IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI S. S. GODARA, JUDICIAL MEMBER
AND
SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.1885/PUN/2019
निर्धारण वर्ष / Assessment Year: 2011-12

Raghuleela Builders Pvt. Ltd., 1401, A-Wing, One BKC, Plot C-66, G Block, Bandra Kurla Complex, Bandra East, Mumbai- 400051. PAN : AADCR5942E	Vs.	DCIT, Circle-1(2), Pune.
Appellant		Respondent

Assessee by : None
Revenue by : Shri M. G. Jasnani

Date of hearing : 28.09.2022
Date of pronouncement : 07.10.2022

आदेश / ORDER

PER S. S. GODARA, JM:

This assessee's appeal for assessment year 2011-12 arises against the CIT(A)-13, Pune's order dated 22.07.2019 passed in case no. PN/CIT(A)-13/DCIT Circle-1(2), Pune/623/2014-15/227, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short "the Act".

Case called twice. None appears at assessee's behest. The very factual position had existed on 30.05.2022 and 21.07.2022 as well. We thus proceed *ex-parte* against the assessee.

2. The assessee raises the following twin substantive grounds in the instant appeal :-

> *"a) The Commissioner of income Tax (Appeals) - 13, Pune [CIT(A)] erred in confirming the disallowance of Rs 96,25,991 being provision for brokerage expenses debited to Profit & Loss Account on sale of flat u/s 37 of the Income Act.*
>
> *Your Appellant submits that the brokerage amount debited to Profit & Loss Account represents the crystalized liability duly allowable u/s 37 of the I.T. Act.*
>
> *b) The CIT(A) erred in disallowing Balance Brokerage expenses of Rs 87,45,077/- i.e. (Total Brokerage expenses of Rs. 1,83,71,068 - Provision for Expenses of Rs. 96,25,991) incurred during the year by holding that the same are not allowable for want of verification of supporting evidences.*
>
> *The Appellant submits that the brokerage incurred on sale of flats is incurred wholly and exclusively for the purpose of business and the same shall be allowed as deductible revenue expense."*

3. We note in this factual background that the CIT(A) has upheld the finding of Assessing Officer in disallowing the impugned commission claim as follows :-

> *"3,3 The impugned issue is whether the Appellant can claim an amount of Rs. 1,83,71,068/- on account of disallowance of brokerage expenses u/s 37(1) or not. As already noted above, the Appellant is a Private Limited Company engaged in the business of real estate development of commercial and residential properties. The Appellant during the year under consideration, started its construction activity on project "One BKC" at Bandra Kurla Complex, Bandra (W) and followed the Percentage Completion Method (PCM) for recognizing revenue and cost in accordance with the 'Guidance Note on Revenue Recognition by Real Estate Developers' issued by the Institute of Chartered Accountants of India. During the year under consideration, the Appellant had debited brokerage on sale of flats for Rs. 1,83,71,068/- and claimed the same as deductible revenue expenses. The Appellant followed mercantile system of accounting and according to the appellant, brokerage paid on sale of flats in the current year was debited to its P&L account. The above brokerage also included provision made for brokerage which was made on the basis of flats allotted in the FY 2010-11 for which brokerage bills were received after 31.03.2011. According to the learned AO, since the liability had not crystalized on the date of sale, therefore, the Appellant was not entitled for deduction in respect for provision made for the brokerage.*

The amount which was provided for or kept apart could not be held to be expenditure actually incurred wholly and exclusively for the business and AO was of the view that the Appellant cannot claim deductions for brokerage for the amount of the provision made towards the brokerage was an accrued liability. The learned AO relied on the decision of Hon'ble Supreme Court in the case of Indian Molasses Co. (P) Ltd Vs CIT (SC) 37 ITR 66 for a preposition that putting aside of money which may become an expenditure on happening of an event is not an allowable expenditure.

3.4 During the course of appellate proceedings, the learned AR for the Appellant submitted before me that out of the total income of Rs. 1,83,71,068/-, provision for commission was of Rs, 96,25,991/- and this was the first year in which provision was made. The learned AR also submitted that no such provision of brokerage was made in the earlier years or in the subsequent years. The learned AR during the course of appellate proceedings submitted the details of the provision for brokerage made as follows :

S. No.	Particulars	PAN	Unit No.	Brokerage Expenses	Agreement Value (in Rs.)	Brokerage %	Actual Expenses Booked in Next Year
1	Immaculate Properties Pvt Ltd	AAACI2711H	1103	2,369,578	99,473,835	1%	2,366,959
	80, Girgaum Road, Opera Mouse, Mumbai-400004		1012		115,119,025		
2	Samudra Lodha	ABAPL8827B	816	936,846	84,936,288	1%	
	80 Girgaum Road, Opera House, Mumbai-400004						936,846
3	AVK Auto Mart Pvt Ltd	AAGCA7190N	707	1,575,664	142,852,600	1%	1,575,664
	Laxmi Plaza,138, Link Road, Laxmi Indl Estate, State Bank colony, Mumbai - 400053						
4	Premkumar Batra	AABPB3511G	1015 A	1,180,452	56,511,003	2%	1,180,452
	321,Trilok 1St Floor,Near Madhu Parkkhar (W), Mumbai-400052						
5	Chatrubhuj Batra	AABPB3512F	1015	1,160,018	55,584,714	2%	1,160,018
	321/Trilok, 1st Road, Khar, Mumbai - 400 052						
6	Umesh Israni	AAAPI0808C	714	194,851	18,423,000	1%	194,402
	1/ Bansuri Apts.,Off. Asha Nagar, Thakur Complex,Kandivali (East),400101						
7	Redefine Realty Consulting Pvt. Ltd.	AAFCR0934C	907	1,963,500	65,450,000	3%	1,963,500
	C-3, Black Diamond Chgs. Society, Khar Sansa Road, Khar (W), Mumbai						

8	Rash investments	AAKFR6638P		245,082			245,082
	B-603, Vesta, Panth Nagar,Ghatkopar (E),Mumbai-400075						
	Total			9,625,991			9,622,923

3.5 The learned AR also submitted the details of allotment letters of different flats for which brokerage have been made. Such details appears on page No. 107 to 111 of the paper book. I have carefully gone through the allotment letters and find that services rendered by the above 8 entities are unverifiable, as none of these names appear. Moreover, TDS has also not been made in the year under reference. This clearly implies that there is no evidence filed by the Appellant in support of the services which have been rendered by the above mentioned parties. The learned AR also submitted that for provision of the commission made, TDS benefit has been done in the FY 2011-13 i.e. in AY 2012-13. It was also submitted that the brokerage amount is estimated @ 1% to 3% on total consideration of value of flats sold and provision is reversed and expenditures are booked in the subsequent year as per the bills received from the brokers. During the course of appellate proceedings, the learned AR relied upon the decision of Hon'ble 1TAT, Mumbai in its own case for AY 2012-13. I have carefully perused the decision of the Hon'ble Bombay ITAT in the case of the Appellant which is on the issue of deletion of addition made by the learned CIT(A) without following the percentage completion method, The brief fact was that the assessee was following percentage completion method and therefore the expenses should have been capitalized or taken as prepaid expenses in the current year and claimed in the respective year in which income was offered to tax and not in the year under consideration. The perusal of this order clearly reveals that the impugned issue at hand does not relate whether it is percentage completion method which is to be adopted or not, rather it is question of provision for brokerage expenses can be allowed in the year under reference or not. I am of the view that whether liability on account of expenses had not been crystalized during the relevant period, the same could not be allowed as deduction in the year under reference. The learned AR also relied upon the decision of Hon'ble Supreme Court in the case of Bharat Earth Movers vs CIT 245 ITR 428 for a preposition that if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. It was held by the Supreme Court that what should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. The Supreme Court also further held that if these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain. The learned AR also relied upon the decision of Hon'ble Supreme Court in the case of Rotork

Controls (India) Pvt. Ltd. vs CIT [314 ITR 0062 SCI for the same preposition that provision is a liability which can be measured only by using a substantial degree of estimation and liability is defined as a present obligation arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits, if the same is done on estimation basis, it can be allowed as deduction.

3.6 I have carefully considered the case laws relied upon by the Appellant and 1 am of the considered view that the case of the Appellant is totally different on facts and there is not any liability contingent in nature and calculated on scientific basis in the year to year, rather it is case where provision of brokerage has been made in the year under consideration for which TDS has been claimed in the subsequent year and this provision is not scientific basis and therefore case laws relied upon by the learned AR is totally distinguishable on facts. Therefore, I do not find reason as to why the provision for commission for Rs. 96,25,991/- should be allowed as deduction u/s 37 of the Act in the year under consideration and therefore I do not find any infirmity in the order of the AO in disallowing the provision made for brokerage amounting to Rs 96,25,991/- and therefore the order of the AO in is upheld.

3.7 Now, the question remains whether the amount of commission i.e. 87,45,077- (1,83,71,068 - 96,25,991 = 87,45,077) can be allowed during the year under consideration or not. The learned AR was required to file any evidence relating to the services rendered by the commission agents. Inspite of giving several opportunities, the learned AR expressed his inability to provide the same. Therefore, in absence of the proof of services provided by commission agents, I am of the considered view that the Appellant is not entitled to claim commission Rs. 87,45,077/- in the year under consideration. In this regard, I draw support from the decision of the Hon'ble High Court of Delhi in the case of Schneider Electric India Ltd (2008) 171 Taxman 177 (Delhi) wherein it has been held that if there was no material on record that the assessee had received commission even if the payments were made on account payee cheques itself lead to conclusion that the assessee was unable to claim deductions on the commission paid and if the understanding between the party was an oral understanding, that appeared to be doubtful and therefore without the concrete evidence, no deductions of the commission paid can be allowed. The observation of the Hon'ble Delhi High Court at para 11 is reproduced as under:

> *"With regard to the existence or otherwise of a written agreement between the parties, our attention has been drawn to Lachminarayan Madan Lal vs. CIT 1972 CTR (SC) 418 : (1972) 86 ITR 439 (SC), wherein it has been held by the Supreme Court that even if there is an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, that does not bind the ITO to hold that the payment was made exclusively and wholly for the purposes of the assessee's business. The Supreme Court observed as follows :*

"... Although there might be such an agreement in existence and the payments might have been made, it is still open to the ITO to consider the relevant factors and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under s. 37 of the Act."

3.8 In this regard, I also draw support from the Hon'ble High Court of Madras in the case of H. Abuthahir vs DCIT (2019) 107 Taxmann.com 89 (Madras) wherein it has been held that if the assessee had failed to disclose the evidence relating to payment of commission, the revenue authorities were justified in disallowing the payment of commission. Extract of the decision of Hon'ble Madras High Court is reproduced below "

"This Court does not have any material on record to establish either 1% or 3.5%, as being the reasonable rate of income. It is for the Assessing Authority to make any such 'Estimate of Income' in the hands of the Assessee. We find from record that the Assessee was given a Show Cause Notice in this respect, but, except contending before the Assessing Authority that 3.5% of income was unreasonable, the Assessee failed to adduce any evidence before the said Authority for establishing that 1% was only reasonable Estimate of Income, assessable in his hands. We also cannot appreciate the claim of the Assessee to be only acting as an Agent, as he could not disclose the details of identifiable purchasers of gold, which was sold by the Finance Company as mortgagee with whom such gold is said to have been pledged for Loans and Advances and upon defaults committed by the borrowers, the mortgagee Finance Company was entitled to sell the gold in question in open market. The Assessee, claiming to be only acting as an Agent, in the absence of any disclosure about the identity of the purchasers, could only be treated as engaged in the said business of his own and, therefore, the Estimate of Income in the business of purchase and sale of gold was required to be assessed by the Assessing Authority. Estimate of Income, in such cases, even undertaking Best Judgment Assessment exercise while rejecting the Hooks of Accounts and Profits of the Assessee, is a fact finding exercise to be made, based on material to be placed on record by the Assessee. In the absence of any evidence placed by the Assessee in this regard, the Assessee cannot simply contend that Estimate of Income at 3.5% is unreasonable or perverse.

The three authorities below have consistently upheld the said 'Ratio of Profit', to be assessable in the hands of the Assessee, and the Assessee has consistently failed before the authorities below to produce any cogent material to establish that 1 % was reasonable Ratio of Profit in the said trade.

Reliance placed by die learned counsel for the Assessee on the order of the Tribunal at Hyderabad in Vonwnala Jagadishwaraiah, cited supra, is hardly of any help to the Assessee, as the Assessee therein apparently dealt with large

scale of turnover of pure gold and the Table extracted by the Tribunal in its order for Assessment Year 2009-2010 was dealing with Assessment Years from 2007-2008 to 2011-2012, where the turnover of over Rs 300.00 crores to Rs.500.00 crores was involved, whereas, the turnover in the present case is only to the extent of Rs.23.00 crore and odd. Therefore, the 'Ratio of Profit' of the said Assessee, as was being dealt with by the learned Tribunal in that case, cannot be a yardstick to estimate the income of the Assessee in the present case. Even the said order of the Tribunal does not appear to have remitted the case to any of the authorities below, which, per se, does not result in any perversity in the orders passed by the authorities below in the case before us. Therefore, we do not find any Substantial Question of Law arising in this case and, accordingly, we do not find any merit in this Appeal filed by the Assessee." (emphasis added)

