

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA Nos.173 & 174/Bang/2023
Assessment Year: 2015-16 & 2016-17

JCIT (OSD) Circle-4(3)(1) Bangalore	Vs.	M/s. Keltech Energies Limited Embassy Icon, VII Floor No.3, Infantry Road Bangalore 560 001 PAN NO : AAACK4702A
APPELLANT		RESPONDENT

Appellant by	:	Shri Shahnawaz Ul Rahman, D.R.
Respondent by	:	N O N E

Date of Hearing	:	02.05.2023
Date of Pronouncement	:	02.05.2023

O R D E R

PER BENCH:

These two appeals by revenue are directed against different orders of NFAC for the assessment years 2015-16 & 2016-17 both are dated 18.11.2022. The issues in both the appeals are common, which reads as follows:

Grounds in ITA No.173/Bang/2023:

- i. *The order of the Notional Faceless Appeal Centre (NFAC)-CIT(A), "in so far as it is prejudicial to the interest of the Revenue is opposed to law and the fact and circumstances of the case.*
- ii. *On the facts of the case, the id. NFAC- CIT(A) is not justified in deleting the addition made on commission expenses debited by the assessee when the AO has rightly made the disallowance holding that commission payment cannot*

be considered as allowable for the purpose of business since the sales are being made to the public sector undertaking, without any justification.

- iii. On facts of the case, the ld. NFAC- CIT(A) has erred in deleting the addition merely based on his predecessor order of relief by holding that there is no merit in holding the impugned payments as not related to business purpose.*
- iv. For these and other grounds that may be urged at the time of hearing it is prayed that the order of NFAC - CIT(A) in so far as it relates to above grounds may be reversed and that of the Assessing Officer may be restored.*
- v. The Appellants craves, leaves to add, alter, amend and or delete any of the grounds that may be urged*

2. None appeared for the assessee even after issuing notice of hearing to them. We proceeded to decide the appeal after hearing the Departmental Representative.

3. There was a delay of 62 days in filing these two appeals in ITA No.173/Bang/2023 & ITA No.174/Bang/2023 for the assessment years 2015-16 & 2016-17 respectively. The revenue has filed the condonation petition stating that the process of preparation of proforma along with required documents for seeking approval and consideration of the same and for preparation of annexure to present appeals before this Tribunal consumed sufficient time. The authority concerned prepared the same and submitted it to the Tribunal on 7.3.2022 and it was due to heavy work load associated with the framing of time barring assessments coupled with acute shortage of manpower in the department. In our opinion, there is a good and sufficient reason in filing the appeals by delay of 62 days in both these assessment years. Accordingly, the delay in filing these appeals is condoned and both the appeals are admitted for adjudication.

4. Facts of the case as narrated in AY 2015-16 are that the assessee is a company, engaged in the business of manufacturing explosives and largely supplying to Coal India Limited and its various subsidiaries. The assessee filed its return of income for the AY 2017-18 on 24/09/2015 declaring a total income of Rs. 5,51,37,120/-. The case was reopened by issuing notice u/s 148 of the Income-tax Act, 1961 [the Act' for short] after obtaining the approval of the Competent Authority on 15/03/2017 which was served on the assessee on 17/03/2017. In response to it, the assessee vide letter dated 12/04/2017 submitted that the original return of income filed u/s. 139(1) of the Act may be treated as filed in response to the notice u/s. 148 of the Act. Accordingly, the AO issued notice u/s. 143(2) of the Act on 01/08/2017 and served on the assessee. Thereafter, the AO issued notice u/s. 142(1) on 22/08/2017 and duly served upon the assessee on 24/08/2017.

4.1 Further, the AO observed in his order that the case was reopened u/s. 147 of the Act after recording the reasons and after obtaining the approval of the Competent Authority. The reasons recorded were as under:

4.2 The assessee company has filed the return of income for the AY 2015-16 on 24.09.2015 declaring total income of Rs. 5,51,37,120/-. The same was processed u/s. 143(1) of the Act on 7/11/2016.

