

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ए' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री आर. सी. शर्मा, लेखा सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI R.C.SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.8810/MUM/2011

(निर्धारण वर्ष / Assessment Year: 2007-08)

ACIT 21(2) Room No.508, C-10, 5 th Floor, BKC, Bandra (E), Mumbai - 400051	बनाम/ Vs.	M/s. Amar Plastics 21, 2 nd Floor, Kalpataru Point, Kamanji Marg, Sion(East) Mumbai - 400022
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFA2724J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Ms. Mrugakshi Joshi
Department by:	Shri B. D. Naik

सुनवाई की तारीख / Date of Hearing: 23.05.2016

घोषणा की तारीख /Date of Pronouncement: 13.07.2016

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 30.09.2011 passed by the Commissioner of Income Tax (Appeals)-32, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2007-08.

2. The Revenue has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.76,66,400/- made on account of sub-letting charges of prior period. The CIT(A) has failed to appreciate that since the assessee was following mercantile system of accounting, the assessee ought to have provided in its books the expenditure on account of sub letting charges.

2. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.8,88,931/- on account of excess payments u/s.40A(2)(b) of the Act to sister concerns.

3. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition of Rs.3,00,000/- made u/s.40A(2)(b) of the I.T. Act on account of excess payment of salary to Shri Manish Chheda.

4. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.3,74,162/- made on account of bank commission and charges not used for business purpose."

3. The assessee filed the return of income for the A.Y. 2007-08 on 27.09.2007 declaring total income to the tune of Rs.92,71,179/- . The case was selected for scrutiny, therefore notice u/s. 143(2) of the Income Tax Act, 1961 (in short "the Act") dated 07.08.2008 was

issued and served upon the assessee on 14.08.2008. Thereafter, notices u/s. 143(2) and 142(1) of the Act were also issued. The assessee is a partnership firm engaged in the business of trading in plastics articles. During the course of assessment the assessee was found to pay subletting charges of Rs.98,53,200/-, therefore, the assessee was asked to furnish the details of payment of subletting charges. The assessee submitted that the subletting charges were paid to the Maharashtra Industrial Development Corporation (MIDC). The Assessing Officer found that the assessee subletted the premises without approval of MIDC and the assessee claimed all the expenses in the current year whereas the same was not claimed earlier, therefore, in the said circumstances the expenses to the tune of Rs.76,66,400/- has been declined and added back to the income of the assessee. The AO also added back excess payment to the tune of Rs.8,88,931/- paid to sister concern u/s.40A(2)(b) of the Act The AO also made an addition excess payment of salary to the tune of Rs.3,00,000/- to Shri Manish Chheda u/s.40A(2)(b) of the Act. He also added the bank commission to the tune of Rs.3,74,162/- which was not used for the business purpose and finalized the assessment but in appeal the learned CIT(A) has deleted the said addition, therefore, the revenue has filed the present appeal before us.

ISSUE NO.1:-

4. According to issue no.1 the contention of the revenue is that the learned CIT(A) has wrongly deleted the addition to the tune of Rs.76,66,400/-. Before discussing further it is necessary to advert the finding of the learned CIT(A) on record:-

“3.3 I have considered the arguments of the Ld AR and also perused the assessment order. The main reason for disallowing the expenditure of Rs.76,66,400/- by the AO is that the assessee had sub-let the property without approval of MIDC and hence it was aware that it had to pay sub letting charges but still the assessee still did not make any provisions in the respective year which arose in the earlier years itself. From the perusal of the letter dated 18.12.2002 of the MIDC, it is clear that the said letter is in the nature of show cause notice only wherein the business agreement of the appellant with M/s. Atos Origin India Ltd has been treated by MIDC as sub letting by the assessee and it is in that context that the MIDC had issued the show cause notice to levy the sub-letting charges as per the terms of the agreement. In response to the said show cause, the appellant had denied the liability vide letter dated 3.2.2003 to MIDC on the grounds that the appellant has obtained the NOC of MIDC for computer software development as per the ‘business

conducting agreement' with M/s.Atos Origin India Pvt. Ltd. and therefore it was not a sub-letting agreement at all. It was after only a series of correspondence exchanged and meetings amongst the Association Members who had received similar notices, the appellant vide letter dated 5.5.2004 has written to the MIDC as under:-

“We as a plot holder of MIDC, Marol are trying to sustain our activities on the plot acquired us from MIDC way back in the year 1991.

The association has been actively following up on the issue of sub letting and we are awaiting the for al meeting to be called by the MIDC authorities to understand the issue so as to enable is to take appropriate steps for the future.

At this junction we wish to understand the meaning and implication of the word sub-letting as pertaining to the context of plot holders in MIDC, Marol.

