

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri J. Sudhakar Reddy., AM & Hon'ble Shri S.S. Godara, JM]

I.T. A Nos. 556 & 745/Kol/2016 A.Y 2010-11

Sri Utpal Basu
PAN: AFSPB 4502M
(Appellant)

V/s.

A.C.I.T, Cir-2, Durgapur/
D.C.I.T, Cir-2, Durgapur
(Respondent/Cross Appellant)

For the Appellant : Shri Sunil Surana, FCA, Id. AR

For the Respondent : Shri Radheshyam, CIT, Id.DR

Date of Hearing : 21-06-2019

Date of Pronouncement : 13 -09-2019

ORDER

Shri S.S. Godara, JM:

1. The Assessee and Revenue have filed the instant cross appeals for assessment year 2010-11 against the CIT(A), Durgapur's order dated 29-01-2016 passed in case no. 84/CIT(A)/DGP/2013-14 involving proceedings u/s 143(3) of the Income-tax Act, 1961 (in short 'Act').

Heard both the parties. Case files perused. We come to assessee's appeal ITA No. 556/Kol/2016.

2. The assessee's first substantive grievance challenges correctness of both the lower authorities' action disallowing commission payment of Rs. 54,10,215/-. The CIT(A)'s detailed discussion to this effect reads as under:-

"The A.O made addition Rs.54,10,215/- of out of total commission of Rs.62,30,202/-. The A.O observed that a sum of Rs. 54,10,215/- was paid commission to M/s. sponge Iron company and a small amount was paid during the year to others. This huge amount of Rs 54,10,215/- was paid as commission in the last quarter of the year. The A.O concluded that in

order to reduce his profits by showing commission the assessee has entered into bogus transaction with M/s. sponge iron company. The fact that TDS has been deducted does not prove the genuineness of the transaction. The A.O issued summon u/s 131 of the Income Tax Act, 1961 to the director of M/S Bhagwati Sponge Pvt. Ltd. In response to Which the accountant of Bhagwati Sponge Pvt Ltd has submitted ledger copy of transactions entered into between the company and the appellant for the financial year 2009-10. From the ledger copy the A.O observed that M/s Bhagwati Sponge Pvt Ltd purchased certain JCB parts etc from the assessee company and payments made on it to the tune of Rs 3,45,353/-. A copy of another ledger account was submitted which shows that Bhagwati Sponge Pvt Ltd has received cash amounts from 18.01.2010 to 03.03.2010 of each cash amount being Rs. 20,000/- or less than Rs 20,000/- totaling Rs 4,75,000/- over a period of 25 days. As on 31.03.2010 one journal entry has been passed for Rs 54,50,000/-. There was no agreement regarding commission to be paid. The purpose of the commission and the manner of calculation of the: same was also not provided. The A.O further observed that over a period of 25 days cash payment entries having been made to the tune of Rs 4,75;000/- only against commission of Rs 54,10,215/- without any cheque payments makes and concluded that the transaction was entered into for the purpose of reducing the profits by the assessee. Hence, A.O. made addition.

In this case, the appellant had made payment of commission of Rs. 62,30,202/- to M/s. Bhagawati Sponge Iron Private Limited and others. The commission paid by the appellant during the last three years on account of JCB sales are as under:

	A.Y 08-09	A.Y 09-10	A.Y 10-11
Commission on Machine Sales	1,63,905/-	1,28,257/-	62,06,350/- total out of which M/s. Bhagwati Sponge Pvt. Ltd is paid Rs.54,10,215/-
Commission on parts sale	11,678/-	11,970/-	23,852/-
Total	1,52,227/-	1,40,227/-	62,30,202/-
Turn Over	5,48,607,760/-	4,45,84,8993/-	8,30,762,645/-

Perusal of above chart shows that in assessment year 2008-09 against the turnover of Rs. 54.86 crore commission payment was Rs. 1,52,000/- only. Similarly, in the case of A.Y. 2009-10 against the turnover of Rs. 4,45,88,999/-, commission expenses incurred was Rs. 1,40,000/- only. Whereas in assessment year 2010-11 it has increased in multi fold in comparison to commission paid in previous years. It is also to point out that in subsequent year 2011-12 no commission has been paid to M/s. Bhagawati Sponge Iron Pvt. Ltd. It is further to point out that M/s. Bhagawati Sponge Iron Pvt. Ltd. has not received any commission from any other party. The main nature of business of M/s. Bhagawati Sponge Iron Pvt. Ltd is profit of dealing from commodity exchange. Perusal of balance sheet of M/s. Bhagawati Sponge Iron Pvt. Ltd shows that it is dealing in production of sponge iron. Apart from it during the year it has shown profit of dealing with commodity exchange. These commodities are iron, coal and dolomite 'etc. No other business is done by the assessee. M/s. Bhagawati Sponge Iron Pvt. Ltd. have no experience of dealing in JCB machine in past. In this case the commission has been paid and TDS has been deducted but, services made by M/s. Bhagawati Sponge Iron Pvt. Ltd have not been proved at the appellate stage too. No evidence has been submitted regarding services rendered. Appellant was given opportunity on 10.12.2015, 16.12.2015 and 30.12.2015 to prove that the services were actually rendered by M/s. Bhagawati.Sponge Iron Pvt. Ltd. Perusal of income tax return of assessment year 2010-11 of M/s. Bhagawati Sponge Iron Pvt. Ltd shows that M/s. Bhagawati Sponge has shown gross total income of income at nil. In spite of receiving commission from M/s. Joy Shree Automobiles it is seen that the income has been adjusted by M/s. Bhagawati Sponge Iron Pvt. Ltd. against their loss. It is also a matter of fact that in spite of repeated opportunity appellant failed to prove that any services was actually rendered by M/s. Bhagawati Sponge Iron Pvt. Ltd. against sale of JCB. A clear cut case of siffling off profit emerges by the appellant through M/s. Bhagawati Sponge Iron Pvt. Ltd by debiting bogus commission. The fact of the case is that the appellant has not proved as what services were rendered by M/s. Bhagawati Sponge Iron Pvt. Ltd. The appellant has not given any evidence which through any light that service were actually rendered by the M/s. Bhagawati Sponge Iron Pvt. Ltd. How the buyers contacted M/s. Bhagawati Sponge Iron Pvt. Ltd for purchase of JCB, what mode of advertisement or publicity was adopted, whether pictures, photographs, pumplets, press release etc. were printed or made by M/s. Bhagawati Sponge Iron Pvt. Ltd etc or not. There is no answer and evidence with the appellant which can throw any light regarding rendering of services by M/s. Bhagawati Sponge Iron Pvt. Ltd. I agree

with the observation of the A.O that it is a clear cut case debiting bogus bills under the guise of commission. Here the appellant has reduced his profit by way of debiting bogus expenses in the name of M/s. Bhagawati Sponge Iron Pvt. Ltd and M/s. Bhagawati Sponge Iron Pvt. Ltd has not paid any penny as a tax but adjusted its loss by so called commission income. It can be concluded that the assessee has inflated its expenses in order to reduce its taxable profit and at both the places, no tax payment has been made.' It is pertinent to mention here that during the appellate proceeding the appellant has accepted this fact that other than claim of payment through cheque and TDS deduction they do not have any evidence which can prove rendering of services. The appellant also could not offer any explanation regarding disproportionate increase in commission expenditure. Hence, the addition made by the A.O is hereby upheld to the extent of payment made to M/S. Bhagwati Sponge Pvt Ltd. Rs. 54,10,215/- and the ground of appellant is hereby dismissed.”

3. Learned counsel submits that both the lower authorities have erred in law on facts whilst invoking commission disallowance on assumption and presumption. Our attention is invited to assessee's detailed paper book including sales, stock and party-wise details in support of the impugned commission claim. The Revenue draws strong support from both the lower authorities' action disallowing the commission expenditure in question. We find that the assessee has placed on record notes of accounts pertaining to the impugned commission payees/recipients, details of commission in favour of M/s. Bhagwati Sponge Iron Pvt. Ltd. (in short 'BSPL'). Assessing Officer's letter dt. 17-03-2015 issued to the said party, M/s. B.S.P.L's confirmation , its ledger account, sales made through the said entity, comparative chart, sales of stock from Ay 2007-08, notes on sales promotion expenses & branch-wise figures of sales promotion etc. All these details have nowhere been rebutted from the department side, who the questions genuineness of impugned payment made on assumption and presumptions. Hon'ble jurisdictional high court's decision in CIT v/s. M/s. Inbuilt Merchants Pvt. Ltd, ITAT No. 225 of 2013/G.A No. 3825 of 2013 decided on 14-03-2014 holds that such commission expenditure is allowable in view of

overwhelming supportive evidence(s) on record as available in the instant case. We therefore direct the Assessing Officer to delete the impugned commission disallowance.

