

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1765/Mum/2020

(A.Y: 2015-16)

Nivo Controls Pvt Ltd 8, Mohatta Bhavan, 2 nd Floor, off Dr. E Moses Road, Worli, Mumbai – 400018.	Vs.	Pr. CIT – 1, Room No. 330, 3 rd Floor, Aaykar Bhavan, MK Road, Mumbai- 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN6646C		
Appellant	..	Respondent

Appellant by :	Shri. Subhash Shethy. AR
Respondent by :	Shri. Rahul Raman & Shri. Manpreet Duggal, DR

Date of Hearing	13.08.2021
Date of Pronouncement	28.09.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Pr.Commissioner of Income Tax- 1, Mumbai order passed u/s 263 of the Income Tax Act, 1961. The assessee has raised the following grounds of appeal:

- “1. The Ld. PCIT erred in setting aside the assessment order for AY 2015-16 by invoking powers under s 263, when the said assessment order was neither erroneous nor prejudicial to the interests of the revenue.*
- 2. The learned PCIT erred in exercising powers u/s 263,*

when the jurisdictional conditions for the same had not been satisfied.

3. The learned PCIT failed to take into account the fact that the assessment order for AY 2015-16 was passed u/s 143(3) which is presumed to have been passed "only after taking into account all relevant material which the Assessing Officer, ITO - 1(3)(2) - AO has gathered". Without bringing any further material on record which AC ought to have considered, the POT was not justified in concluding that the order was erroneous.

4. The learned PCIT erred in not following the order of the Hon'ble Income Tax Appellate Tribunal (ITAT) in the identical case of the Appellant Company for AY 2012-13, which had become final as decided in ITA No 1838/MUM2017 and ITA No. 2232/MUM/2017, both decided under a common order dated 11.05.2018 and in Miscellaneous Application No. 751/MUM/2018 order dated 13.11.2019, arising out of the dept's appeal in hA no. 2232/MUM/2017.

In the said AY 2012-13, the Assessing Officer ITO-1(3)(2) in his order u/s 143(3) had disallowed the entire commission payment made by the Appellant Company. In first appeal, the disputed commission payment amount was allowed in favour of the Appellant Company by the Learned Commissioner of Income Tax (Appeals)-2 and the Dept's further appeal and subsequent Miscellaneous Application filed before the

Hon'ble ITAT, both were dismissed.

5. The learned PCIT committed a gross error of law in coming to the conclusion that the order of the Hon'ble ITAT for AY 2012-13 has not been accepted in principle by the Department and, therefore, such an order can have no bearings on the outcome of such proceedings for AY 2015-16.

6. The learned PCIT committed a gross error of law and facts in not appreciating that the findings and conclusions of the Hon'ble Tribunal for AY 2012-13, on identical

facts as AY 2015-16, were binding on him unless the same is reversed by a higher

authority.

7. The learned PCIT erred in neither communicating his final order u/s 263 for AY 2015-16 dated 16.03.2020 to the Appellant Company either by email (e mail id of the Appellant Company registered and available on the DIT's portal) or speed-post or by hand delivery.

8. The Order of learned POT is against the weight of evidence, equity and natural justice.

9. The Appellant Company craves leave to add, alter or amend the above grounds of appeal.”

2. The brief facts of the case are that the assessee company is engaged in the business of manufacturing and trading of electronic process controls. The assessee has filed the return of income for the A.Y 2015-16 declaring a total income of Rs.(-) 53,286/- and book profit u/s 115JB of Rs.1,63,291/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny under the CASS and notice u/s 143(2) and 142(1) of the Act along with questionnaire was issued. In compliance, the Ld. AR of the assessee has appeared from time to time and submitted the information and the case was discussed. The A.O after considering the details and facts has assessed the total income of Rs.(-)53,286/- and passed the order u/s 143(3) of the Act dated 08.11.2017.

