



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.341/CTK/2017
Assessment Year : 2011-12

Asst. CIT, Rourkela Circle, Rourkela.	Vs.	M/s. Tarini Minerals Pvt Ltd., A-6, Commercial Estate, Civil Township, Rourkela.
PAN/GIR No. AA ACT 6489 P		
(Appellant)	..	(Respondent)

Assessee by : None
Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 20 /08/ 2019
Date of Pronouncement : 04 /09/ 2019

ORDER

Per C.M.Garg, JM

This is an appeal filed by the revenue against the order of the CIT(A), Sambalpur dated 14.6.2017 for the assessment year 2011-12.

2. The only issued involved in this appeal of the revenue is that the CIT(A) is not justified in deleting the additions totaling to Rs.2,00,45,153/- which constitutes (a) commission paid to HUF of Rs.90,86,236/- (b) unverifiable commission payment of Rs.73,65,427/- and (c) unverified sundry creditors of Rs.35,93,490/-.

3. Briefly stated the facts of the case are that during the course of assessment proceedings, the Assessing Officer noticed that the assessee has debited Rs.3,69,40,714/- to the profit and loss account as commission paid in connection with the sales effected during the year. Before the AO, it was stated that the commission was paid to arrange buyers for sale of iron ore. The Assessing Officer sent notice u/s.133(6) of the Act to the persons who has arranged the buyers for sale of iron ore, as reproduced in the impugned order at page 4 & 5. In response to the query, the assessee has stated that the payments were made by the assessee and the buyers had nothing to do with it and hence, no disallowance should be made. The reply of the assessee was not favour to the Assessing Officer. Therefore, he disallowed the same and added to the total income of the assessee.

4. On appeal, the CIT(A) found that similar disallowance made for the assessment year 2010-2011 of Rs.3,29,17,011/- has been deleted by the CIT(A)-2, Bhubaneswar. Hence, he deleted the addition made by the Assessing Officer.

5. Being aggrieved, the revenue is in appeal before us.

6. At the time of hearing, Id A.R. of the assessee produced a copy of decision of the ITAT in assessee's own case for the

assessment year 2010-2011, in the appeal filed by the revenue against the deletion of addition made by the Assessing Officer. The Tribunal vide its order dated 31.8.2017 upheld the findings of the CIT(A) in deleting the disallowance, inter alia, observing as under:

“ 7. We have heard rival submissions, perused the orders of lower authorities and materials available on record. We find that the CIT(A) deleted the disallowance of Rs.3,29,17,011/- out of total commission payment of Rs.6,94,53,756/- by observing as under”

“I have considered the content and substance of the impugned assessment order and the Grounds of Appeal preferred and the additional submissions filed by the Appellant, and accordingly decide as under:

a) In respect of the disallowance of commission payments made by the appellant to the extent of Rs.3,29,17,011/-, it appears that the AO has not correctly understood the meaning and import of the term “agent”. It is not necessary that an agent receiving Commission payments has to always be a physical go-between between the principal (the Appellant in the instant case) and his/her/its customers being buyers. An agent can carry out the business of prospecting for client-buyers which would mean that many of the intended targets may not transform into buyers or may decide to purchase the items directly from the principal instead of through the agent or even without informing the agent. An advertising agent, likewise, has only a generic target segment and no customers can be asked of such agent to be specifically identified. A procurement agent, on the contrary, may have a set of sellers from whom he/she routinely contracts for purchases.

b)The Cambridge dictionary defines an agent as

“someone who sells a company's products and receives a part of the money paid for the goods for doing this”, which would mean that it would be unfair and unreasonable in many cases and circumstances to expect such agent to remember and provide the names of the multitude of buyers.

c) It is also clear from the definition that an agent is dependent for his/her/its incomes on his/her, its principals and the sales that he/she/it helps facilitate for the latter. A commission agent derives compensation from actual sales, usually expressed as a percentage of sales. In many cases, they may facilitate in locating buyers for goods/services, providing information about the product, making the actual sale, and ensuring delivery and follow-up service. However, the precise nature and details of the facilitations engaged in by the agents depends upon the facts and circumstances of the arrangement/agreement entered into with the principal, the nature of the products/goods sold, relevant business factors, etc. Benefits from the agency arrangement accrue to both the principal and agent. Principals can extend market reach without incurring major fixed personnel costs, and agents can earn compensation based on their productivity. Some agents may represent more than one principal. All of the above mean that the agent is more reactively dependent on the principal being part of a direct arrangement than with the clients/buyers/customer which relationship is more proactive and hence independent. While, commission agents depend on customers in generating their compensation, the compensation itself is paid by the principal after the customer/buyer pays the principal the proceeds of the sale or other transaction. While some agents may be aggressive, they also depend on satisfied customers for repeat business and are motivated to that end; it is in this connection that some of them may keep track of buyers/customers in their own interests. Such tracking and retrieval of customer details upon demand, as the AO has insisted upon, is not. part_of a mandatory or statutorily stipulated

nature of duties of all agents.

d) There are Commission agents who arrange and participate in the sales and arrange outbound-movement-and-packing, transport and logistics in the interests of the principal, and there are agents who do not. The law of agency is an area of commercial law dealing with a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person (the agent), who is authorized to act on behalf of another (the principal) to create legal relations with a third party. Succinctly, it may be referred to as a more-or-less equal relationship between a principal and an agent whereby the principal, expressly or implicitly, authorizes the agent to work under his or her or its control and on his or her or its behalf. The agent is, thus, required to negotiate on behalf of the principal or bring him or her and third parties into a contractual relationship. The reciprocal rights and liabilities between a principal and an agent reflect commercial and legal realities. A business owner often relies on an employee or another person to conduct a business. The principal is bound by the contract entered into by the agent, so long as the agent performs within the scope of the agency. Importantly, a third party may rely in good faith on the representation by a person who identifies himself as an agent for another. It is not always cost effective to check whether someone who is represented having the authority to act for another actually has such authority. If it is subsequently found that the alleged agent was acting without necessary authority, the agent will generally be held liable.

e) In the instant case, the agents were relatively small and unknown players. Also, as per the terms of the agreements/understanding with the Appellant, they did not appear to have any authority to attract or enlist buyers for the Appellant. **Their range of duties was limited to facilitating**

smooth supply of goods to the buyers.' This would mean that they were in most cases interacting with buyers who were in direct transactional and interactive relationship with the Appellant. The buyers therefore had no cause to regard the agents as purchase intermediaries (they being supply facilitators temporarily visible at a given point in time in respect of the transactions operational at that time) and the agents had no reasons to prepare iron-clad lists and details of the buyers. Therefore, there was little reason for the buyers to make enquiries about the agents and certify the genuineness or veracity of the latter in the matter of supplies of materials. All the buyers were concerned with was the timely delivery of quality-tested goods/products as specified by them. All the Appellant expected from the agents was total adherence to the terms of the agreement/arrangement between them.

- f) Therefore, the express non-remembrance of the agents in the creative-proactive awarenesses of the buyers alone will not negate the fact of the impugned transactions and the truth and character of the Commission payments. The AO has not carried out any investigations or inquires, on unearthed/discovered any evidences that suggest that the transactions and payments were not what they seemed to be. The decision to disallow has been made on presumption, surmise, conjecture, supposition, and a summary and unilateral conclusion based on rudimentary facts (of the buyers being presumably non-existent or apparently unaware of the agents and the agents being unable to list the buyers) taken in prejudiced isolation and based on a spurious implied "transcendental" principle that seeks to cover/fill the schism between flimsy foundations and meretricious arguments on one side and a tendentious decision on the other. This is not a scientific, professional and responsible exercise carried out by the AO. Much more homework was

required to be done by the AO in discharge of his responsibilities, which he plainly failed to carry out.

g) How to go about doing one's business is the prerogative of the business man, as are the related matters like incurring expenses, making investments, obtaining loans and providing advances, etc. The decision of Hon'ble Supreme Court in the case of S.A. Builders Limited vs CIT, 288 ITR 1 (SC) is relevant. The Hon'ble Court held in the above ratio reiterated the settled position in the past that no businessman can be compelled to maximize his profit. While considering the claim of deduction of any expenditure, income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. Once it was established that there was nexus between the expenditure and purpose of the business, revenue cannot justifiably claim to put itself in the arm chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. The authorities must look at the matter not from their own point view but that of a prudent businessman.

h) Consequently, whether to engage the services of a Commission agent or not in respect of her sales is the business prerogative of the Appellant, and even if such agents do are not able to bring in a single customer, the expenses made of the nature of Commission payments to the agents would not be ineligible.

i) In harmony with the principles of economic neutrality, what is to be verified is whether the agents are creating economic value for the

Appellant through the functions carried out, risks absorbed and assets being time and effort invested in by it, and is therefore entitled to be compensated for the same in the form of receipts of Commissions. Compensation can be denied or disallowed only if it is proved that the apparent arrangement is not germane or related to the business and/or is non-genuine and no economic value is being generated by the agent for the principal. The Appellant is free to enter into agreements with and appoint as many agents, as it seeks to, in line with its business needs and commercial practices. If the agreements and appointments are wholly and exclusively for the purpose of business, and the payments made in the said regard are fully billed/vouched, accounted for and audited, then there is little scope for Revenue to take a prejudicial view.

j) The AO has not been able to show that the payments have not been made to the purported agents and that these payments are not relatable to the carrying out the business and for other business purposes. The AO has merely leaped to conclusions (in the cases of Categories II, III and IV) that the seeming absence of buyers (as ostensibly evidenced by letters addressed to them returning unserved), or the negations or disavowals by such buyers of any knowledge or nexus with the agents or the inability of the Commission agents to list the actual buyers would automatically disentitle the agents of their status and rights to receive Commission payments. In the scheme set in place by the Appellant, the buyers directly transacted with her; the agents did not enroll them and therefore in most cases would not know them. ***The agents would be able to only provide some names of buyers in respect of whom/which the agent would have facilitated the supply after the sales were made.*** Likewise, sworn depositions from the buyers that they did not know the agents would not make for adverse finding because in the minds of these buyers, they had transacted

directly with the Appellant, and the person referred to as an agent would have appeared in their eyes like an employee of the Appellant or other individual engaged in facilitating the movement of the goods, and not in a formal position of engagement as an 'agent'.

k) What was needed for the AO was to prove any of the following: a) the impugned agents did not exist or were not genuine agents; b) the agents had not carried out any facilitation work for the Appellant; and c) the agents had not actually received the stated Commission moneys. He has instead proceeded on presumptions and concluded on unproven inanities that the absence of information about the buyers meant that the Commission agents did not exist or were not genuine participants in the Appellants business. In respect of Category I, the buyers confirming at they had carried out direct transactions with the Appellant is well within the general and accepted scheme of things. It is not part of the role of the agent to always act as a physical intermediary between the buyers and the appellant being the sellers. Purchases were directly made from the appellant with the agent remaining in the background. The buyer is interested only in effecting the purchases; he is not duty bound to keep tax on the appellant -seller's agents and prepare lists when called for. Buyers also interact with several agents of the same nature employed by their respective competing principals participating in the suppliers of material supplies. Such lack of awareness alone 'does not take away the character of the payments made being that of commissions or the truth and genuineness of the principal-agent transactions. The part of the order that deals with the enhancements of Commission payments appears to have framed on suspicion and presumption, and as held by the Hon'ble Supreme Court in the case of **State of Kerala vs. M.M. Mathew** 42 STC (1978), however strong such suspicion or presumption it could not replace legal proof.

i) In consequence of all the above, it is held that the AO's action in disallowing the impugned expenses totaling Rs. 3,29,17,011/- have been made on extremely thin and specious grounds that the buyers were not found or did not respond or disclaimed any knowledge of the agents or that the agents were not able to remember the buyers or were not able to furnish detailed particulars about them or for the reason that the Commission agents were HUFs. All of them are reasons that do not show any clear understanding about the reasons for and the manner in which the agents have been employed and engaged by the Appellant. The Appellant is seen to have made the necessary deductions of I DS, maintained the necessary bills, receipts certificates and other documentation, made the necessary entries in books of accounts that have been duly audited and also furnished the Income-tax particulars of the agents before the AO. Copies of some of the communications made by the Appellant to the AO in this regard have been provided on record by the Appellant.

j) The enhancement made of Rs. 3,29,17,011/- on the said count is consequently deleted and the Appeal allowed."

8. Ld D.R. could not point out any specific error in the findings of the CIT(A) that at times commission agent when approaches the purchasers, he does not identify himself as an agent of the seller and merely identifying himself as representative of the seller, in such circumstances, the buyer cannot be aware that the person who has approached is employee of the seller or agent of the seller. Further, the CIT(A) observed that the commission may be paid to an agent for facilitating the trade even when the orders are directly given to the sellers by the purchasers. Further, non-service of letters to the buyers or non-compliance of the letters by the buyers does not show that the payment of

commission was not genuine when the relative sale was considered genuine. Further, non-furnishing of the name of the buyers by agent in compliance to the notice does not necessarily mean that the agent is not aware of the buyers. We find that no material could be brought before us to show the person to whom commission was paid were accommodation/entry provider and the money which was paid through banking channel to them came back to the assessee. In the circumstances, in the absence of any specific defect being point out in the order of the CIT(A), we find no good reason to interfere with the order of the CIT(A), which is hereby confirmed and the ground of appeal of the revenue is dismissed."

7. Before us no specific error in the order of the CIT(A) could be pointed out by Id D.R. Further, Id D.R. could not point out whether the order of the ITAT passed in assessment year 2010-2011 was varied in appeal by any higher forum. Hence, since the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the assessment year 2010-11, we following the precedent, confirm the findings of the CIT(A) in deleting the addition made by the Assessing Officer and reject the ground of appeal taken by the revenue.

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

Order pronounced on 04/09/2019.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 04 /09/2019

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Asst. CIT, Rourkela Circle,
Rourkela.
2. The Respondent. M/s. Tarini Minerals Pvt
Ltd., A-6, Commercial Estate, Civil
Township, Rourkela.
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT- 2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack