

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

**BEFORE SHRI AM ALANKAMONY, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 375/DEL/2018 (A.Y 2013-14)

K S Commodities Pvt. Ltd. 719, Indra Prakash Building, 21, Barakhamba Road, New Delhi PAN No. AABCK2584P (APPELLANT)	Vs	ACIT Circle-14(1) New Delhi (RESPONDENT)
---	----	--

Appellant by	Sh. Gaurav Jain, Adv
Respondent by	Ms. Princy Singhla, Sr. DR

Date of Hearing	10.03.2022
Date of Pronouncement	24.03.2022

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal is filed by the assessee against the order dated 23/11/2017 passed by CIT(A)-5, Delhi for Assessment Year 2013-14.

2. The grounds of appeal are as under:-

“1. That the Commissioner of Income-tax (Appeals) [in short “CIT(A)”] has erred on the facts and circumstances and in law in confirming the addition made by the assessing officer aggregating Rs.36,08,001/- in the assessment order dated 18.03.2016 passed under section 143(3) of the Income-tax Act, 1961 (The Act’).

2. That the Id. CIT(A) has erred on facts & circumstances and in law in upholding the addition of Rs.36,08,001/- on account of disallowance of commission paid by the appellant during AY 2013-14, which was incurred wholly and exclusively for the purpose of business.

2.1. The aforesaid addition has been made without appreciating the agreements, contract notes and copies of invoices and other substantiating documents submitted during the course of assessment related to the impugned addition.

3. That the Id. CIT(A) has erred on facts and in law in making addition of Rs. 36,08,001/- on estimated basis of alleged excessive commission paid for procuring orders for sale of agricultural commodity by the appellant on the pretext of no commercial expediency and wrongly treating certain parties as related parties and making disallowance of commission.

3.1. That the Id. CIT(A) has erred in upholding the addition made based on surmise and conjecture as disallowance is based on mere estimates and averages dehors facts of the case.

3.2. That the CIT(A) has erred in law and in facts by upholding the order that was not passing a speaking order and also not disclosing full facts in the order like

recording of statement of Ms. Seema Verma, hence the order suffers from legal and factual infirmity.

4. Without Prejudice, the CIT(A) has erred confirming the addition that was made against the principles of natural justice without confronting/cross examining to the third parties.

5. That the CIT (A) has erred in law and in facts and circumstances of the case by upholding the charging of interest under section 234B of the Act.”

3. Brief facts of the case that, the assessee Company is carrying out the business of agriculture commodity trading and commission agency. The assessee has filed its return of income for AY 2013-14 declaring total income of Rs. 2,65,260,90/-. The case of the assessee was selected for scrutiny under CASS and notice u/s 143(2) of the Act has been issued and the assessee has participated in assessment proceedings. The assessment order has been passed on 18/03/2016 u/s 143(3) of the Income Tax Act by disallowing the commission expenses of Rs. 36,08,001/- and the total income of assessee has been computed at Rs. 3,01,34,090/- as against the returned income of Rs. 2,65,260,90/-.

4. As against the assessment order, the assessee has appealed before Commissioner of Income Tax (Appeals) -5 Delhi (CIT(A) in short). The Ld. CIT(A) vide order dated 23/11/2017, dismissed the appeal filed by the Assessee by upholding disallowance of Rs. 36,08,001/- made by the A.O.

5. Aggrieved by the dismissal of the appeal before the CIT(A), the assessee has preferred the present appeal on the grounds mentioned above.

6. The grounds of Appeal No. 1 to 3.2 are directed against the disallowance of commission paid in the year under consideration to three parties and the details are hereunder.

Parties	Amount of Expenditure (in Rs.)	Disallowance (in Rs.)
1. <i>Trust Commodities Pvt. Ltd.</i>	18,88,888	13,64,197
2. <i>NRG Consultants Pvt. Ltd.</i>	1,94,563	1,47,680
3. <i>Seema Verma</i>	23,11,111	20,96,124
Aggregate Disallowance		36,08,001

The Ld. AO partly disallowed the commission paid to three parties aggregating Rs. 36,08,001/- on the ground that, such disallowed portion was excessive, more than average rate and the same were paid to related parties. The said order of the AO has been confirmed by the CIT(A), which is the order impugned in the present Appeal.

7. Ld. Counsel for the assessee contended that, either the Ld. A.O or the Ld. CIT(A) have doubted the genuineness of the payment of commission made to the three parties, but found that, the same are excessive and disallowed the payment of Rs. 36,08,01/- out of total payments of Rs. 43,94,000/-. Further contended that the higher brokerage was paid to the aforesaid three parties viz-a-viz., brokerage paid to other parties, since the transaction were materially different inasmuch as the higher brokerage was paid in case of transaction of finding buyer of products more particularly for export sale and lower brokerage was paid in case of finding seller of goods for domestic purchases.

8. Per contra, Ld. DR vehemently contended that, the addition was made by the Assessing Officer on commission aggregating Rs. 36,08,001/- paid to three parties on the ground that, parties are related and share holders and the commission is highly excessive and unreasonable, which were substantially higher than the average range of commission paid by the assessee to all other parties. The difference in the rate of commission payment in case of Soybean is 32.5% (Trust Commodities Pvt. Ltd.), for sugar it is 189% (NRG Consultant Pvt.

Ltd.) and for Rice it is 195%(Miss Seema Verma). Further argued that, even during the CIT(A) proceedings an opportunity has been provided to the assessee to specify the reason as to why higher payment was made to the three specific parties, but assessee has failed to submit any reply. By relying on the reasoning and findings of the AO and CIT(A), submitted that no interference is called for by this Tribunal.

9. We have heard the advocate for the assessee Sh. Gaurav Jain and also heard the Departmental Representative Ms. Princy Singhla, Sr. DR, we have gone through the entire materials available on record and gave our thoughtful consideration.

10. It is not in dispute that, out of three persons who have received excessive commission i.e. Trust commodities Pvt. Ltd. was having 9% share holding in the assessee company and another person Ms. Seema Verma was an employee of the assessee and was holding 17.05% share in the assessee Company and the third person i.e. NRG Consultant Pvt. Ltd. was having no share in the assessee company. The Ld. AO found that, the commissions paid to three parties are substantially higher than the average rate of commission paid by the assessee to other parties. Accordingly, disallowed “excessive expense on commission” and added back to the total income of the assessee on following manner:-

Sl No .	Particulars	Average rate of commission	Rate of commission paid on higher side (A)	Difference of rate of commission (B)	Name of the party to whom commission has been paid on higher side	Amount paid to the said party (C)	Excess amount of commission paid (C*B/A)
1	Soyabean Meal	12.5	45	32.5	Trust Commodities Pvt. Ltd.	Rs.18,88,888	Rs.13,64,197
2	Sugar	60	249	189	NRG Consultants Pvt. Ltd.	Rs.1,94,563	Rs.1,47,680
3	Rice	30	215	195	Seema Verma	Rs.23,11,111	Rs.20,06,124
				Total			Rs.36,08,001

11. In so far as commission paid to NRG Consultant Pvt. Ltd. is concerned, we found that, there was no marital available on record to suggest that, the said entity is either the Director or the share holder of the assessee to bring to the purview of 'related person'. The basic requirement of applicability of Section 40A (2) of the Act is that, payment should be made to a 'related person' i.e. to a person referred to in Clause (b), of sub-Section (2) of Section 40A of the Act.

12. In the order of the Coordinate Bench of this Tribunal, reported in [2013] 36 taxmann.com 103 (Delhi Trib. (Hero MotoCorp Ltd. Vs. Additional Commissioner of Income-tax, Range-12, New Delhi), while dealing with the issue regarding applicability of Section 40A(2) of the Act, held as follows:-

"13.17. In the present case, it is an undisputed fact that none of the parties fall within the persons specified as defined under clause (b) of section 40A (2) of the Act. Related parties are to be considered in terms of provisions of sec. 40A (2) of the Act and not as mentioned in AS-18 issued by the Institute of Chartered Accountant. Thus, we are of the view that the provisions of section 40A (2) do not apply to the present case. Further, there is no provision under the Act which authorizes the Assessing Officer to lift the corporate veil and disallow an expenditure on the ground of reasonableness and commercial expediency unless it is established that the transaction is primarily devised to evade tax.

13.18. In the present case, it was submitted by the learned AR of the assessee that the related parties are profit making companies and are subject to tax to at some less or the same rate of tax. Thus there is no loss of Revenue. This submission of the assessee has not been controverted before us by the learned DR. Tax benefit alleged is factually wrong as the other compared assesseees are profit making companies/ assesseees. There is no loss to the revenue if only the excess payment of price is taken, but this situation is not considered by the Revenue. Except for allegation that excess price is paid to reduce profit, no other evidence is gathered by assessing officer to prove that the assessee had

in fact evaded or saved tax by such exercise. The argument of the Revenue fails. The allegation that the assessee has structured his associate concern so as to avoid sec. 40A (2) is also devoid of merit, as the revenue has failed to demonstrate as to how it has come to such a conclusion. The allegation means that profit is transferred to third parties, where the share holding of the assessee is not a major share holding. The allegation means that the assessee is distributing profits to companies with majority holding by unrelated parties for the purpose of reducing taxes. Such wild allegation cannot be endorsed by us.”

13. Further, in the decision reported in [2010] 8 taxmann.com 159(Bombay) (Commissioner of Income-tax Panaji-Goa Vs. V. S. Dempo & Co. (P.) (Ltd.), wherein it is held that, *‘as subsidiary company was not a member of assessee sub Clause 4 of the Clause (b) of the Act is also not attracted in the present case’*.

14. By respectfully following the ratio laid down in the case of Hero MotoCorp (supra) and in the case of V. S. Dempo & Co. (P.) (Ltd.) (supra), we hold that, in the absence of any material on record to show that NRG Consultant Pvt. Ltd. is a ‘related person’, the commission paid to NRG Consultant Pvt. Ltd. cannot be disallowed under section 40A(2) of the Act. Accordingly the said issue regarding the payment of commission made by the Assessee to NRG Consultant Pvt. Ltd. is allowed and decided in favour of the assessee.

15. Now, come to the payment of commission made to Trust Commodities Pvt. Ltd. and Miss. Seema Verma. As per the tax report of the Trust Commodities Pvt. Ltd., it is an entity owned by the Directors of the assessee and Ms. Seema Verma is on the Board of Directors as admitted by the assessee before the AO. The said Trust Commodities Pvt. Ltd. was also having 9% share in the assessee Company. Further, Ms. Seema Verma was 16% share holder of the assessee Company and she was employed with the assessee Company in the relevant FY 2012-13 and later she has also been inducted as Director of the

Company in the FY 2015-16. Therefore both the above persons are 'related persons' to the assessee as per Section 40A (2) of the Act.

16. Now come to the quantum of the commission paid to the above two entities. The average rate of commission paid by the assessee to others in respect of Soybean meal was 12.5, but the rate of commission paid to Trust Commodities Pvt. Ltd. was 45 and the difference of rate of commission is 32.5%. Further, the average rate of commission paid by the assessee to others in respect of rice was 20, but rate of commission paid to Ms. Seema Verma was at 215 and the difference of rate of commission is at 195%. The said deference is not only excessive and the same is unrealistic in the market. The AO has rightly made the comparison of the average rate of commission paid by the assessee himself in the case of non related parties to come to the said conclusion. Further, the Ld. CIT(A) has also given specific opportunity to the counsel of the assessee to explain the reason for commission being extraordinary in excess over the average expenditure, but no substantive reason was furnished by the assessee even before CIT(A) proceedings. In our opinion, the said commissions paid to those two entities are not only excessive and also unrealistic compared to average rate of commission paid by the assessee itself.

17. The Ld. Counsel for the assessee has relied on the following judgments in support of his contention.

(i) [2014] taxmann.com 227(Gujarat) (Commissioner of Income tax-III Vs. Ashok J. Patel. The Ld.)

(ii) [2013] 33 taxmann.com 637 (Allahabad) (Commissioner of Income-tax Vs. Modi Xerox Ltd.)

(iii) 2012] 23 taxmann.com 40(Delhi) in the case of DCIT, Circle (1) Vs. Sports Station (India) Pvt. Ltd.

(iv) [2021] 124 Taxmann.com 69 (Allahabad-Trib.) in the case of Rajesh Bajaj Vs. DCIT, Circle-1, Allahabad.

18. We have gone through the above cited decisions; in all the above decisions the ratio laid down was that, 'the burden of bringing comparative cases on record is not on the assessee, but on the AO. Failing to bring the comparables/competitive market price by the Assessee cannot be ground for disallowance'. Further, also laid down the ratio that, 'disallowance of expenditure u/s 40A(2)(b) of the Act in the absence of finding that, payment made by assessee is in excessive or unreasonable in comparison to fair market rent is not warranted'.

19. In the present case, the Ld. AO has not disallowed the commission on the ground that assessee has not produced any market comparative commissions, on the other hand the Ld. AO has considered the average commission paid by the assessee himself in the case of other parties and compared the said average with the related parties, which is much more accurate. Apart from the same an opportunity has also been given before the CIT(A) to explain reason for payment of commission being extraordinarily in excess over the average expenditure, but no such reason has been assigned even before appeal proceedings. Further, the Ld.AO has also recorded the specific finding that payment made by assessee is highly excessive or unreasonable in comparison to the payment made by the assessee to all other parties. Therefore, in our opinion, the above cited decisions are not applicable in view of the peculiar facts and circumstances of the case.

20. In view of the above discussion, we uphold the disallowance made in respect of the payment of commission made by the Assessee to Trust Commodities Pvt. Ltd. and Miss. Seema Verma and decide the said issue in favour of the Revenue. Accordingly the Grounds of Appeal No. 1 to 3.2 are partly allowed.

21. In so far as ground No. 4 is concerned, there is no iota of evidence to suggest that, the assessee has sought for cross examination of any of the parties before the lower authorities. Further assessee has become absolutely silent about its rights without seeking for cross examination of any of the parties concerned before the Lower Authorities, now at this stage assessee cannot take such plea before us. Accordingly Ground No. 4 is dismissed.

22. In so far as Ground No. 5 with regarding charging of interest under section 234B of the Act is concerned, the same is consequential and also mandatory, which does not requires adjudication. Accordingly, the Appeal Ground No.5 is dismissed.

23. In the result the Appeal of the Assessee is partly allowed.

Order pronounced in the Open Court on this 24th Day of March, 2022

**Sd/-
(AM ALANKAMONY)
ACCOUNTANT MEMBER**

**Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

Dated: 24/03/2022
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

