

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.125/SRT/2021

(निर्धारणवर्ष / Assessment Years: (2013-14)

(Physical Court Hearing)

Kshitij Marine Services Pvt. Ltd., O-2, Office Floor, Madhulka Apartments, Bhatar Road, Surat-393001	Vs.	Assistant Commissioner of Income-tax, Circle-1(1)(2), Surat, Aaykar Bhavan, Majura Gate, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAACK 9924 E		
(अपीलार्थी /Assessee)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Rasesh Shah, CA

राजस्व की ओर से/Revenue by : Shri Vinod Kumar, Sr- DR

सुनवाई की तारीख/ **Date of Hearing** : **05/04/2023**

घोषणा की तारीख/**Date of Pronouncement** : **23/05/2023**

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2013-14, is directed against the order passed by the National Faceless Appeal Centre (NFAC for short)/Ld. CIT(A)] dated 27.07.2021 which in turn arises out of an assessment order passed by Assessing Officer under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as the "Act"] dated 31.03.2016.

2. Grounds of appeal raised by the assessee are as follows:

"1. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of Assessing Officer in making addition of Rs.2,34,91,839/- of the Income Tax Act 1961 on account of alleged unexplained expenditure u/s 69C of the Act.

2. It is therefore prayed that addition made by the Assessing Officer and confirmed by CIT(A) may please be deleted.

3. Assessee craves leave to add, alter delete any ground(s) either before or in the course of hearing of the appeal."

3. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is a private limited company and engaged in the

business of marine related services. In the instant case, the assessee filed return of income for assessment year 2013-14, declaring total income at Rs.21,48,920/-. The assessee's case was selected for scrutiny under CASS. During the course of assessment proceedings, it was observed by the Assessing Officer that assessee had paid commission of Rs.2,34,91,839/- to M/s Sumeet Industry Ltd and M/s J & P Foils Ltd, being 45% of the total turnover. In order to verify the claim of commission made by the assessee, the Assessing Officer issued notices u/s 133(6) of the Act, to following eight parties, to whom assessee had provided marine related services:

- a. M/s Mophit Minerals P.Ltd.
- b. Sai Maritime & Management P. Ltd.
- c. Hazira Port P.Ltd.
- d. Taurus Shipping Pvt. Ltd.
- e. Hindalco Inds. Ltd.
- f. Banline Agencies (India) P. Ltd.
- g. Adani Logistics Ltd.
- h. Adani Enterprises Ltd.

4. In response to notice under section 133(6) of the Act, all the above mentioned parties filed their replies and their replies are reproduced at para-4.4 to 4.5 of the assessment order. After considering the said replies, the Assessing Officer, vide letter dated 22.01.2016, asked the assessee to submit various details regarding commission paid to M/s Sumeet Industry Ltd and M/s J and P Foils Ltd and the same is reproduced at para-4.6 of assessment order. The assessee filed its reply on 27.01.2016 and the same is reproduced at para-4.7 of assessment order. On perusal of assessee's reply, the Assessing Officer observed various discrepancies which are discussed at para-4.8 to 4.10 of assessment order. On noticing the discrepancies, the Assessing Officer again issued notices u/s 133(6) to the parties mentioned above, at para 3 (a) to (h) above. After analysing the replies received from these parties, the Assessing Officer issued show cause asking the assessee as to why the said commission should not be considered as unexplained expenses and added to the total income of the assessee (vide para 4.14 of assessment order). After considering the said reply of the assessee, the Assessing Officer also issued

notice u/s 133(6) to M/s Sumeet Industry Ltd and M/s J & P Foils Ltd asking them to prove the genuineness of the commission received from the assessee. In response to this reply was received only from M/s Sumeet Industry Ltd. Since the Assessing Officer did not find the reply of the parties, (M/s Sumeet Ind. Ltd) satisfactory, therefore on the basis of detailed investigation carried out by the Assessing Officer, he has recorded his observation at para-4.24 to 4.25 of assessment order and made the addition of Rs.2,34,91,839/- as unexplained expenditure u/s 69C of the Act.

5. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Learned CIT(A), who has confirmed the addition made by the Assessing Officer. Aggrieved, the assessee is in further appeal before us.

6. Shri Rasesh Shah, Learned Counsel for the assessee vehemently argued that during the assessment proceedings, the assessee-company has produced the following documents and evidences viz: (i)confirmation from parties, (ii) Ledger account of parties, (iii) acknowledgement of return of income of both the parties to whom the commission was paid, and (iv) Transaction was through banking channel therefore genuineness of the transaction should not be doubted.

7. The Ld. Counsel has also argued that in response to notice issued by the Assessing Officer u/s 133(6) of the Act, all the parties replied to the Assessing Officer with documentary evidences, therefore genuineness of the parties should not be doubted. It was also argued that both the parties are the agent of the assessee and not the agent of the persons from whom the assessee received the revenue. The assessee has paid the commission after awarding the work order. In the work order, the scope of the work, the terms relating to remuneration and payment to remuneration have been mentioned. As per the work order the party was not only required to procure the work but also required to do follow up with concerned accounts department for early release of payments.

8. The Ld. Counsel has further argued that similar commission expenses were allowed by the assessing officer in the past assessment years, viz: assessment year

2010-11, assessment year 2011-12 and assessment year 2012-13. The Commission agreement and facts are similar in the assessment year under consideration, therefore such commission expenses should be allowed in the assessment year under consideration, based on the principles of consistency. For this, Id Counsel relied on the judgment of the Hon'ble Supreme Court in Radhasoami Satsang vs. CIT 193 ITR 321 (SC).

9. The Ld. Counsel has also argued that during the assessment proceedings, the Assessing Officer collected material from third party, behind the back of the assessee, and no any opportunity for cross examination was provided to the assessee, therefore appeal of the assessee should be allowed on this ground also.

10. The Ld. Counsel has also pleaded that commission expenses, under dispute, has been already recorded by the assessee in its books of accounts, therefore Assessing Officer should not have been made addition under section 69C of the Act. The addition made by the Assessing Officer under wrong section of the Income Tax Act, is not sustainable in the eye of law, hence addition should be deleted. Another argument of the Id Counsel was that similar commission was allowed in the past in the scrutiny assessment. The assessee had paid the commission @ 45% to the parties including the service tax amount. It is contended that in the assessment for A.Y 2012-13, the Assessing Officer disallowed only the commission of Rs.12,18,829/- by holding that 45% of the amount cannot be paid on service tax component.

11. On the other hand, Id Sr-DR for the Revenue argued that contention of the Id Counsel for the assessee that Assessing Officer in the assessment years 2010-11, 2011-12 and 2013-14 has allowed the similar commission based on the similar agreement is not well founded, as in the Income Tax proceedings, principle of *res judicata* is not applicable. In the Income Tax Act each assessment year is different assessment year, therefore, the assessee cannot claim that the Assessing Officer is required to follow principle of consistency, in the impugned assessment years, 2010-11, 2011-12 and 2013-14.

12. On merits, Id Sr-DR submitted that assessee has not proved the *bona fide* of the commission payment. Such huge commission ought not have been paid by the assessee.

13. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. We note that in the course of assessment proceedings, assessee produced the confirmation, ledger account and acknowledgement of return of income of both the parties to whom the commission was paid. The assessee also filed the executed work order with both the parties. The transactions were through banking channel and appropriate TDS were deducted. These details and documents are furnished at page no. 11, 12, 49 to 62 of the assessee's paper book. We note that Assessing Officer has not refuted or discredited these evidences and documents. The Assessing Officer does not mention why he is not accepting these evidences. On the contrary, the Assessing Officer has just brushed aside these evidences. It is a well settled law that when an assessee has all the possible evidence in support of its claim, they cannot be brushed aside based on surmises. Therefore, we note that based on these plethora documents and evidences, the genuineness and *bona fide* of the transactions have been proved by the assessee, hence assessee's claim for commission expenses should be allowed.

14. The Id Counsel pleaded before us that similar and identical commission expense was allowed by the Assessing Officer in the previous assessment years. The assessee submitted copy of the previous assessment order, for assessment year 2010-11 before the Bench and we note that for assessment year 2010-11, the assessment was made originally u/s 143(3) on 29.11.2012 and the claim of commission of Rs.1,18,29,266/- was fully allowed by the Assessing Officer. Thereafter, the Id. PCIT took action u/s 263 of the Act proposing to disallow 45% of the commission paid on the service tax amount. The Assessee preferred an

appeal against the order passed by the Id PCIT u/s 263 and Hon`ble Tribunal allowed assessee's appeal vide order dated 04.10.2018 and accordingly the commission was allowed in full. The copy of the order of the Hon`ble Tribunal is enclosed at page no. 38 to 44 of the paper -book. Similarly, in the assessment for A.Y. 2012-13, Assessing Officer disallowed only commission of Rs.12,18,829/- by holding that 45% of the amount cannot be paid on service tax component. The assessee preferred an appeal before Ld.CIT(A) against this assessment order which was dismissed by Ld. CIT(A) vide order dated 08.09.2017. However, the Hon`ble Tribunal vide order dated 14.02.2020 allowed the commission even on the portion of service tax and the commission was allowed in full. The copy of the order of Hon`ble Tribunal is enclosed at page no. 45 to 48 of paper book. Besides, the commission expense was also allowed in full in the scrutiny assessment for A.Y. 2011-12 also. The copy of the assessment order is enclosed at page no. 33 to 37 of the paper book. Therefore, we note that assessee`s claim for commission expense was allowed by the Department in preceding three assessment years, viz: Assessment years, 2010-11, 2011-12 and 2012-13, hence we are of the view that based on the principle of consistency, the commission expense for the assessment year 2013-14 should also be allowed. It is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular's view or proposition in the past, it is not open for the Revenue to take an entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon`ble Supreme Court in Radhasoami Satsang vs. CIT 193 ITR 321 (SC), wherein it was held as follows:

"We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the

Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

15. We note that in assessee's case under consideration, there is no change in facts, that is, facts in the assessment years 2010-11, 2011-12, 2012-13 and in the assessment year 2013-14 are same and identical, therefore we are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration.

16. The Id Counsel states that both the parties are the agent of the assessee and not the agent of the persons from whom the assessee received the revenue. The assessee paid the commission after awarding the work order. In the work order the scope of the work, the terms relating to remuneration and payment to remuneration have been mentioned. As per the work order the party was not only required to procure the work but also required to co-ordinate and follow up with concerned accounts department for early release of payments of assessee. The Assessing Officer issued the letters u/s 133(6) to various parties to whom assessee rendered the services through Sumeet Industries Ltd and J & P Foils Ltd. The Assessing Officer reproduced the reply of the eight parties. From the perusal of these replies it is clear that Assessing Officer never asked the parties regarding the involvement of the M/s Sumeet Industries Ltd and M/s J & P Foils Ltd. This can be verified from the details called for from the parties as reproduced by Assessing Officer at para no. 4.2 of the assessment order. Thereafter Assessing Officer again sent the letters to the parties asking for the involvement of the agents to whom the commission was paid. In this letter also the names of the two agents viz Sumeet Industries Ltd. and M/s.J & P Foils Ltd were not referred. The four parties have stated that they directly deal with the assessee. One of the parties namely M/s Taurus Sniping Pvt Ltd referred the name of Sumeet also. One of the parties namely M/s Hindalco Industries Ltd stated that they are dealing with the assessee for long time and since then various employees have changed at their end and so they are not able to lay hands to old records to find out by whom they were introduced. Accordingly, Assessing Officer did not disclose the true facts of the customers from whom assessee received the revenue.

17. The Assessing Officer issued the notice u/s 133(6) to both the parties to whom the commission was paid. The Assessing Officer observed that only Sumeet Industries Ltd filed the reply in response to notice u/s 133(6). The other party Ms J & P Foil Ltd. might not have replied. It is to be noted that M/s J & P Foil Ltd. was assessed by the same Assessing Officer and so the Assessing Officer should have pursued the matter further. The Assessing Officer shifted the burden of producing the parties before him to the assessee. However, it was the duty of Assessing Officer to issue the summons to the parties so that they could appear before the Assessing Officer as the party, M/s J & P Foil Ltd was assessed by the same Assessing Officer. We also note that Assessing Officer collected the material behind the back of the assessee in respect of both these parties however, both the parties to whom the commission has been paid by the assessee were not produced by the Assessing Officer for cross examination. Even the parties to whom the services rendered by the assessee through agents and who have filed the reply in response to notice issued by Assessing Officer u/s 133(6) were not produced for cross examination. This specific plea was also raised before CIT(A), however, Ld. CIT(A) didn't make further inquiry. Therefore, ld Counsel prays the Bench that addition sustained by ld CIT(A) may be deleted.

18. We note that Ld. CIT(A) relied on certain case laws which are distinguishable and not applicable to assessee's facts of the case. The case of Durgaprasad More [1971] 82 ITR 540 (SC) was with reference to the taste of human probabilities and case of Sumati Dayal V. CIT (1995) 80 taxman 89 (SC) was with reference to the surrounding circumstances. Here in assessee case, the assessee has filed the sufficient evidences in support of his claim of deduction for commission expenses, such as assessee produced the confirmation, ledger account and acknowledgement of return of income of both the parties to whom the commission was paid. The assessee also filed the work order executed by the assessee with both the parties. The transactions were through banking channel and appropriate TDS were deducted. These details are furnished at page nos. 11, 12, 49 to 62 of the assessee`s paper book. Therefore, in case of the assessee, the material available on record is in favour of the assessee and there is no incriminating

evidence available with the Assessing Officer. Both the parties to whom the commission were paid have confirmed the receipt of the commission and they have shown the commission income in their accounts and their return of income. Here the commission was paid to corporate entities and their expertise and necessity cannot be doubted. The other judgments cited by the Ld. CIT(A) are even otherwise not applicable when cross examination of the concerned parties was not granted to the assessee. Therefore, if documents and evidences are available then there is no need to take assistance of surrounding circumstances, and human probabilities. Besides, there is no change in facts, in the assessment years 2010-11, 2011-12, and 2012-13 wherein the similar claim of the assessee was allowed in scrutiny assessments.

19. The Assessing Officer observed that the parties to whom the commission was paid were incurring huge losses. In this connection it was submitted by Id Counsel that M/s Sumeet Industries Ltd paid the tax of Rs. 6,20,26,768/- on book profit of Rs.29,05,61,639/-. In case of J & P Foil Ltd., the amount of Rs.29,45,675/- by way of TDS and he claimed the refund as the income in its hands resulted into loss after adjusting commission income. It is to be noted that in both the cases, the income was assessed as the regular income and the commission paid by the assessee was not assessed in their hands as income u/s 115BBE of the Act. This can be apparent from the assessment order u/s 143(3) r.w.s. 153A dated 29.12.2017 passed by the Assessing Officer in case of Sumeet Industries Ltd for A.Y. 2013-14. Therefore, we note that commission income has been shown by the respective parties in their return of income and they paid the taxes thereon. Therefore, genuineness of the transaction should not be doubted.

20. Another grievance of Id Counsel is that Assessing Officer did not make disallowance u/s 37 of the Act but made the addition u/s 69C of the Act, as unexplained expenditure. Even the Assessing Officer invoked Section 69C of the Act, only and he confirmed the addition under the said section. Apparently, no addition can be made u/s 69C of the Act, as assessee made the payment of commission through banking channel which is reflected in the audited financial

statements and therefore source of the expenditure is proved. The addition u/s 69C of the Act can be made only when assessee did not offer the explanation about the source of expenditure. The assessing officer and the CIT(A) both have failed to justify that how the assessee's explanation regarding source of the expenditure is not acceptable. In fact, both the lower authorities have not raised any doubt regarding the source of the payment of the commission. Therefore, Id Counsel submitted that addition so made by the Assessing Officer may be deleted.

21. In view of the above facts and circumstances, we note that assessee has proved the genuineness and bona fide of the commission expense. Hence, we are not inclined to accept the contention of the Assessing Officer in any manner and hence the addition so made is deleted. Hence this appeal of the assessee is allowed.

22. In the result, appeal filed by the assessee is allowed.

Order is pronounced on 23/05/2023 by placing result on notice board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सुरत /Surat / दिनांक/ Date: 23/05/2023

Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Sr. Private Secretary/Private Secretary/
Assistant Registrar, ITAT, Surat