3.9. I also draw support from on the decision of Hon'ble ITAT Agra Bench in the case of ACIT vs Brijbasi Hi tech Udyog Ltd (2013) 31 taxmann.com 271 (Agra-Trib) wherein it has been held that if the assessee did not produce any evidence to justify commission payment, it could not be said to be for commercial consideration and expended wholly and exclusively for the purpose of business. The relevant headnote is extracted as under:

"Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of [Commission] - Assessment year 2005-06 - Assessee, a manufacturer of fire fighting equipment, claimed to have engaged an agent for effecting sales to a Government organization - It claimed deduction of 10 per cent commission paid to said agent - However, no correspondence between said agent and assessee was produced - Even Manager-Sales and Service denied of having any knowledge about said agent - Government department also affirmed that said agent was not attending their office on behalf of assessee - Agent filed his return only after initiation of enquiry by Assessing Officer and, thus, assessee's submission that agent was income-tax assessee was found to be false - Moreover, agent did not produce any evidence to justify commission received - Whether since both assessee and agent failed to prove that commission was paid against service rendered, commission payment could not be said to be an expenditure laid out wholly and exclusively for purpose of business - Held, yes - Whether further said amount would be disqualified under Explanation to section 37(1) as being opposed to public policy - Held, yes [Para 22] [In favour of revenue)"

3.10 I also draw support from the decision of Hon'ble Delhi High Court in the case of CIT vs Modi Stone Ltd (2011) 15 taxman.com 112 (Delhi) wherein the Hon'ble High Court held as under:

"The assessment order clearly showed that no details of the amount alleged to have been paid towards commission/discount were furnished to the Assessing Officer nor was any evidence

produced before him to prove the aforesaid payments. The Commissioner (Appeals) rightly noted that it was for the assessee who had claimed those payments to produce relevant material before the Assessing Officer to satisfy him with respect to these payments. But, strangely the Commissioner (Appeals), despite noting that the assessee had not discharged the onus placed on him and had not furnished necessary details, allowed those payments on the basis of past record and nature of claim alone. Payment of commission/discount in a previous year could not, by itself, and without anything more have been made the basis for allowing such payments for the subsequent years. It was very much possible that the commission/discount paid during the previous assessment year(s) was not paid during assessment years in question or the payment was not to the extent claimed by the assessee. It was obligatory for the assessee to produce relevant evidence before the Assessing Officer to prove the alleged payments, particularly when it was specifically called upon to do so and an opportunity was given to it for that purpose. Once it was found that the onus of proving the alleged payment was on the assessee and he had not produced any evidence to prove those payments, neither the Commissioner (Appeals) nor the Tribunal could have allowed those payments without having any material before them to substantiate such payments. Thus, the Commissioner (Appeals) as well as the Tribunal committed a serious error of law in upholding those payments despite finding that no material had been produced by the assessee to substantiate those payments. The Tribunal was not justified in rejecting the appeal of the revenue on the sole ground that the department had not produced any material to prove that the findings of Commissioner (Appeals) were not based on past records. It was for the assessee to prove the alleged payments during the assessment years 1995-96, 1996-97 and 1997-98 and not for the department to prove otherwise. [Para 5]

For the reasons given above, the Tribunal committed an error of law in allowing the aforesaid payments despite onus of proving being on the assessee and no evidence having been produced by the assessee to prove those payments, and thereby misplacing burden of proof on the revenue. [Para 6]"

In view of the above, I find no infirmity in the order of the AO in disallowing the commission of Rs 87,45,077/- for want of evidence and accordingly ground of appeal preferred by the appellant is dismissed."

4. Suffice to say, it has come on record that the assessee could not get the impugned commission claim verified from the corresponding recipients' hands regarding the so-called referrals

coming from the latters' side involving sale of its residential units. The very factual position continues regarding the latter issue of provisions for commission involving Rs.87,45,077/- as well since such an expenditure could hardly be treated as an ascertained and foreseen liability in absence of any supportive material as per hon'ble apex court's landmark decision in Bharat Earth Movers (supra). Faced with this situation, we conclude that both the learned lower authorities have rightly disallowed the assessee's commission expenditure claim(s) in these peculiar facts and circumstances. We duly uphold the same.

5. This assessee's appeal is dismissed in above terms.

Order pronounced on this 07th day of October, 2022.

Sd/-	**Sd/-**
(G. D. PADMAHSHALI)	**(S. S. GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 07th October, 2022.
Sujeet (DOC)

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**B**" बेंच, पुणे / DR, ITAT, "**B**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.