

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.846/Bang/2014 : Asst.Year 2010-2011

M/s.B Fouress Private Limited Plot No.7, P.B.No.11 KIADB Industrial Area Hosakote - 562 114. PAN : AAACB6220A.	v.	The Deputy Commissioner of Income-tax, Circle 11(2) Bangalore.
(Appellant)		(Respondent)

ITA No.847/Bang/2014 : Asst.Year 2009-2010

ITA No.848/Bang/2014 : Asst.Year 2010-2011

The Deputy Commissioner of Income-tax, Circle 11(2) Bangalore.	v.	M/s.B Fouress Private Limited Plot No.7, P.B.No.11 KIADB Industrial Area Hosakote - 562 114.
(Appellant)		(Respondent)

ITA No.646/Bang/2020 : Asst.Year 2008-2009

The Deputy Commissioner of Income-tax, Circle 1(1)(2) Bangalore.	v.	M/s.Boving Fouress Private Limited, Plot No.2, Phase-II, Peenya Industrial Area Bangalore - 560 058.
(Appellant)		(Respondent)

Revenue by : Sri.Muzaffar Hussain, CIT-DR

Assessee by : Sri.S.Parthasarathi, Advocate

Date of Hearing : 01.08.2022	Date of Pronouncement : 03.08.2022
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ORDER

Per Bench :

The Hon'ble High Court of Karnataka in ITA No.203/2016 (judgment dated 12.01.2021) had set aside the earlier Tribunal order in ITA No.846/Bang/2014 to 848/Bang/2014 (ITAT's order dated 30.12.2015). The Hon'ble High Court directed the Tribunal to examine the issue afresh.

The relevant finding of the Hon'ble High Court reads as follows:-

“5. We have considered the submissions made by learned counsel for the parties and have perused the record. From perusal of para 4.6 of the order passed by the Commissioner of Income Tax (Appeals), it is evident that the material was produced by the assessee which has not been considered by the tribunal. It is also noteworthy that the tribunal has not considered its order passed in respect of Assessment Year 2006-07 by which it had restored the case back to the file of the Assessing Officer who after appreciation of material on record had allowed the claim of the assessee for deduction. However, the tribunal has upheld the disallowance under Section 37 of the Act merely on the basis of order passed in respect of preceding year. The order passed by the tribunal is cryptic and suffers from the vice of non application of mind.

In view of preceding analysis, the substantial question of law is answered in favour of the assessee and against the revenue. In the result, the order dated 30.12.2015 insofar as it pertains to Assessment Years 2009-10 and 2010-11 is hereby quashed and the matter is remitted to the tribunal for decision afresh in accordance with law.”

2. In view of the above directions of the Hon'ble High Court, the above appeals were heard on 01.08.2022. The solitary issue raised in all the appeals is regarding commission payment made by the assessee, whether it is an allowable deduction. ITA No.646/Bang/2020 concerning assessment year 2008-2009 is a direct appeal at the instance of the Revenue and not a High Court directive case. Both the learned Departmental Representative and the learned AR submitted that ITA No.847/Bang/2014 may be taken as a lead case and the decision rendered in the said case may be applied *mutatis mutandis* to the other cases as well. In view of the submissions of the learned DR and learned AR, we shall

first adjudicate ITA No.847/Bang/2014.

ITA No.847/Bang/2014 (assessment year 2009-2010)

3. The brief facts in relation to the above case are as follows:

The assessee is a private limited company. It is engaged in the manufacture of hydro turbines. The assessee erects / commissions hydro power projects. For the assessment year 2009-2010, the return of income was filed on 26.09.2009 declaring total income at Rs.18,44,87,730. The assessment u/s 143(3) of the I.T.Act was concluded vide order dated 14.12.2011 determining the total income at Rs.21,37,96,180. The Assessing Officer made disallowance of commission payment of Rs.2,93,08,446. Aggrieved, the assessee filed appeal before the first appellate authority. The first appellate authority allowed the appeal of the assessee. The CIT(A) after going through the terms and conditions of agreement entered between the assessee and the commission agents, had held that the assessee had derived benefit in executing project and the commission payment was considered to be genuine and reasonable. On further appeal by the Revenue, the ITAT allowed the appeal of the Revenue (order dated 30.12.2015). The ITAT held that merely by making cheque payments, the A.O. is not prevented to probe the issue. Further, it was held by the ITAT that the assessee has not been able to substantiate the nature of work done by the agents, and therefore, the expenditure claimed cannot be allowed as deduction u/s 37 of the I.T.Act. On appeal by the assessee

before the Hon'ble High Court u/s 260A of the I.T.Act, the Hon'ble High Court set aside the issue to the Tribunal for *de novo* consideration (supra).

4. When the matter was taken up for hearing, the assessee had furnished the details with reference to summary of agency commission paid from financial year 2006-2007 to 2015-2016, copies of the assessment order for assessment years 2006-2007 to 2015-2016. The learned AR submitted that for the assessment year 2006-2007, the Tribunal even after noticing the adverse order against the assessee for assessment year 2002-2003, had set aside the matter to the A.O. to consider the allowability of the commission payment made by the assessee. It was stated that subsequent to the remand by the ITAT for assessment year 2006-2007, the A.O. had summoned the commission agents u/s 133(6) of the I.T.Act, verified the payments made and came to a categorical conclusion that the commission payments were genuine and reasonable. Therefore, it was prayed that the facts being identical and the commission payments also are more or less to the same parties, the Tribunal in its earlier order dated 30.12.2015 has erred in disallowing the commission payments u/s 37 of the I.T.Act.

5. The learned Departmental Representative supported the assessment orders.

6. We have heard rival submissions and perused the material on record. The assessee has filed fresh paper book

enclosing therein summary of agency commission paid for the assessment years 2006-2007 to 2015-2016. The party-wise break-up of the commission payments for the aforesaid assessment years are also mentioned in the particulars given. The assessee has also furnished the assessment orders for assessment years 2006-2007 to 2015-2016, wherein for all the years, except for the impugned assessment years before us, the commission payments was allowed as deduction u/s 37 of the I.T.Act.

7. The ITAT in assessee's own case for assessment year 2006-2007 in ITA No.764/Bang/2010 (order dated 13.04.2012), had restored the matter to the A.O. for *de novo* consideration. The ITAT while disposing of the matter, held that the agents were third parties unrelated to the assessee and all commission payments were made by account payee cheques. It was further held that the TDS deduction has been made wherever the said provisions were applicable. The relevant finding of the Tribunal in assessee's own case for assessment year 2006-2007 (*supra*), reads as follows:-

"6.3. With due respects to the observations of the earlier Bench, we would like to point out that on careful perusal of the impugned assessment order under dispute, it" has to be noted that the AO has not done independent examination of facts for this assessment year and whether the commission payments are genuine and is wholly and exclusively for the purpose of the business. There is nothing on record even to remotely "suggest that the Assessing Officer has scrutinized the agreements entered into between appellant and the local agents. All the agents were third parties unrelated to appellant and all commission payments were made by account payee cheques. The agents, to whom the commissions were paid, are entities on their own right. The appellant in its

paper book had produced the agreement entered between the appellant and the commission agents. In the agreement, the various works that is to be undertaken by the commission agents is explained. The agreement also explains the terms of commission payments. The commission is paid, for example, in the case of S R Engineers is at 15% of the profit amount (Machinery supplied to Virender Dogra Power Project P Ltd.). The terms of commission payment is (a) 5% immediately on receipt of order; (b) 5% during the execution of the order; (c) 5% after receipt of full value of contract. Had the Assessing Officer doubted about the services rendered by commission agents or actual receipt of commission, the Assessing Officer ought to have examined the commission agents, who were unrelated to appellant and were independent parties in their own right, especially when commission payments have been made through account payee cheques and appellant had deducted TDS under section 194H in respect of the said payment. It is also the claim of the appellant that commission received by the agents have been offered as their income and brought to tax. These matters have not been properly examined.

6.4 The Assessing Officer had pointed out in his order that "the percentage of the commission vis-a-vis the total receipt on supply of turbines is substantially high....[courtesy: Para 8 of the asst. order]. However, he had not spelt out how the percentage of the commission was so high with any comparable figure. He had also, in our considered view, failed to highlight the alleged agreements were vague and general in nature. It appears that the AO had highly been influenced to arrive at such a conclusion of the findings of the earlier Bench in the appellant's own case for the AY 2002-03 (supra) without analyzing the merits and demerits of the issue before him. However, while arriving at such a conclusion, the IT authorities have failed to keep in view the rulings of the Hon'ble Apex Court in the case of Sasson J David & Co; Pvt. Ltd v. CIT (1979) 118 ITR 261 (SC), Hon'ble jurisdictional High Court in the case of Mysore Kirloskar Ltd v. CIT (1987) 166 ITR 836 (Kar).

6.5 For the assessment year 2005-06, the assessment order has been completed under section 143(3) of the Act vide order dated 27/12/2007 wherein we find there is no disallowance of commission payments. The principle of res judicata does not have application to income tax proceedings and each assessment year is separate and has to be independently considered. As stated earlier, in the instant case, the IT authorities were highly influenced by the finding of the

Tribunal in respect of assessee's own case for assessment year 2002-03, without independently examining whether the commission payment is allowable expenditure or not for this assessment year, namely assessment year 2006-07. We are of the firm view that issue requires- examination independently dehorse the findings/conclusion that is rendered for assessment year 2002-03 and assessment year 2005-06.