4. Next comes section 40(a)(ia) disallowance forming subject matter of assessee's ground nos. 2 to 4 raised in the instant appeal. There is no dispute that neither the assessee has not deducted the TDS nor there is any evidence that payees/recipients stand assessed qua the sum as per section 40(a)(ia) second proviso r.w.s 201(A) of the Act. The fact also remains that the Finance Act, 2014 w.e.f 1-4-2015 has amended the impugned statutory provision restricting the consequential disallowance from 100% to 30% only. This tribunal's decision in ITA No. 767/Kol/2016 Deepak Parui v/s. JCIT decided on 20-07-2018 holds the above amendment as curative in nature having retrospective effect. We therefore direct the Assessing Officer to restrict the impugned disallowance under these two heads @ 30% only. The Assessee's instant second & fourth substantive grounds are partly accepted in above terms.

5. The Assessee's and Revenue's third identical substantive ground(s) relates to sales promotion expenditure disallowance of Rs.25,75,386/- out of Rs.88,84,794/- made in the course assessment and partly reversed to the above effect in lower appellate proceeding as under:-

I have perused the submission of the appellant; the appellant says that the FOC (Free of Cost parts) are supplied by the company free of cost which is provided to customer. In the trading account FOC parts value including vat credited by the company is shown as sale and in the profit & loss account the FOC expenses are debited under the sales promotion expenses. The A.O. added Rs. 88,84,797/- on account of FOC supply to the customer ignoring the fact that appellant has already offered income under the head of FOC in his trading account. The A.O made addition on two assumptions which are as under:

(1) That the assessee agrees about the expenses incurred for sale promotion which is of Rs. 2,92,376/- only whereas remaining portion

expenses is of Rs. 88,84,797.99/- for FO~ parts supplied and other item in the claim made out of Rs. 91,77,174/-

(2) The A.O further observed that the Free of Cost parts (FOC) have been supplied by the company as per scheme and debit note were raised to the supplier. A close look of entries in FOC memorandum account will show that credit debit note has been raised to company. The total debit note was Rs. 1917516/- and credit was Rs. 28,26,889/- up to 03.10.2009 which shows that receivable amount was more than expenditure whereas after 03.10.2009 the entry under FOC head as expenses has raised substantially.

In response to observation No. (1) of the A.O the appellant submitted that the appellant has not committed any mistake by accepting the same fact during the course of appellate proceeding the head wise expenses should have been verified that FOe was Rs. 88,84,797.99/- . We had simply stated that expenses includes major parts of FOe. The breakup of expenses as under:

Supply of Foe parts

Other sales promotion expenses	: -	Rs. 63,09,411.00/-
(Registration fees, insurance fees, customer entertainment and employees, incentive etc.. which were treated as FOC by the company)	:-	<u>Rs.28,67,763.00/-</u>
		Rs.91,77,174.00

Appellant already submitted bills & vouchers to the A.O but the same has not taken into account and no verification was made. In fact AO has taken only part of sub ledger which total was Rs. 2, 92,376 /- stated as "Sale Promotion" and ignored rest of the part. In fact all expenses booked under this head are for boosting of sales only.

In response to the observation NO.2 where the A.O has made another basis for addition was that there was substantial increase in the expense of FOC after 03.10.2009.

The appellant described through sales ledger and invoices that after October sales has been increased more than double. Break up of sales are as follows:

- (i) Sales for 1st six months: Rs.24,39,93,267.00/-, before 03.10.2009
- (ii) Sales for last six months: Rs. 47,08,05,520.00/-, after 03.10.2009

As the sale value has been increased in last six months therefore, A.O's observation is not acceptable, because he has ignored the fact that the

increasing of expenditure is in relation to increase of sales. He has also rejected the invoices without examining it and arrived at conclusion in air on mathematical calculation, that too is not supported by the necessities.