We are given to understand by the association that pending the outcome of the discussion between

MIDC & the plot holders all the notices issued by MIDC would be held in abeyance.

Therefore kindly respond with a formal meeting being conveyed at an early date to understand and resolve the issue. "

Vide letter dated 22.2.2006 though the assessee still denied any sub-letting and claimed that the business was being conducted on royalty basis but it offered to the MIDC that even if it is to be treated as sub letting it should be treated as under Information Technology Industry s to be levied should be @ 1000 per sq. mt. instead of Rs.1500 per sq.mt. Accordingly the appellant requested to issue a fresh demand notice of 20 lacs. It was only after a series of consultations and meetings that the MIDC that the MIDC in response to the letter dated 22.2.2006 of the appellant finally agreed to levy the charges @ 1000 sq.mt. only and raised a total fresh demand of Rs.87,59,800/- for the period 1.10.2002 to 30.9.2006. Thus it is clear that the original dated 18.12.2002 issued by MIDC was only a show cause notice and not a final demand notice and even the said show cause was disputed by the assessee on the grounds that there was no sub letting at all. The assessee was

under a bonafide belief that the business conducting agreement with M/ s. Atos Origin India Ltd was not in the nature of sub letting at all. This belief of the assessee is further supported by the fact that the royalty charges received by the assessee from M/ s. Atos Origin India Ltd has been assessed by the AO as business income all along these years and not as income from house property. Hence it may not be correct to say that the assessee was aware from the beginning that it had to pay the sub letting charges. Therefore; there was no question for the assessee to have provided such disputed/unascertained liabilities in its accounts. Hence the liability to pay the sub letting charges has been crystallized only on 13.6.2006 and not before that. This is further evident from the fact that earlier the proposed rate was @1500 sq. mt. whereas in the final letter dated 13.6.2006 the rate applied after considering the reply of dated 22.2.2005 of appellant is @1000 sq.mt. only. The assessee is following mercantile system of accounting and therefore it is required to make provisions in the books of accounts only for the ascertained liability and not contingent or disputed liability. The above view is submitted by the ratio of the decisions in the case of Saurashtra Cements and Chemical Industries Ltd. 213 ITR 523(Guj.), Sterlite

Industries 6 SOT 497(MUM), Annamaria & Tours P.Ltd. 95 TTJ 71, Swadeshi Cotton and Flor Mills 53 ITR 14(SC), Ashok Iron & Steal Coal Mills 199 ITR 815 (Allah.), Padmavati Raje Cotton Mills 203 ITR 375(Cal.) relied by the appellant. Even otherwise by not claiming such expenditure in earlier years the assessee has not derived any benefit because by not claiming such expenses in those years rather it has paid more tax in those years. It is also not the case that in earlier years the assessee was in losses. Hence there is also a no case of reduction in tax liability by postponing the accounting of expenditure in books. Hence the view of the AO that the liability was ascertained in earlier years is not correct in the facts and circumstances of the case and therefore, as per the system of accounting the expenditure are allowable in the current year and accordingly the addition of Rs.76,66,400/- is directed to be deleted.”

No distinguishable facts have been produced before us contradicting to the finding of the learned CIT(A). The Assessing Officer disallowed the expenditure to the tune of Rs.76,66,400/- on the ground of that the assessee sub-letted the property without approval of MIDC and the sub letting charges were also belonging to the earlier year which were not claimed by the assessee earlier years. No doubt

thereafter the sanction thereon has been taken and the payment is on record and the assessee did not claim these expenditure in earlier years. Moreover, it also came to notice that the liability to pay the subletting charges was crystallized only on 13.06.2006. The assessee was following mercantile system of accounting and therefore it is required to make provisions in the books of accounts only for ascertained liability and not contingent or disputed liability. In this regard the decision relied by the learned CIT(A) has already been mentioned above, therefore there is no need to discuss the same. Accordingly, in this case the learned CIT(A) has passed the order judiciously and correctly which does not require interference at this appellate stage.

ISSUE NO.2:-

5. Under the second issue the revenue has challenged the deletion of addition to the tune of Rs.8,88,931/- on account of excess payments u/s.40A(2)(b) of the Act to sister concern. Before discussing further it is also necessary to advert the finding of learned CIT(A) on record:-

“6.3 I have considered the above arguments of the Ld. AR. Despite of production of the invoice of purchase and sales, the AO has not mentioned any discrepancy except for saying that the sales made by the appellant is almost equal to the purchase price. The contention of the appellant that since it was closing

the trading in plastics, it sold the goods at the market price only cannot be said to be devoid of merit, which is evident from the fact that such goods is further sold to BMC on the same rates. The AO on the other hand has not given any basis or evidence to suggest that the purchase / sales of the material was not at the market price. He has merely proceeded on the basis of presumption that no business man would do business without a reasonable profit ignoring the facts and circumstances as narrated by the appellant before him. The disallowance of purchases on adhoc basis @ 10% without pointing any specific evidence or suppression of sales or inflation of purchases cannot be sustained and hence the addition of Rs.8,88,931/- is directed to be deleted.”