3. Subsequently, the Pr.CIT find that the A.O. has not examined the large commission expenses and low net profit and there is a mismatch of interest paid to the related persons u/s 40A(2)(b) of the Act. Therefore, the Pr. CIT is of the opinion that the A.O has failed to examine the genuineness and reasonableness of the claim of large commission paid to M/s. Toshbro controls P Ltd which is also related party. The Pr. CIT observed that the A.O has not applied his mind and the Commission expenses paid to M/s Toshbro Controls P Ltd is not verified. The assessee has filed the submissions and explained that for the A.Y 2012-13 the Honble Tribunal has decided the issue in favour of the assessee. whereas for the A.Y 2014-15, the matter is pending before the CIT(A). In the Assessement proceedings, in response to notice u/s 133(6) of the Act the concerned party has responded. Whereas the Pr.CIT is of the opinion that the order passed by the A.O. is without proper enquiry and therefore the contentions of the assessee are overruled. The Pr.CIT considering the fact that there is no enquiry was conducted by the A.O. and has set aside the order passed u/s 143(3) for the A.Y 2014-15 as prejudicial to the interest of the revenue and directed the A.O to carry out the enquiries and verification of large commission expenses and make a fresh assessment and passed order

u/s 263 of the Act dated 16.03.2020. Aggrieved by the order, the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, the Ld. AR submitted that the Ld. CIT(A) has erred in passing the revision order irrespective of the fact that the assessee has cooperated in the scrutiny proceedings and submitted the information, and complied with the notices. Further, the Ld. AR submitted on the disputed issue of claim of commission payments, The Honble Tribunal has granted the relief to the assessee and substantiated the submissions with the judicial decisions and voluminous paper book and prayed for allowing the relief.

5. Contra, the Ld. DR supported the order of the Pr. CIT and submitted that the A.O has not conducted enquiry and has allowed the claim without verification.

6. We heard the rival submissions and perused the material on record. Prima-facie, the dispute envisaged by the Ld.AR that the revision order passed by the Pr.CIT is bad in law as the assessment order passed u/sec143(3) of the Act doe satisfy the twin conditions of (i) erroneous and(ii) prejudicial to the interest of the revenue. The Pr. CIT has observed that A.O. has not conducted enquiry

in respect of large commission payments and the assessee has not substantiated the claims with proper evidences in the assessment proceedings. Whereas, the Ld. AR submitted that the assessee has cooperated and submitted the information and referred to the notice issued u/s 142(1) of the Act and the reply filed in response to the notice. Even other wise, the contention of the Ld. AR that the similar claim of commission payment was disallowed in the A.Y 2012-13 and the Hon'ble Tribunal has granted the relief to the assessee. Whereas for A.Y 2014-15 on the similar disallowance, the appeal is pending before the first appellate authority (CIT(A)). The contentions of the Ld. AR that the claim is wholly and exclusively incurred for the purpose of the business and there is no change in the criteria. The Ld. AR referred to the paper book and referred to the details of activities and the questionnaire issued. Further the Ld.AR emphasized on the Agency agreement between the assessee company and M/s Toshbro Controls Pvt Ltd. The Ld. AR demonstrated the statement showing the profit earned by the assessee due to the transactions of commission payment for the last five years at page 65 of the paper book. Further, the statement of commission received by M/s Toshbro Controls Pvt ltd on orders procured from various other parties referred at page 66 to 67 of the

paper book. The Ld.AR also submitted that the assessment order does not satisfy the twin conditions of erroneous and prejudicial to the interest of the revenue. We find that the Pr. CIT has issued notice u/s 263 of the Act on the ground that the large commission payments are made to M/s. Toshbro Controls Pvt Ltd and low profit. We find the Hon'ble Tribunal in the assessee's own case for the A.Y 2012-13 has dealt on commission payments and observed at Page 4 Para 4 to 6 of the order read as under:

4. The Ld. DR vehemently supported the orders of the Assessing Officer. On the other hand, the Ld. Counsel for the assessee strongly supported the orders of the Ld.CIT(A). Further the Ld. Counsel for the assessee referring to Page No. 31 of the Paper Book, submitted that similar disallowance of commission to sister concern was deleted by the Ld.CIT(A). Ld. Counsel for the assessee further referring to the details of sales commission to M/s. Toshbro Controls Pvt. Ltd. and breakup of the sales submitted that during the Financial Year 2011-12 relevant to the Assessment Year 2012-13 the percentage of total sales made through the sister concern M/s. Toshbro Controls Pvt. Ltd., is 58.30% and the percentage of total sales made directly by the assessee is 32.47%. Referring to the said chart, it is further submitted that the percentage of commission of sales made to M/s. Toshbro Controls Pvt. Ltd. in earlier years right from the Financial Year 2007-08 to 2014-15 stood between 11.57% to 18.83% based on percentage of sales made through M/s. Toshbro Controls Pvt. Ltd., and such sales commission was all along accepted by the Revenue. Therefore, it is submitted that the commission paid to sister concern is not to shift any profits and the sales commission paid by the assessee should be allowed as deduction.

5. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the Assessment Order, we find that the Assessing Officer disallowed sales commission paid to M/s. Toshbro Controls Pvt. Ltd. mainly on two grounds firstly the parties through whom M/s. Toshbro Controls Pvt. Ltd. made sales have stated that they have received material directly from the assessee company and M/s. Toshbro Controls Pvt. Ltd. is a loss making company and therefore he was of the view that in order to see that there is no tax incidence, the profits were shifted to the loss making company by the assessee and therefore the commission is not allowable. The Ld.CIT(A) considering the submissions of the assessee deleted the disallowance observing that the recipient company is a loss making company and is not a ground for disallowance of commission. He also accepted the submissions of the assessee that M/s. Toshbro Controls Pvt. Ltd. is known to customers by its flag ship company and may not be aware of the subsidiary company and therefore the customer might have stated that they have got materials directly from the assessee company M/s. Nova Controls Pvt. Ltd. which is the flag ship company.

6. We further find from the details that similar commission has been paid to M/s. Toshbro Controls Pvt. Ltd., during the Financial Years 2007-08 to 2014-15 and the percentage of total sales made through the M/s. Toshbro Controls Pvt. Ltd. by the assessee ranges from 58.30% to 78.78% and the commission paid ranges between 11.57% and 18.83% depending upon the percentage of sales to total sales. We find that that the Revenue has accepted the payment of commission in all the earlier years and disallowance was made only during this year and based on an apprehension that the sister concern is making loss and therefore assessee tried to shift the profits, this fact is not proved beyond doubt. When the commission paid by the assessee is accepted in all earlier years there is no reason why it should not be accepted during the Assessment Year under appeal. In the circumstances, we do not find any infirmity in the order

passed by the Ld.CIT(A) in allowing the claim of the assessee. Hence the order of the Ld.CIT(A) is sustained on this issue.

7. Further the Revenue has filed a Miscellaneous Application(M.A) against the Honble Tribunal order in MA No. 751/Mum/2017 dated 13.11.2017.The observations are at page 2 Para 4 of the order as under:

“4. On hearing both the parties and perusing the order of the Tribunal, we find that the Tribunal on appreciation of facts on record taken a conscious decision in sustaining the order of the Ld.CIT(A) in deleting disallowance of commission expenses and restoring the issue of disallowance of travelling expenses to the file of the Assessing Officer. In this Miscellaneous Application the Revenue is seeking review of order by the Tribunal which is not permissible. The Revenue could not point out any patent mistake apparent on record in the order of the Tribunal. Thus, there is no mistake apparent on record on the face of the order by the Tribunal”.

8. Considering the merits of the case, we find that the claim was allowed by the Hon'ble Tribunal in the earlier assessment year and the miscellaneous application filed by the revenue is dismissed. Whereas in respect of twin conditions of (i) Erroneous and (ii) Prejudicial to the interest of the revenue. We find the revenue is disputing of the Assessement order. Whereas, the assessee has discharged the burden by submitting the information and requisite details as called for by issue of statutory notice U/sec142(1) of the Act along with the questioner which cannot be overlooked. Since the

information was available with the A.O in the course of the assessment, the A.O. has considered the facts, submissions and evidences filed and took a possible view. In the assessment proceedings the assessee has responded to the clarifications/ queries raised by the A.O. and after verification and satisfaction of claims, the assessing officer (A.O) has passed the order U/sec143(3) of the Act. We considering the facts, circumstances and the provisions of law are of the considered view that the Assessing officer order passed u/sec143(3) of the Act does not satisfy the twin conditions of erroneous and prejudicial to the interest of revenue and Accordingly, the revision order passed by the Ld.Pr.CIT is quashed and allow the grounds of appeal in favour of the assessee. .

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 28.09.2021.

Sd/-	Sd/-
(SHAMIM YAHYA)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 28.09.2021

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai