

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. No.4908/Del/2016
Assessment Year: 2011-12**

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| Late Girish Chand Agarwal, (Thru L/H Smt. Rekha Aggarwal) B-2/2056, Rock View Apartments, Vasant Kunj, New Delhi. PAN: ADFPC9543E (Appellant) | vs | ACIT. Circle -24(1), New Delhi. (Respondent) |
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**Assessee by: Shri Deepesh Jain, CA
Department by: Shri Sanjog Kapoor, Sr. DR**

**Date of Hearing: 15.10.2019
Date of Pronouncement: 30.10.2019**

ORDER

PER NARASIMHA K. CHARY, JM

Aggrieved by the order dated 13.06.2016 passed by the learned Commissioner of Income Tax (Appeals)-11, New Delhi ("Ld. CIT(A)"), the assessee filed this appeal in respect of the Assessment year 2011-12.

2. Brief facts of the case are that the assessee was a proprietor of two concerns Mahabir building materials store and

MahabirSteels and both the concerns are authorised dealers forRathi steel& Tata for their MS bars and seven other major cement companies and has shown income under the head “income from business” and interest income under the head “income from other sources”. For the Assessment Year 2011-12, he had filed his return of income on 30/9/2011 declaring an income of Rs.65,56,880/-.

3. During the assessment proceedings, learned Assessing Officer noticed that the assessee had claimed commission expenses amounting to Rs.15,37,486/-in respect of the following parties, namely,-

| S.No. | Name of the party | Commission paid in Rs. |
|--------------|--------------------------|-------------------------------|
| 1 | Harish Patel HUF | 2,06,450/- |
| 2 | Rajen Patel HUF | 2,06,406/- |
| 3 | Kamla Patel | 6,45,660/- |
| 4 | Govind Patel | 4,78,970/- |
| | Total | 15,37,486/- |

4. To verify the genuineness of the commission expenses, ld. Assessing Officer issued summons under section 131 of the Income Tax Act, 1961 (“the Act”)to the above for parties and though the said parties sent postal replies, failed to enter personal appearance. Learned Assessing Officer, therefore, drew an inference that these are bogus expenses. Learned Assessing Officer further referred to the two HUF parties and observed that the HUF is a virtual body and as the assessee has claimed that sales commission has been

provided to the HUF, commission can only be earned by the personal efforts and HUF can make personal efforts only through kartaor members, his suspicion was that that the expenses are bogus was strengthened.

5. Appeal was preferred before the Ld. CIT(A) and it was contended that the details were submitted by the assessee before the Assessing Officer clearly establishing that there is increase in turnover along with increase in gross profit ratio and net profit ratio as a result of the payment of commission to the four parties and the commission paid constitutes only a small amount when compared to gross turnover of Rs.62,85,54,520/-. It was further contended that all the information relating to those four parties like the names, addresses, PAN numbers etc. were furnished to the learned Assessing Officer vide letter dated 18/10/2013 and as a matter of fact the learned Assessing Officer had received the replies from all such persons with the necessary evidences to substantiate the receipt of commission by them. It was further contended before the Ld. CIT(A) that a HUF can carry on business and there is no legal impediment.

6. Ld. CIT(A), in the impugned order, observed that the main reason for disallowance of commission was that the four parties to whom the commission was paid did not appear before the Ld. AO during the assessment proceedings in response to the summons under section 131 of the Act for their personal appearance. It was

further observed that even during the appellate proceedings, Ld. AR was asked as to whether the two parties representing the HUFs and also the other two individuals were ready to appear before the Assessing Officer, but no confirmation of the same was submitted by the Ld. AR in his letter dated 21/12/2015. Ld. CIT(A) observed that in the absence of appearance of the said parties before the learned Assessing Officer either during the assessment proceedings or during the first appellate proceedings, the claim of rendering of service could not be examined. In the circumstances Ld. CIT(A) drew an inference that since no services have been rendered by the persons to whom commission was paid, which would have been exposed during the personal examination, learned Assessing Officer was justified in making the addition by disallowing the commission expense.

7. Ld. CIT(A) rejected the contention of the assessee that the payments were made by cheques after deducting TDS by stating that it will not make the claim genuine in the absence of evidence of rendering of service which has to be brought on record by examination of the persons who received the commission and the payment by check and deduction of TDS only satisfies the form of the transaction, but only when the substance of transaction is established, the commission expense will be allowed. Ld. CIT(A) accordingly dismissed the appeal in respect of this disallowance.

8. Aggrieved by such a finding of the Ld. CIT(A), assessee is before us in this appeal stating that all the requisite information/details to substantiate the genuineness of services rendered was duly submitted by the parties vide postal replies in response to the summons issued as well as through the assessee and therefore there was no justification on the part of the authorities below to doubt the genuineness of the expenditure incurred solely on the ground of non-appearance of the parties before the authorities in person. It is submitted by the Ld. AR that the Ld. CIT(A) in his order observed that the persons who received the commission were out of station and therefore unable to appear before the Assessing Officer and in such circumstances, it was always open for the authorities below to look into the material that was furnished by the assessee and the persons who received the commission and reach a right conclusion.

9. Ld. DR justified the action of the authorities below stating that unlike other expenses, in case of commission payment the rendering of services is the key issue, without verification of which it is not possible to reach a conclusion as to the allowability of such an expense. He further submitted that if the persons were out of station at the time when the summons under section 131 were issued, it is always open for the assessee to produce them at least during the first appellate proceedings and there is no reason for their non-production before the authorities.

10. We have gone through the record in the light of the submissions made on either side. There is no dispute that in response to the summons issued under section 131 of the Act, the persons who received the commission have submitted their replies and confirmed the receipt of the commission amount. However, though the Assessing Officer sought their personal appearance for verification of the genuineness of the claim vis-a-vis the rendering of the services, the recipients did not turn-up and according to the assessee, he had no power to enforce their personal attendance before the learned Assessing Officer. Ld. CIT(A) took note of the fact that at the time when the summons under section 131 of the Act were issued and when the persons submitted the replies, it was pleaded that such persons were out of station and that was the reason why their personal attendance could not be entered.

11. Ld. CIT(A) observed that when he made an enquiry as to the possibility of those persons again appearing before the Assessing Officer, there was silence on the part of the assessee which did not inspire confidence in the mind of the Ld. CIT(A) to direct the Assessing Officer to verify the genuineness of the claim and the rendering of the services on personal examination of such persons.

12. In the peculiarity of the circumstances stated above, we are of the considered opinion that it is difficult to find fault with the conclusion reached by the authorities below. However, during the course of hearing of this appeal it is submitted by the Ld. AR that

given an opportunity the assessee is willing to produce such persons before the Assessing Officer for personal verification as to the rendering of the services and inasmuch as the endeavour of all this exercise is to determine the just tax liability of the assessee, a final opportunity may be granted to him. When we heard the Ld. DR, he submitted that in the absence of personal verification of the rendition of services by examination of such persons, a definite conclusion cannot be reached. He, however, could not resist the request of the assessee for a remand with any cogent reasons.

13. Having regard to the facts and circumstances involved in this matter, we are of the considered opinion that an opportunity could be granted to the assessee for substantiating their claim by producing the recipients of the commission before the learned Assessing Officer. However, keeping in view the conduct of the assessee in the earlier proceedings, we deem it just and convenient to direct the Assessing officer shall provide an opportunity to the assessee of substantiating their claim only if the assessee produces such persons before him within 90 days from this day, failing which, the Assessing Officer would be justified in passing the order which he deems fit.

14. With this view of the matter, the issue relating to the commission payment is remanded to the file of the learned Assessing Officer for fresh verification on examination of the recipients of the commission to be produced by the assessee within 90 days from this day.

15. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the Open Court on October, 2019.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

**Dated: October, 2019
VJ**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT NEW DELHI**

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| Draft dictated on | 18.10.2019 |
| Draft placed before author | 23.10.2019 |
| Draft proposed & placed before the second member | |
| Draft discussed/approved by Second Member. | |
| Approved Draft comes to the Sr.PS/PS | |
| Kept for pronouncement on | |
| Date of uploading order on the website | |
| File sent to the Bench Clerk | |
| Date on which file goes to the AR | |
| Date on which file goes to the Head Clerk. | |
| Date of dispatch of Order. | |