6.6. In an overall consideration of facts and circumstances of the issue as discussed supra and also in the interests of the principles of natural justice and equity, we are of the considered view that the issue requires fresh consideration. Accordingly, the issue is remitted back to the file of the AO with a specific direction with reference to the facts of the issue for the relevant assessment year under consideration. The AO, shall, however, keep in view the rulings of the judiciary cited supra, while taking an independent consideration with the reference to the issue under dispute. It is ordered accordingly.”

8. Subsequent to the remand by the Tribunal for assessment year 2006-2007, the matter was examined by the A.O. The A.O. issued notice u/s 133(6) of the I.T.Act with regard to the confirmation of payment of commission from the local agents as well as foreign agents. After examining the issue in detail, the A.O. allowed the commission payments as an allowable deduction, except to the extent of Rs.6,32,626, wherein the parties did not respond to the notice issued u/s 133(6) of the I.T.Act. The relevant finding the A.O. in this regard reads as follows:-

“In response to the notice issued u/s 133(6), the following parties have confirmed the payment of commissions as under and also enclosed copy of the agreements entered into by the assessee with the commission agents for carrying out specific projects and the services rendered by these agents.

<i>Sl No.</i>	<i>Name of agents</i>	<i>Confirmation of commission amount</i>

1.	Lakshmi Engineering & Construction.	5202000
2.	Kotawal India Ltd.	1497293
3.	EDCO (I) Pvt. Ltd.	7500000
4.	Harishankar Power Projects	9170000
	Total	23369293

The details furnished by the above parties have been carefully examined. After going through the contents of the agreements and also the services rendered by these agents and taking into account the benefits derived by the assessee in executing the projects effectively with the help of these agents, the .commission amount paid to the above four parties are considered to be reasonable and hence the same is allowed.

As regards the commission paid to M/s.S R Engineers to the tune of Rs.2,00,000/-, this party has not responded to the letter issued u/s 133(6). The assessee company was again asked to furnish the details from this party. The assessee company has expressed its inability to furnish the details at the stage and has agreed for disallowance of Rs.2 lacs. Similarly, in respect of claim of commission payment of Rs.4,32,626/- to Global Allianz Pvt. Ltd., Srilanka, the assessee could not able to give any details. Though the assessee contended that the payments were actually made, he could not produce further details for cross-examination and under the circumstances has agreed for the disallowance of Rs.4,32,626/-. The total disallowances comes to Rs.6,32,626/-. The same is brought to tax.”

9. The assessee has furnished the party-wise break-up of the commission payments and since most of the commission payments are to the same parties year after year, in the interest of justice and equity, the matter needs to be examined afresh by the A.O. Accordingly, the issue of commission payments made to the local agents as well as foreign agents, is restored to the files of the A.O. The assessee shall cooperate with the Revenue and shall furnish the necessary details in support of its case. The A.O. shall afford

a reasonable opportunity of hearing to the assessee before a decision is taken in the matter. It is ordered accordingly.

**ITA Nos.846/Bang/2014 and 848/Bang/2014
(Assessment Year 2010-2011)**

10. These are cross appeals directed against the CIT(A)'s order dated 27.02.2014. The assessee has also filed an appeal, since the CIT(A) had disallowed the provisions of the commission payments as not allowable u/s 37 of the I.T.Act. Since we have allowed the appeal of the Revenue for statistical purposes and restored the issue of commission payments for *de novo* consideration by the A.O. (concerning assessment year 2009-2010), both the Revenue's appeal and assessee's appeal with regard the commission payments concerning assessment year 2010-2011 is allowed for statistical purposes. The reasoning given by us from para 6 to 9 will hold good for these appeals also.

ITA No.646/Bang/2020 (Assessment Year 2008-2009)

11. This appeal at the instance of the Revenue is directed against the order of the CIT(A) dated 28.02.2020. The relevant assessment year is 2008-2009. The solitary issue raised is whether commission payments made by the assessee is an allowable deduction? We have restored an identical issue to the files of the A.O. concerning assessment year 2009-2010. Therefore, the issue raised in this assessment year is also restored to the files of the A.O. for *de novo* consideration. It is ordered accordingly.

12. In the result, the appeals filed by the assessee and the Revenue are allowed for statistical purposes.

Order pronounced on this 03rd day of August, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 03rd August, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-1, Bengaluru.
4. The Pr.CIT-1, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore