessee has placed on record the order of the Tribunal in case of group concern in ITA No. 143/JP/2014 ACIT Vs Kishore Singh Gehlot (HUF) order dated 15/02/2017 wherein under similar facts and circumstances, the disallowance restricted by the Id. CIT(A) to the extent of 20% of expenses was upheld by the Tribunal. The precise observation of the Tribunal was as under:

“3.4 We have heard the rival contentions and perused the material available on record. The expenses under consideration are sales promotion expenditure which are paid to salesman for pushing the sales to various customers situated in remote places. The details of salesman with customer and amount of reimbursement, vouchers signed by the respective salesman giving details of nature of expenses incurred and the method through which these payments were verified by management were submitted and verified by the Id CIT(A). At the same time, in the absence of actual third party expenditure vouchers from salesmen supporting their respective claims, disallowance of 20% of these expenses was held reasonable and disallowed by the Id CIT(A) for want of verification. In this factual matrix, firstly, the incurrence of expenditure for business purposes cannot be disputed. Secondly, one can debate about the basis of 20% disallowance and whether the same is reasonable or not. In this regard, we were informed by the Id AR that the Revenue has accepted the said position of 20% disallowance in subsequent years while completing the

assessments u/s 143(3) for A.Y. 2011-12 & 2012-13. In light of that, where the facts and circumstances are same and the Revenue has accepted the said position in subsequent years, we don't feel it would be appropriate to unsettle the position. We accordingly confirm the order of the Id CIT(A). Ground no. 2 of the Revenue is thus dismissed.

4. *In respect of ground no.3, the brief facts of the case are that in respect of sale of implements amounting to Rs. 31,60,000/-, the assessee has submitted that bills for implements are issued to help the customers in getting loan of higher amount. In fact no such sales are made. Therefore, a reverse entry to this effect is made in the books of accounts. The assessee has not made any purchase of the implements and only sale bills have been issued to enable the customers to get higher amount of loan. As per AO, if the contention of the assessee is accepted, it is also a fact that a business man would never issue a bill without making any charge from the customers. There is another possibility that such implements could have been sold through some other dealer or implements. In either case, the assessee would get some remuneration for the service rendered by him. In view of this fact it was assumed by AO that the assessee has received 5% commission on the total sales booked for implements resulting into addition of Rs. 1,58,000/(31,60,000 x 5/100) to the income of the assessee.*

- 4.1 *The findings of the Id. CIT(A) is as under:*

"I have considered the facts of the case, assessment order and appellant's written submission. Assessing officer made the addition of 5% of Bill amount of equipments on the ground that appellant must have earned this much commission for facilitating customers in getting loan of higher amount. Appellant submitted that he has not received any money or commission for the facility provided to the customers. For making sales in the competitive

environment, all these facilities are required to be provided to the customers for which no separate charges are made. The addition made by the AO is completely presumptive without any basis. I agree with the appellant that income cannot be presumed. There are several decisions in which courts have held that income has to be real and not presumptive. Since there is no basis to presume that appellant must have earned commission at 5%, the addition cannot be sustained. This ground is accordingly allowed.”

- 4.2 *The Ld. AR of the assessee submitted that many customers in order to avail of higher loan facility require the assessee to issue bill for sale of implements. However, they do not purchase such implements in actuality and, therefore, credit voucher is again issued. No actual sale has been effected. It is only a debit and credit entry not resulting in any profit. The Id. AO after discussion in para 8 of its order has assumed and presumed that the bill has been issued after making a charge. He has indulged in the surmise, that a business man would never issue a bill without making any charge from the customers. He has not found any customer complaining that any charge has been made for such entry. There is no truth in the said claim and there is no evidence in support of it. It is without evidence and material. The Id. AO has further observed that there is another possibility that such implements could have been sold through some other dealer of implements. It is the surmise and conjecture, without any material or evidence. The Id. AO has not found as to such assumed sale to any other dealer. We are submitting herewith details of such implement sale/return alongwith date, invoice number, name of the party, amount alongwith date, credit note and the amount squaring up such debit. In actuality a sale of Rs. 60,000/- was made on 31.3.2009 vide invoice No.351 to Shri Ramavtar. Such amount of Rs. 60,000/- has been duly shown as sale and profit earned thereon stands duly considered in the trading*

account. We are submitting herewith such details of reversal entry of Rs. 31 Lacs. We submit the addition is based on surmise, conjectures, doubts, suspicious without any material or evidence. The Id. CIT(A) considering the above submission and after verifying the facts has rightly deleted the addition which is just and correct in law.

4.3 We have heard the rival contentions and perused the material available on record. The AO has made the subject addition towards earning commission income by the assessee without any material/evidence and is thus on a presumptive basis. Mere suspicion or probability of earning commission income cannot form the basis for bringing the amount to tax in the hands of the assessee. There has to be something positive and tangible to substantiate the said position taken by the Revenue which unfortunately is not apparent in the present case. In light of above, we do not see any infirmity in the order of the Id CIT(A) which is hereby confirmed. Ground no. 3 of the Revenue is thus dismissed.

In the result, the appeal filed by the Revenue is dismissed.”

5. We have considered the rival contentions and carefully gone through the orders of the authorities below as well as order passed by the Tribunal in the case of group concern of the assessee. The facts in brief are that the assessee company deals in automobile sector i.e. tractors, implements, accessories and their spare parts. It is main dealer of TAFE tractor to Jaipur and Dausa district. The assessee filed the return of income on 16/09/2009 declaring an income of Rs.31,91,500/-. The AO assessed the same at an income of

Rs.1,24,61,290/- by making various additions/disallowance. The disallowance made by the AO includes disallowance of Rs.86,26,198/- u/s 40(a)(ia) on account of no deduction of the TDS on financial service charges as required u/s 194H by treating the same as brokerage/commission to salesman. Against this addition the assessee filed an appeal before the CIT(A). The CIT(A) vide order dated 27-12-2013 deleted the disallowance by holding that the same cannot be termed as commission or brokerage and therefore provisions of section 40(a)(ia) does not apply. The Ld. CIT(A) further held that the payment is liable to be treated as part of the salary. Against this the department filed an appeal before the ITAT. The Hon'ble ITAT vide order dated 4-08-2016 set aside the issue to the file of the AO by holding as under:-

"3.4. Now the issue to be adjudicated is whether the expenditure claimed by the assessee in the form of payments made to the employees in the nature of Financial Service charges is amenable to the provisions of tax deduction at source or not. The AO has relied on the provisions of section 194H. As per the AO, these payments were brokerage and commission to the employees. Before the AO. the assessee has not furnished any independent evidence except the vouchers made by itself stating therein that cash payment on account of expenditure incurred on Bank, Customers. Patwari for arrangement of loan file of Tractor loan. It is a normal practice that wherever the loan facility is availed, certain paper work is carried out by the concerned banker and the amount incurred on such work, normally processing charges are debited to the loan account of the concerned beneficiary by the banker. This facility, the assessee is claiming to have been provided by itself for facilitating the loan transaction, in fact it is carried out by the banker

itself. But it is also a fact that bankers have tie-up with the vehicle/tractor agency who carried out this kind of service to the prospective customers. Therefore, in our considered view, both the authorities below have misdirected themselves for not appreciating the fact that the nature of payment as made by the assessee is neither a payment in the nature of salary nor related to employer-employee relationship. The payment is made in respect of the expenditure claimed to have been incurred for facilitating the loan transaction. The AO in the assessment order has considered this claim of the assessee i.e. expenditure being the reimbursement to the employees, and rejected the same on the ground that not a single bill was available with the assessee. It was further observed that these expenses were incurred for the services provided by the salesmen and that there was an absolute absence of even a single supporting voucher or any other documentary evidence which could prove assessee's claim that the said expenses were reimbursements to the salesmen. The AO treated such payment as the payment of commission or brokerage to the employee. In support of such finding, the AO has not placed any material on record suggesting that these payments were in the nature of brokerage or commission. In the absence of such material, in our considered view, merely on the basis of conjectures, the payments made to the employees would not partake the character of payment of brokerage or commission. Another aspect of the matter, which the AO has not appreciated that in the normal loan transaction, the bank mostly debit the amount of processing charges. The AO has also not verified from the banker whether the said expenditures were debited to the account of the loan beneficiary by the banker or not. Whether there was any agreement between the banker and the assessee company in this behalf Even the assessee has not furnished the requisite details in support of its claim that such payments were nothing but reimbursement to the employees and such expenditure is allowable deduction. After considering the totality of the facts and circumstances of the present case, it would be in the interest of justice if the issue is restored to the file of the AO for decision afresh. Hence we set aside the impugned order and restore the matter to the file of the AO with the direction to verify from the bank whether any loan transaction was carried out as claimed by the assessee and also to verify whether the expenditure incurred in respect of documentation of the loan transaction, the expenditure related to verification of title deeds/ownership title was carried out by the banker or by the assessee company. He would also verify whether such amount

relating to processing of loan transaction was claimed from the beneficiary of the loan transaction or not. If the AO finds that the assessee company had carried out such services on behalf of the bank and bank has not debited such expenditure to the account of the concerned beneficiary and borne by the assessee company, in that event, he would grant deduction of expenditure to the assessee, incurred during the course of business of the assessee. This ground of the revenue's appeal is allowed for statistical purposes."

4. *In set aside assessment proceedings the assessee vide reply dated 07/12/2017 reproduced on page no. 5 to 6 of the order explained the nature of expense and claimed that such reimbursement of expenses to employees was for carrying out services for application of loan. By helping the customers in getting bank loan facility the assessee also promoted its sales and expenses incurred for the purpose of business is allowable.*

6. The A.O. upheld the same disallowance which was restricted by the Id. CIT(A) to the extent of 20% by following the order of the Tribunal. Since the facts and circumstances during the years under considerations are same, therefore, we do not find any infirmity in the order of the Id. CIT(A) for restricting the disallowance to the extent of 20% in all the three years under consideration.

7. In the result, all the appeals of the revenue are dismissed.

Order pronounced in the open court on 26th July, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 26th July, 2019

***Ranjan**

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The A.C.I.T., Circle-2, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Gehlot Enterprises Pvt. Ltd., Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 609 to 611/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar