

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya (AM)

I.T.A. No. 4596/Mum/2018 (Assessment Year 2011-12)

Ashwin B. Shah (Prop. A.B. Enterprise) 89, 1 st Floor, Ramesh Bhawan, Pydhooni Tambakanta Mumbai-400 003. PAN : AAPPS1183H (Appellant)	Vs.	ITO-15(1)(4) Aayakar Bhawan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Forum N. Mehta
Department by	Shri Chaitanya Anjaria
Date of Hearing	9.7.2019
Date of Pronouncement	1.10.2019

ORDER

This appeal by the assessee is directed against order of learned CIT(A) dated 21.5.2018 and pertains to assessment year 2011-12.

2. The grounds of appeal read as under :-

"Disallowance of Commission paid of Rs.13,16,273/- under section 40A(2)(b) of the Income-tax Act. 1961 ('the Act'):

1. On the facts and in the circumstance of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals) erred in upholding the action of the Ld. Assessing Officer in disallowing the commission of Rs. 13,16,273/- paid to its sister concerns under section 40A(2)(b) of the Act.

The Appellant prays that the disallowance made under section 40A(2)(b) of the Act be deleted".

3. Brief facts of the case as under

The assessee is engaged in the business of manufacturing grey cloth under proprietary concern M/s. A.B. Enterprises. The appellant filed return of income on 26.09.2011 declaring total income of Rs.9,59,250/-. The case was

selected for scrutiny and notice was served ON the assessee. The AO completed the assessment u/s.143(3) determining the total income at Rs.22,75,520/- by disallowing the commission amounting to Rs.13,16,273/- paid by the assessee to its sister concerns by applying the provisions of Section 40A(2) of the I.T. Act. The Assessing Officer observed that :-

- (a) Assessee was failed to furnish the details of transaction on which the commission was paid to commission agents
- (b) It is further seen that you have given commission to the assessee's associated/related parties and assessee has failed to justify the use payment of the commission.
- (c) Moreover, assessee has failed to file documentary evidence in support of services rendered by the commission agents.

4. The assessee responded as under :-

“M/s. Saurabh Enterprise is proprietary concern of Mr. Saurabh A. Shah. He is daily visiting Bhiwandi where the production is carried out, coordinate with the various weavers, draws plans of production as per the requirements of the customers, arrange delivery of the customers and follow up for the payments. He is being paid commission @1% on the total sales.

5. M/s. Meet Enterprise is a proprietary concern of Mr. Meet A. Shah. He is engaged to look after the purchases. He is inquiring rates from various suppliers, placing orders with the suppliers, coordinating delivery of raw materials, coordinate with the various weavers, monitors the supply and consumption of raw materials, draws plans of production as per the requirements. He is being paid commission @ 0.50% on the total purchases”.

6. However, the Assessing Officer was not convinced. He rejected the contentions. Upon assessee's appeal learned CIT(A) confirmed the disallowance by inter alia observing that it cannot be ruled out that assessee has made these payments to reduce the profits.

7. Against this order assessee is in appeal before the ITAT.

8. I have heard both the Counsel and perused the records. I find that the disallowance in this case has been done on the basis of surmise and conjecture. It is settled law that disallowances based upon surmise and conjectures are not sustainable. Assessee has duly explained the reason for payment of the commission. The payments have not been found to be bogus.

The assessing officer was of the opinion that these payments were not required. It is settled law that the revenue authorities should not set into the shoes of the businessman. While making disallowance under section 40A(2)(b) of the Act it was incumbent upon the assessing officer to bring on cogent material to show that the amount paid by the assessee was more than the fair market value of the services. I find that no such exercise has been done by the assessing officer. The learned CIT(A) has also sustained the disallowance purely on conjecture by holding that it cannot be ruled out that assessee's motive was to reduce profit. In this view of the matter in my considered opinion disallowance in this case is liable to be deleted. I order accordingly.

9. In the result this appeal filed by the assessee stands allowed

Order has been pronounced in the Court on 1.10.2019.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 1 /10/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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