4.3 On going through the return of income the AO observed that the assessee company has claimed commission payments of Rs. 1,94,07,785/- under expenditure schedule. In assessee's case during the assessment proceedings for the AY 2010-11, 2011-12 & 2012-13, a detailed enquiry was made regarding the commission claimed by the assessee. The AO observed that assessee was making sales to public sector organizations. The

contract was awarded by the public sector organizations through tender. As the entire receipts of the assessee business were from Public Sector Organizations, there is no justification of making any commission payment to anybody for procurements of orders etc. During these assessment years the whole amount of commission expenses were disallowed and added to the total income for the respective years. Since, the issue of commission expenses is exactly same as of the preceding years, i.e. AY 2010-11, 2011-12, 2012-13 & 2014-15, amount of commission declared by the assessee company in its return of income for AY 2015-16 cannot be considered as allowable for the purpose of business and hence needs to be disallowed.

4.4 In view of the above the AO had a reason to believe that the income has been understated for the AY 2015-16 amounting to Rs. 1,94,07,785/- within the meaning of section 147 of the Act because the assessee has failed to disclose fully and truly all material facts in its return of income and he felt necessary to reopen the case for assessment and therefore notice u/s. 148 of the Act was issued on 15.03.2017 which was served on 17.03.2017.

5. The NFAC observed that the AO had issued the notice u/s. 148 of the Act on 15.03.2017 after taking due approval from the appropriate authority as per law and the notice was served on 17.03.2017. The assessee also responded to the said notice by filing letter dated 12.04.2017 stating that the original return of income filed u/s. 139(1) of the Act may be treated as filed in response to the notice u/s. 148 of the Act. The AO had issued notices u/s. 143(2) and 142(1) of the Act requiring the assessee to furnish necessary details. In response the notices u/s. 143(2) and 143(1) of the Act the details were filed by the AR of the assessee. The AO accordingly after considering the same had passed the

assessment order u/s. 147 / 143(3) of the Act. Therefore, it is obvious from the assessment order that no procedural lapses as far as issuing of various notices chronologically and completion of assessment had occurred in passing the re-assessment order. Considering the facts as above as stated by the NFAC, it was of the considered opinion that the assessment order was passed by the Ld. Assessing Officer in accordance with law and no interference in this regard is called for. Accordingly, Ground No.2 raised by the assessee in this regard was dismissed by NFAC.

5.1 Regarding ground Nos.3 to 6 before the NFAC regarding disallowance of payment of Commission of Rs.1,94,08,000/-, it was observed by NFAC that the assessee company has paid an amount of Rs. 1,94,08,000/- as commission on sales. A detailed enquiry was made during the assessment proceedings for AY 2010-11, 2011-12 & 2012-13 and after that the entire commission expenses were disallowed in those years. Since, the issue of commission expenses is exactly same as of the preceding years i.e. AY's 2010-11, 2011-12 and 2012-13 the assessee was asked as to why not entire commission expenses of Rs.1,94,08,000/- be disallowed as the issue is recurring and addition in earlier assessment years. The assessee vide its submission dated 12.10.17 filed in the office of AO on 13.10.17 has, inter-alia, submitted as under:

“As regards the nature of payment. we may mention that the assessee company inter alia sells explosives to Coal India Ltd., through its subsidiaries located in various parts of the country. The company also sells explosives to customers (other than PSUs) located in various parts of the country. The assessee company does not have its own establishment where the customers are located and where execution of the orders is undertaken.

As rightly pointed out by you, the orders in respect of sale to PSUs are awarded through tender process. For customers, other than PSUs. no tender process is involved. After the receipt of the orders, whether in respect of sale to PSUs or otherwise, for subsidiary wise/location wise allocation in the case of PSUs and for rendering services for executing the

sale. the company has appointed commission agents for various locations. These agents provide the following service facilities:

- a) Provide magazine for use & stocking of the products therein for onward distribution to various projects.*
- b) Handling of explosive stocks and maintaining the records of receipt, issue & stocks of explosives as per the provisions of Explosives Act & other statutory provisions.*
- c) Prompt loading & unloading of the explosives. d) Collection of indents from the projects, delivering the materials from the magazines as per schedule, preparing the delivery challans & collecting the receipted delivery challans, preparing the invoices & submitting the same to customers & help the management in payment follow up for expeditious recovery.*

For the services provided by these agents, the company is required to pay magazine rent. handling charges & commission. Thus, the expenditure is incurred wholly & exclusively for the purpose of business of the company. Copies of agreements with various agents are enclosed herewith for your records.

