

IN THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" Bench, Mumbai  
Before Shri SHAMIM YAHYA, ACCOUNTANT MEMBER

I.T.A. No.7053/Mum/2019 (Assessment Year 2012-13)

Bhomaram Rajaramji Joshi 301, Shatrunjay Apartment 3 <sup>rd</sup> Floor, 28, Sindhi Lane Mumbai-400 004  PAN : ADLPJ5601L (Appellant)	Vs.	ITO, Ward-19(1)(2) Mumbai-400 007  (Respondent)
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Assessee by	None
Department by	Ms. Smita Verma-DR
Date of Hearing	11.10.2021
Date of Pronouncement	01.11.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-53, dated 16.09.2019 and pertains to assessment year 2012-13.

2. Grounds of appeal read as under:-

(1) "On the facts and in law, Ld.CIT(a) has erred in sustenance of addition to the extent of Rs. 9,70,162/- being commission paid of Rs. 9,70,162/- and bank deposits of Rs. 40,000/-.

3. Brief facts of the case are that the assessee is an individual and proprietor of M/s D R Metal and dealing in Ferrous and Non-ferrous metals. The assessee has claimed commission expenses of Rs. 9,30,162/- on total turnover of Rs.5,15,77,317/-. Details in this regard were called for. As per the AO, no proof of rendering services was submitted by the assessee. Though a list of names showing payment of commission of Rs. 9,30,162/- was filed along with the audited account but the

essential ingredient i.e. evidence of service rendered was absent. The AO held that mere proof of payment by cheques, TDS on the commission and confirmation does not make the transaction genuine. The assessee failed to substantiate with any evidence that such services were provided. Further, if these parties were regularly bringing business for the assessee, they must be doing for the other parties too. However, no such evidence was filed before the AO. Further, in the immediate preceding year, there was no such commission payment either as seen from the annexure to the 3GD. The AO, therefore, disallowed commission expenses claimed of Rs. 9,30,162/-. As regards, the introduction of Rs. 40,000/-, in the capital account in cash, there was no explanation or source/and, therefore, this amount was also added in the assessment year.

4. The Ld.CIT(A) noted that submission of assessee as under:-

“In the appellate proceedings the appellant submitted confirmations from the agents. Copy of four debit notes giving details of commission from the brokers was submitted. Copies of bank statements of the appellant highlighting payments made on account of commission to the brokers was filed. It was stated that Shri Tukaram V Purhoit, Shri Shripal Nareshkurnar Shah and Shri Pataram Rabari were handling purchases made from various parties and have been paid commission @ 1.5% on the total purchases made by them, Shri Dinesh D Joshi is handling sales made to various parties and commission @ 1% on total value of sales made by him.”

5. The Ld.CIT(A) upheld the AO's action by holding as under:-

“In the appellate proceedings, Id.AR was specifically asked to identify and apply for admission for additional evidence, if any, and furnish justification for the same. No application was made. The appellant was also called upon to submit copies of bank statements of the parties to whom commission was paid. This was also not filed.

I have considered the submissions carefully. It is noted that the appellant has not filed any proof of services rendered. The appellant has not answered how, business remaining same, there was no such claim of commission expenses in

the preceding year. The bank statements of the recipient of commission is not filed, It is noted that these entries are passed on the last date of the year i.e. 31.3.2012. Further that virtually no payments were made even in FY 2012-13. All these clearly indicate bogus claims to reduce taxable income. The appellant did not file any application for admission of additional evidence. Such papers filed in the appellate proceedings are therefore ignored. It is also noted that the assessing officer had initiated proceedings for levy of penalty u/s 271 (1)(b) for non compliance of notices u/s 142(1) and that the assessment order is passed u/s 144 of the IT Act, 1961.”

6. Against the above order, assessee is in appeal before the ITAT.

7. I have heard the Ld. DR and perused the records. I note that assessee expenditure of commission expense have been disallowed solely on the basis that assessee has not been able to produce the necessary evidence to show that the commission expense was required. Due proof for payment by cheques TDS on commission and confirmations have been produced. Before the Ld. CIT(A), it was further submitted that particular rates of commission was paid to particular parties for handling sales to various parties. The AO was more concerned about the non-presence of assessee during assessment proceedings. He has not even bothered to issue notice to the recipients of the commission. He has tried to sit into the shoes of businessman and has not applied any mind in making the disallowance Ld.CIT(A) has gone one step further in making the order devoid of application of mind by mentioning that assessee was asked to apply for admission for addition evidence and was also asked to submit copies of bank statements of the parties to whom commission was paid. I fail to understand as to what stopped the authorities below in issuing notice to the recipients of commission and asking for the any details from the said parties. It is not the case that the address of parties was not available or provided. It is beyond comprehension to how the assessee is supposed to provide the bank statement of the recipients of commission. Ld.CIT(A) has further written that he is not admitting the papers filed by the assessee in appeal proceedings as assessee did not file an application for admission of additional evidence. Such failure to discharge of statutory duties

diligently is appalling and needs to be avoided as such. These are quasi judicial proceedings. Going behind the web of hyper technicalities, while non performing in such proceedings is uncalled for. This is more so when lack of application of mind by AO and failure of AO in issuing even notice to the recipients of commission is glaring on record.

8. In my considered opinion, the disallowance made by the authorities below is without application of mind, solely based upon surmise and conjecture and does not deserve to be upheld. Hence, I set aside the orders of authorities below, this issue and decide the issue in favour of the assessee.

9. As regards, the issue of capital introduction of Rs. 40,000/- in the partnership capital account, the same has been added by the AO in the hands of the assessee an individual. It is not the case that the AO were assessing the partnership firm. The issue of capital introduction in the partnership firm is to be examined in the hands of partnership firm. The AO has treated the same as income from other sources. Under what section, he has done so has not been mentioned. How can a person's contribution to a partnership firms capital account be treated as income from other sources of the said person's individual account without examination of the partnerships account is unexplained. Hence, it is clearly an addition without application of mind. The Ld.CIT(A) has not dealt with this issue. Hence, I set aside the orders of authorities below and decide the issue in favour of the assessee.

10. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 01.11.2021.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 01/11/2021  
Thirumalesh, Sr.PS

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