IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH, JABALPUR (SMC)
(through Video Conferencing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA No.152-153/JAB/2013
Assessment Year: 2006-07

Anushree Engineering, Vijay Nagar, Jabalpur (M.P.) [PAN: AAIFA 2547G]	vs.	Income Tax Officer, Ward -2(1), Jabalpur
(Appellant)		(Respondent)

ITA No. 06/JAB/2018
Assessment Year: 2006-07

Anushree Engineering, Vijay Nagar, Jabalpur (M.P.) [PAN: AAIFA 2547G]	vs.	Income Tax Officer, Ward -2(1), Jabalpur
(Appellant)		(Respondent)

Appellant by	Sh. Sapan Usrethe Adv.
Respondent by	Sh. S.K. Halder, Sr. DR
Date of hearing	31/08/2021
Date of pronouncement	28/09/2021

ORDER

Per Sanjay Arora, AM

This is a set of three Appeals by the Assessee directed against the Orders dated 26/6/2012 by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short) dated 26/6/2012, dismissing the assessee's appeals contesting his assessment and reassessment under section 143(3) and u/s. 143(3)

read s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) and that dated 13/11/2017 confirming the levy of penalty u/s. 271(1)(c) of the Act, for the Assessment Year (AY) 2006-07.

2.1 The facts of the case in brief are that the assessee, a partnership firm in the business of providing services in relation to electric installations and authorized dealer for Godrej products, preferred an appeal against its' assessment u/s. 143(3) dated 02/9/2008, assessing its' total income at Rs.5.02 lacs, as against the returned income of Rs. 2.54 lacs. During the pendency of the said appeal, reassessment was initiated, and income assessed vide order u/s. 143(3) read with s. 147 dated 17/12/2009, enhancing the income for the year to Rs. 6.85 lacs. Penalty proceedings u/s. 271(1)(c) were also initiated in respect of income additionally assessed u/s. 147 and, accordingly, penalty levied at Rs. 60, 275. The assessee filed appeal against both these orders as well. The quantum appeals were taken up together for hearing by the first appellate authority. The ld. CIT(A), as explained by Sh. Usrethe, the ld. Counsel for the assessee, observing two appeals for the same year, which were in his view not permissible, suggested withdrawal of one of them, i.e., *qua* the original assessment. This was accordingly done, clarifying that the grounds of the said appeal be considered as part of the appeal against the reassessment order. Vide the impugned orders dated 26/6/2012, however, the ld. CIT(A) has dismissed both the quantum appeals, stating the same to have been withdrawn by the assessee, which the assessee seriously disputes, and toward which he would advert to Gd. 1 for both the years before the Tribunal. There is no, or possibly could not be any, reason for the assessee to withdraw its' appeals, and that too for both the years, which had been pending adjudication on merits for so long, having been filed on 10/10/2008 and 20/01/2010 respectively *qua* it's assessment and reassessment. The only concession by the assessee, and that too on being given to understand by the ld. CIT(A) that there could not be two

appeals against one, final assessment, was to withdraw one, i.e., against the original assessment, on the condition that the grounds assumed therein be considered as forming part of the other appeal, even as stated in Gd. 1 of the appeal against the original assessment (ITA 152/Jab/2013). The letter dated 20/6/2012 by the assessee explaining this was filed with the office of the ld. CIT(A) on 27/6/2012.

2.2 So, however, the ld. CIT(A) having dismissed both the appeals *in limine*, i.e., as withdrawn, which could not but be given due credence; the ld. counsel also failing to explain as to why, in that case, the assessee did not file the letter dated 20/6/2012 on that date itself or immediately thereafter, but only after the passing of the impugned orders a week later, or why did it not file a rectification petition/s before the ld. CIT(A). The assessee was, accordingly, required to procure and produce the copy of the application/s or the order sheet entry/s; the impugned orders referring to one in each of them, from the office of the ld. CIT(A) as well as file an affidavit averring the factual contentions being made. The asseessee reporting non-cooperation from the said office, the ld. Sr. DR was asked to produce the record of the assessee's appeals with the office of the ld. CIT(A), and the hearing adjourned for 15 days. The assessee was, on its' part, also asked to independently pursue the matter with the said office. As there was a change in the incumbent Sr. DR on the next date of hearing, i.e., 05/8/2021, with she pleading ignorance of the directions by the Tribunal, and the assessee stating a *status quo*, i.e., no response from the office of the ld. CIT(A) on account of it facing acute manpower shortage, the hearing was adjourned, with the same directions, to 31/8/2021. There was however no improvement in the matter thereat, with both the parties reporting no response from the said office. This is indeed unfortunate. Be that as it may, it was decided to proceed with the hearing, and adjudicate on the basis of the material on record after hearing the parties in the matter.

3. I have heard the parties, and pursued the material on record.

3.1 The assessee's principal grievance, raised per several grounds of appeal for ITA 152/2013, is the summary dismissal of its' appeals inasmuch as these are claimed to have not been withdrawn, i.e., contrary to what stands stated in the impugned orders, and which forms the basis of the said summary dismissal. Sure, it is only the appellate record of the office of the ld. CIT(A) that could exhibit as to what actually transpired, as well as the content of the application/s or concession, if any, made by the assessee before her in first appeal. If, as stated in the impugned orders, the assessee had actually withdrawn its appeals before the ld. CIT(A), the same stand rightly dismissed *in limine*, and there could be no cause of grievance, for this Tribunal to interfere in the matter. However, as the same is not furnished, the matter would have to be necessarily decided, and is being so done, on the basis of the circumstantial/surrounding evidence.

3.2 To begin with is the question as to why would any person withdraw his appeals. He has nothing to loose. At worst, the appeals would stand dismissed on merits. In the facts of the case, the assessee's letter dated 20/6/2012, filed on 27/6/2012, i.e., a day after the date of the impugned orders, is nevertheless the only contemporaneous material, and substantiates the assessee's stand. The impugned orders were in fact communicated to the assessee on 19/3/2013, i.e., much later. The facts as narrated by Sh. Usrethe have in fact also been stated in the 'Statement of Facts' (SoF) accompanying Form 36, the prescribed form for filing an appeal before the Tribunal. The Grounds of Appeal assumed in this regard, together with the SoF, form part of the assessee's appeals, duly verified. There is accordingly no reason not to give due cognizance thereto, particularly in the face of absence of any contrary material on record. The Grounds alleging illegal and incorrect summary dismissal of the appeals are accordingly allowed.

It is, however, at the same time, made abundantly clear that if the assessee had, in respect of any of the orders under reference, actually withdrawn its' appeal/s, the Revenue is at liberty to move this Tribunal for the restoration of the said Grounds, and adjudication thereof afresh. This is as the withdrawal of its' appeals, which is stated in the impugned orders to be per an application dated 26/6/2012 (*qua* ITA 152/Jab/2013) and order sheet entry dated 26/6/2012 (*qua* ITA 153/Jab/2013), is essentially a matter of fact, and which cannot and, therefore, ought not to be decided on the basis of a presumption. An actual withdrawal, where so, only implies that the assessee has misled this Tribunal. The affidavit dated 19/7/2021 furnished by the assessee during the course of hearing (copy on record) is non-committal and in vague terms. Also, the letter dated 20/6/2012 supra, having been furnished with the office of the ld. CIT(A) after the closure of the hearing and, in fact, the passing of the impugned orders on 26/6/2012, though included therein, cannot, strictly speaking, form part of the paper-book by the assessee. Sure, the Revenue ought to have presented its' case before the Tribunal properly, but not doing so would not mean an abrogation of its' rights or that a misrepresentation by the assessee would be allowed to prevail. No right accrues or would inure on the basis of an untruth or misrepresentation. That fraud vitiates everything is a well-known maxim in law, case law on which, as well as *qua* misrepresentation, is legion, obviating the need for any elaboration here. Though the same goes without saying, a reservation of right for restitution in favour of the Revenue is considered proper in the facts and circumstances of the case, i.e., with a view to balance the interest of the parties *inter se*, guided solely by the consideration of not causing prejudice to either side and the following injunction by the Apex Court in *CIT v. Walchand & Co. (P.) Ltd*. [1967] 65 ITR 381 (SC):

'…… the expression is intended to define the jurisdiction of the Tribunal to deal with and determine questions which arise out of the subject-matter of the appeal *in the light of the evidence, and consistently with the justice of the case*. In the hierarchy of authorities the Tribunal is the final fact-finding body: its decisions on questions of fact

are not liable to be questioned before the High Court. The nature of the jurisdiction predicates that the Tribunal will approach and decide the case in a judicial spirit and for that purpose it must indicate the disputed questions before it with evidence pro and con and record its reasons in support of the decision. The practice of recording a decision without reasons in support cannot but be severely deprecated.' (pg. 384)

Clearly, though, the withdrawal of an appeal on the basis that its' Grounds be considered as part of the other appeal, not withdrawn, is no withdrawal at all.

3.3 I decide accordingly.

4. Coming to the case on merits, the appeals shall be taken up in seriatim. The only issue in the appeal against the original assessment (ITA No. 152/Jab/2013) is the *adhoc* disallowance of the expenditure on Conveyance, Travelling, Boarding & Lodging, Site Expenses, and Telephone. With reference to the assessment order, read out during hearing, Sh. Usrethe would submit that there is no finding by the AO in respect of any infirmity attending the assessee's claims, i.e., save the expenditure on conveyance, on which only the AO has commented, ostensibly on the basis of the material produced before him, as to the claim being not properly substantiated. That is, the disallowance of the said expenses is purely arbitrary and not preceded by or based on any finding by the AO in their respect. This is found correct, with the ld. Sr. DR failing to rebut the same. There is as such no factual basis for the said disallowances, i.e., other than of the conveyance expenditure, and are therefore directed to be deleted. As regards the disallowance of conveyance expenditure, the AO is clear and definite in his finding in the matter, based on an examination of the material before him, and which has not been rebutted in any manner, i.e., including as to its quantum and, at any stage, including before me. The same is accordingly upheld. The powers of the assessing authority in the matter of assessment are plenary and, two, estimation is integral to assessment. The same is accordingly upheld, and the assessee gets part relief. I decide accordingly.

5.1 The second appeal, i.e., against the reassessment (ITA No. 153/Jab/2013), raises a single issue, being the disallowance of commission expenditure, claimed at Rs. 1,82,656, and supposedly paid to one, Kirti Trading Co., Jabalpur. The assessee challenging the reopening itself, the same shall be considered first as, if the assessee succeeds thereon, the issue *qua* merits of the said disallowance does not survive for consideration.

5.2 The assessee's case *qua* the initiation of the reassessment proceedings is that the same is based on an invalid reason, which reads as under: (PB-II, pg. 1)

'Assessee firm filed return of income for Asstt. Year 2006-07 on 31-10-2006 declaring total income of Rs. 3,54,440/-. Case was selected for scrutiny under CASS and assessment completed determining total income at Rs. 5,02,440/- on 02/09/2008.

However, as per information received from ACIT, Cir. 2(1), Jabalpur, in one of his case commission paid to M/s. Kirti Trading Co. was disallowed on the basis of statement recorded by him of the proprietor of the firm, Smt. Divya Shah on 18/12/2007. In her statement Smt. Divya Shah categorically denied to carry on any business herself.

In the above case, assessee has shown payment of commission of Rs. 1,82,656/- to M/s. Kirti Trading Co. In view of the above findings, the alleged commission expenses to M/s. Kirti Trading Co. shown by the assessee in its profit and loss account is disallowable.

In view of the above, I have reasons to believe that income chargeable to tax to the extent of Rs. 1,82,656/- for Asstt. Year 2006-07 has escaped assessment.'

During the course of the assessment proceedings; the assessee being unable to produce Smt. Divya Shah, she was summoned by the AO, and who filed a written reply stating of not being the proprietor of M/s. Kirti Trading Co. (KTC), as well as per a reply filed on her behalf as to having not undertaken any transaction with the assessee-firm. The AO accordingly summoned Sh. Dilip Shah, the proprietor of KTC, who, citing medical grounds, did not appear before him. In view thereof, the AO disallowed the commission expenditure, which had been allowed, in whole, to KTC.

6. I have heard the parties, and perused the material on record.

6.1 The assessee's case is two-fold. One, that Ms. Divya Shah being admittedly not the proprietor of KTC, the payee-firm, and whose statement is the basis for the reopening, the same obtains no longer. The second legal aspect raised by the assessee is the invalidity of the (re)assessment as there is no disallowance on the ground *qua* which the assessment was reopened, i.e., the statement of Divya Shah, but has been effected on the basis of the failure of Sh. Dilip Shah, the karta of the HUF proprietor of KTC, to appear and depose before the AO.

6.2 Coming to the first aspect, the argument is valid. When Ms. Divya Shah, the stated proprietor of KTC, to whom commission, against services rendered, has been admittedly allowed by the assessee, states that she is not doing any business, it raises serious doubts as to the genuineness of the commission expenditure claimed by the assessee in respect of the said firm inasmuch as the proprietor denies being in business, so that there could be no provision of any services to the assessee, or to any other for that matter. However, when she later denies being the proprietor of KTC through a written reply furnished in the reassessment proceedings, her statement, which led to the reason to believe escapement of income in respect of the expenditure allowed by the assessee to her firm, is lost. Of what value, one may ask, is her statement when she, as it transpires subsequently, is not the proprietor of KTC? *Her denying doing any business herself becomes consequential to her stating to be not the proprietor of KTC, also clarifying thus to be not engaged in any other business*. The rationale and live nexus between her said statement, i.e., the tangible material and information with the AO, and the reason to believe under-assessment, obtains no longer. That is, there is no reason to believe so.

I am conscious, when I say so, that she has not denied her relationship with KTC, which, where so, would be the first thing she would have said. *In fact, why would anyone be in the first place required to and, in any case,*

actually make a statement on behalf of a firm, if he has no relation or connection therewith? For all one knows, she may be the wife of Sh. Dilip Shah, the karta, or otherwise a member of Dilip Shah (HUF) and, thus, actively involved in the business of KTC. Why, it could also be that she may be the proprietor at the time of her first statement, and not so at the time of her written reply to the AO, so that both the apparently contradictory versions are correct, and the reason to believe, as recorded, holds. In fact, even the assessee also has not, at any stage, including before the Tribunal, stated so, and it is therefore not its' case that Divya Shah is not related to or connected with KTC, and which, rather, where so, would be the first thing it would say. That is, were she to be a stranger to the said firm, further clarifying of not knowing her or of her having nothing to do with the said payee-firm, and who, instead, was the contact person/s thereof, and with whom it therefore interacted, and that therefore her statement dated 18/12/2007 was of no consequence. On the contrary, the assessee does not state anything in the matter, and which constitute the basic facts of the case.

So, however, the fact of the matter is that there is nothing on record to show that she was the proprietor of the firm KTC on 18/12/2007, the date of her statement relied upon in forming the reason to believe, or indeed anything to link her with KTC. Rather, given the reason recorded, the relevance of her statement is only where the same is delivered by her in her capacity as the proprietor of the said firm. It is only the fact of her being regarded as the proprietor of the said payee-firm that made her statement relevant and led to the reason to believe that the commission expenditure incurred and claimed in respect of her said firm was not genuine. That is, her said statement ceases to be of relevance and, consequently, impugn the assessee's claim/return if she is not its' proprietor. This is as all she has said in her statement, as per the reason recorded – which only can be considered at this stage, is that she is not doing

any business herself. As such, even if she were to be closely associated with the said firm, her statement does not in any manner lead to any reason to believe that the claim of commission allowed by the assessee to the said firm is not genuine and, thus, as to the escapement of income from assessment.

It was open for the AO, and in his absence by the ld. Sr. DR, to show, with reference to her statement, that she had acknowledged or admitted to be the proprietor of KTC, and that therefore the reason to believe cannot be faulted with. After all, all that is required to validate a reason to believe is that it is an honest belief, held *bona fide*, as to the escapement of income from assessment (*Raymond Woollen Mills v. ITO* [1999] 236 ITR 34 (SC)). The AO, however, does nothing of the sort. There is no reference in the assessment order to her statement, which has also not been made a part of the record by the Revenue. The AO, rather than pursuing and examining her inasmuch as it was her statement that led to the reason to believe, abandons her, and proceeds to question Sh. Dilip Shah, accepting him to be instead the proprietor of KTC, i.e., as the karta of his HUF. It would all therefore depend on her statement, not on record, or for that matter any other material which formed the basis of the AO regarding her as the proprietor of KTC in the first place. If she has therein admitted to being the proprietor of KTC, the reason as recorded by the AO cannot be faulted with despite her later denying so. Additional material would in that case be required to be brought on record to establish the veracity of her contrary statements, which could only be in the reassessment proceedings. The onus in either case, though, is on the AO inasmuch as he cannot proceed further in the matter of assessment before establishing her being the proprietor. *This is as, where not so, he has proceeded/proceeds on a wrong premise*. The AO, however, has not done so, rather, proceeds to examine Sh. Dilip Shah, i.e., as the proprietor of KTC. In doing so, he defeats his own case inasmuch he thus acts contrary to the reason recorded. In fact, even on merits he, in drawing an

adverse inference against the assessee in view of the non-attendance of Sh. Dilip Shah, misleads himself. This is as Sh. Shah is his, and not the assessee's – who rather has the right to cross examine him in case of any adverse statement, witness. The Revenue has, in sum, completely botched up the case, if any, it could have set up. Considered which-ever way, and even as there is nothing on record to show that KTC did indeed provide any services to the assessee during the relevant year, for which the commission has been allowed thereto and, rather, Divya Shah has clarified during the course of the reassessment proceedings to not having any transaction with the assessee-firm, no disallowance could hold in the facts and circumstances of the case.

6.3 It is wholly unnecessary, in view of the foregoing, to travel to or consider the other legal ground (refer para 6.1) by the assessee.

6.4 I decide accordingly, and the assessee succeeds.

7. The third appeal (ITA No. 06/Jab/2018), which challenges the levy of penalty u/s. 271(1)(c) *qua* the disallowance of commission expenditure allowed by the assessee to KTC, is rendered consequential in view of the unmaintainability in law of the said disallowance and, in fact, of the assessment. The same is accordingly allowed. I decide accordingly.

8. In the result, subject to the caveat stated at para 3.2, the assessee's:

a). quantum appeal (ITA 152/2013) is partly allowed;

b). quantum appeal (ITA No. 153/2013) is allowed; and

c). penalty appeal (ITA 06/2018) is allowed.

Order pronounced in the Open Court on September 28, 2021

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 28/09/2021

Copy of the Order forwarded to:

1. The Appellant: M/s. Anushree Engineering, 33, Sant Shantaji Nagar, M.R.-4, Ahinsha Chowk, Vijay Nagar, Jabalpur
2. The Respondent: Income Tax Officer, Ward- 2(1), Jabalpur
3. The Pr. CIT-2, Jabalpur
4. The CIT(Appeals)-1, Jabalpur
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

// True Copy //