The payment made is, thus, wholly and exclusively for the purpose of business of the assessee company and is in respect of services rendered by these agents in connection with execution of the sales. The amount is not paid for the purpose of obtaining the orders. The amount paid is allowable as business expenditure. We request your honour to allow the same.”

5.2 The reply of the assessee has been considered by the AO and decided that the same is not acceptable for the reasons below:

- (a) AO observed that assessee is making the sales to public sector organizations. The contract is awarded by the public sector organizations through tender. As the entire receipts of assessee's business are from public sector organizations, there is no justification of making any commission payment to anybody for procurement of orders etc.*
- (b) AO noted that assessee is making payment to its commission agents for the services such as handling of explosives, safe transportation of explosives, liaison with other agencies, etc.' for which handling charges,*

transportation charges and magazine rent have been separately paid to these parties only. On perusal of the agreement, the AO noted that a commission @ 3.5% of the basic cost is being given to the commission agents. All the services provided by these agents can be grouped in transporting charges, handling charges & magazine rent. Payment of commission is over and above the handling charges, transportation charges and magazine rent. Therefore, payment of commission is not for the purposes specified by the assessee during the course of proceeding as payment for those specific services have already been made under the subheads of transporting charges, handling charges and magazine rent. Prima facie there does not appear to be any justification for making such commission payment when the specified services are being accounted for under the subheads of handling charges, magazine rent and transportation charges. AO observed that no commission can be considered as payable as the sales are being made to the public Sector Undertakings.

- (c) The issue of commission payment has been examined in detail during the assessment proceedings for AY 2010-11 by Additional Commissioner of Income tax, Range 3(2), Mumbai and the said commission payments were disallowed in its entirety during that assessment year i.e. 2010-11. The facts are exactly same during the current assessment year. Therefore, AO decided that such commission payment cannot be considered as allowable for the purpose of business and an amount of Rs. 1,94,08,000/- claimed as commission expenses was therefore disallowed.

5.3 The NFAC was of the opinion that the grounds are covered in assessee's favour in assessee's own cases for A.Ys. 2010-11 to 2014-15. The relevant extract of NFAC's Id. Predecessor order for AY 2010-11 was reproduced here for ready reference:

"7.2.3 During the course of appellate proceedings, the appellant had explained that it is in the business of manufacture and sale of industrial explosives. They sell it to various PSUs which are located at different places across the country. To execute the orders placed by the PSUs, the appellant company engages services of agents for specific areas to assist and handle sales. The services rendered by these agents include monthly forecasts, preparing indents, maintaining explosives magazine as per provisions of Explosives Act. handling various formalities, raising invoices, filing of sales tax/service tax returns, maintaining records and other related activities. It was contended that all these specific services rendered by the agents are compensated by "service charges" which is termed as 'commission" at a certain percentage of sales handled by the agents. It was also pointed out that the appellant company has been following the same system in earlier years and payments to agents were allowed in the preceding assessment year. It was further stated that in the course of assessment proceedings copies of agreements, ledger extracts, bank statements showing payments made, details of TDS etc., were furnished to the Assessing Officer, Confirmations of services rendered and amounts were also provided.

7.2.4 It is also noted that neither at assessment stage nor during remand proceedings has the Assessing Officer doubted the amounts paid or the transaction itself. His objection appears to be based on a belief that making sales to PSUs cannot involve payment of any "commission" for executing the sales Further, he has conjectured that since the appellant was separately making payments under heads transportation, handling, magazine rent etc., there could be no justification for making additional payments to agents relating to these activities.

7.2.5 I find that the Assessing Officer has not understood the nature of appellant that the amounts paid to the agents are for procurement of orders because such procurement by PSUs is done through public tenders for which no commission needs to be paid. However, PSUs using explosives are mostly in mining sector which are spread across remote areas of the country. The appellant has appointed agents to properly execute sales orders in these different locations all over the country, it can be appreciated that executing of these orders require considerable efforts to be made by the agents in terms of statutory compliances, storage, last mile transportation, inventorising etc., obviously no one would render these services without charging any fees. The appellant has

been compensating its agents by offering 3.5% of the sales effected through them. As indicated above, the amounts or facts of payments have not been disputed by the Assessing Officer. It is also not disputed that confirmations IDS certificates etc., were furnished to the Assessing Officer during the course of assessment proceedings. This has been clearly stated by the appellant in its letter that was forwarded to the Assessing Officer for remand report and the Assessing Officer has not given any adverse comment or observation or finding to refute this aversion,

*7.2.6 Under the circumstances, in my opinion, the Assessing Officer has tried to step into the shoes of the appellant company in deciding what should or should not be paid to carry out the business of the company. It is trite law that the Assessing Officer cannot step into the shoes of a businessman to decide what is allowable and what is not allowable or what is reasonable or unreasonable expenditure to carry out the business. Apart from basing his conclusion on conjectures and surmises, the Assessing Officer has not brought out any investigative finding that doubts the payment made to the agents. He has only expressed an opinion that there is no justification for such payments. Therefore, in my view, the explanation offered by the appellant is acceptable. Also, the details made available to the Assessing Officer, have also not been contested by the Assessing Officer in the remand report and, therefore, there cannot be any doubt on their authenticity. In the facts and circumstances, there is no merit in holding the impugned payments as not related to business purpose. Accordingly, disallowance of Rs. 1,03,09,115/- is deleted. These grounds of appeal are **ALLOWED.**"*

5.4 Since the facts and circumstance of the instant case are the same for this AY i.e. 2015-16 under consideration, except for the amount involved, following the decision of Ld. Predecessor for AY 2010-11 to AY 2014-15, the NFAC directed the AO to delete the disallowance of Rs. 1,94,08,000/- claimed by the assessee as commission expenses. Therefore, these grounds of appeal were allowed by the NFAC. Against this the revenue is in appeal before us.

6. We have heard the rival submissions and perused the materials available on record. Similar issue came for consideration before the Tribunal in assessee's own case in assessment year 2011-12 in ITA No.124/Bang/2020 vide order dated 27.5.2022 wherein held as under:

“8. As regards the issue on merits, we find that the assessee is in the business of manufacture and sale of industrial explosives. The assessee sells goods to various public sector undertakings, which are located at different parts of the country. To execute the order, the assessee-company engaged various services of agents to assist and handle sales. The services rendered by these agents are explained in the order of the CIT(A) for assessment years 2010-2011 and 2013-2014 (extracted in the impugned order of CIT(A)). The services rendered by the agents are remunerated by “service charges”, which is termed as “commission”. The assessee has produced copies of the agreement, the ledger extracts, the bank statement showing payments made, details of the TDS etc. The A.O. has not doubted the amounts paid nor the transaction done. The only reasoning of the A.O. for making disallowance of these payments is that the orders are received from PSUs based on public tenders for which no commission need to be paid. We find that the A.O. has not understood the nature of business of the assessee. The PSUs using explosives are mostly in mining sector, which are spread across the remote areas in the country. The assessee had admittedly appointed these agents to whom the payments were made to properly execute the sales orders and there is considerable efforts made by the agents in terms of statutory compliance, storage, inventorising etc. The assessee has admittedly paid these agents at 3.5% of the sales handled by them. As stated earlier, the amounts or fact of payments has not been disputed by the A.O. The CIT(A) has rendered a categorical factual finding, which has not been dispelled by the Revenue by placing any contra evidence. In the light of the aforesaid reasons, we reject grounds 2 and 3 raised by the Revenue.”

6.1 Since the issue involved in both of these assessment years is similar as considered in assessment year 2011-12, taking a consistent view on the same set of facts, we are inclined to dismiss all the grounds raised by the revenue before us on similar lines.

7. In the result, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 2nd May, 2023

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 2nd May, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**