Considering the method on accounting of the appellant that FOC parts (free of cost items) supplied by the company were treated as income and when the same is passed on customer the same are debited as expenses (stated as incentive) .The increase of sale in the month of October to March more than double and treatment of various items under head FOC has increased proportionately. The A.O's observation does not hold much over the issue considering the facts in totality. It is also true that the A.O has not considered the credit entries treated as sales for FOC. No inquiry was made regarding expenses relating to FOC. No evidence was brought on record which can claim that the appellant books of account, ledger and its supporting vouchers are bogus in respect of FOC expenses. The additions are made merely on presumption, without looking to the facts and evidences submitted by the appellant. Perusal of various heads under sale promotion expenses shows that directly attributable FOC expenses against the income booked by the appellant was to the extent of Rs.63,09,411/- Remaining expenses are relating to various gifts items incentive and claimed as fee of free registration on sold vehicles. There is expense relating to registration which has been treated as a FOC. It is also seen that in all cases while registration charges has not been borne by the company. The registration charges are normally borne by the purchases. It is also seen that the appellant company has not borne expenses in case of all registration. It is also not explained as why pick and choose method have been adopted for spending registration fee on behalf of customer. No sample confirmation or documentation has been submitted which can show that these registration expenses are borne by the appellant company except self made ledger. Similar nature is also for the other expenses. Individual payments are mentioned against expenses, no confirmation or document has been submitted which can be verified from third party. It is also seen that the appellant has debited the same expense in cash. Considering the facts of the case evidences submitted before the assessing officer and copy of ledger account and nature of payment out of total disallowance of Rs. 8884797/- , Rs. 63,09,411/- is hereby deleted as the same relates to the FOC cost directly and remaining addition of Rs. 25,75,386/- is upheld for want of evidence, clarification, explanation and non justifiable. The ground of appeal is partly allowed.”

6. Coming to Revenue's appeal ITA 745/Kol/2016, we find that the net tax involved in all of its three grounds is less than Rs. 50 lakhs as per the CBDT's latest Circular No. 17/2019 dated 08.08.2019 increase threshold limit from Rs. 20 lakhs to Rs. 50 lakhs. The Revenue's former two substantive grounds seek to revive trading expenditure and entertainment expenses disallowance of Rs. 4,06,663/- and Rs.1,69,675/ respectively. This department's appeal fails accordingly.

7. The revenue's case on merits qua the instant third issue also does not deserve to be accepted. We make it clear that the assessee has filed all necessary details witnessing sales of JCB machine, system and lubricants etc. The CIT(A)'s above extracted findings nowhere indicate even a single folded fact in his voluminous evidence. Nor it is the Revenue's case that the manufacturer company has borne the impugned sales promotion expenses culminating in double deduction. The Assessing Officer had also not called for even a single customer/party so as to rebut assessee's explanation. We conclude in these facts that assessee's impugned sales promotion expenditure deserves to be accepted in entirety. Both the lower authorities' findings stand reversed therefore.

The assessee's appeal ITA No. 556/Kol/2016 is partly allowed in above terms whereas Revenue's cross appeal ITA No. 745/Kol/2016 is dismissed. Orderd accordingly.

Order pronounced in the Court on 13-09-2019

Sd/-

[J. Sudhakar Reddy]
Accountant Member

Sd/-

[S.S.Godara]
Judicial Member

Dated : 13 -09-2019

****PRADIP, Sr. PS**

Copy of the order forwarded to:

1. Appellant/Assessee: Sri Utpal Basu C/o V.N. Purohit & Co. Chartered Accountants, Diamond Chambers, Unit-III, 4th Floor, Suit No. 4G 4 Chowringhee lane, Kolkata-16.
2. Respondent/Department: ACIT/DCIT, Circle-2, Durgapur, Aayakar Bhawan Annexe, City Centre, Durgapur-713216.
- 3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
H.O.O/D.D.O Kolkata