On appraisal of the Assessment Order on this issue, it is apparent that the Assessing Officer disallowed 10% purchases of the assessee without any evidence. The said finding has been deleted by the learned CIT(A) on the ground of that the Assessing Officer was not having any material contrary to the record produced by the assessee. At the time of the arguments before us nothing distinguishable facts were produced by the revenue to contradict the finding of the learned CIT(A) on record. There is no tangible material with the revenue contrary to the record produced by the assessee. No disallowance can be made on the basis of assumption and presumption. Since the

Assessing Officer was not having any material with him for the disallowance of the said purchases, therefore, we are of the view that the learned CIT(A) has rightly deleted the said addition in accordance with law. Accordingly, the finding of the learned CIT(A) on this issue is quite justifiable and reasonable which does not require to be interfered with at this appellate stage.

ISSUE NO.3:-

6. Issue no.3 is in connection with the deletion of the addition to the tune of Rs.3,00,000/- u/s.40A(2)(b) of the Act on account of excess payment of salary to Shri Manish Chheda. Before discussing further this matter further it is necessary to advert the finding of the learned CIT(A) :-

“7.3 I have considered the arguments of the Ld. AR. Mere fact that the turnover of the assessee is 1.41 crores and that the assessee had other employees also, does not by itself leads to conclusion that the salary of Rs.6 lacs paid to Shri Manish Chheda was excessive. The AO has allowed 50% of salary which means that it is not the case where no services have been rendered. The AO has not pointed out any material facts to show as to how the salary received by Shri Manish Chheda was excessive with reference to his contribution to the business looking to his qualifications. The contribution made by a

person cannot be judged by mere turnover of the business more so when in earlier year the same salary has been allowed. On the other hand Manish Chheda has already offered the salary of 6 lacs in his returns. Under these circumstances, in absence of any material to the contrary the salary paid to Shri Manish Chheda cannot be treated as excessive u/s.40A(2)(b) and hence the addition of Rs.3 lacs is directed to be deleted.”

The Assessing Officer has disallowed the 50% salary paid to Shri Manish Chheda who was relative within the meaning of section 40A(2)(b) of the Act. The Assessing Officer has disallowed the salary paid to Shri Manish Chheda on the ground of that turnover of the appellant firm was Rs. 90 lacs approximately and the sales turnover of Rs.1.41 crores and therefore considering the volume of trading activity, the salary was excessive more so when there were other employees to look after the affairs of the business of the assessee. The contention of the assessee is that Shri Manish Chheda no doubt is son of one of the Director who had taken active part in the business and general administration of the appellant. Shri Manish Chheda got his education and experience in USA in business management and he was negotiating all the matters with MIDC and marketing of business with M/s. Atos Origin India Ltd. He was also getting the salary in the earlier years also for the A.Y.2006-07. No doubt when the salary of the earlier years has been allowed but while disallowing the 50% of

the salary not distinguishable facts were put on record. No material of any kind was also produced before us to which it can be assumed that the salary paid to Shri Manish Chheda is excessive u/s.40A(2)(b) of the Act. No doubt in the said circumstances the learned CIT(A) while considering all the facts on record, decided the matter of controversy judiciously and correctly which does not require to be interfered with at this appellate stage. Accordingly this issue is decided in favour of the assessee against the revenue.

ISSUE NO.4:-

7. The revenue has also challenged the deletion on addition of Rs.3,74,162/- made on account of bank commission and charges not used for business purpose. The finding of learned CIT(A) is hereby reproduced as under for ready reference:-

“8.3 I have considered the arguments of the learned AR. The AO has made no disallowance of any interest of Rs.1,01,83,136/- claimed by the assessee in the P & L A/c. Once the total interest has been allowed as business expenditure, it goes to prove that no part of the loans have been used by the appellant for any other purposes other than for earning the business income or the interest income. If the loans have been utilized for the purpose of earning the interest which has been offered for taxation, then there is no reason to disallow

the bank charges paid on the loan processing u/s.37 or alternatively u/s.57. Hence the disallowance of Rs.3,74,162/- is not justified and the same is directed to be deleted.”

The said addition has been deleted by the learned CIT(A) on the ground of that the Assessing Officer was not having any material contrary to the record produced by the assessee. At the time of the arguments before us nothing distinguishable facts were produced by the revenue to contradict the finding of the learned CIT(A) on record. There is no tangible material with the revenue contrary to the record produced by the assessee. No disallowance can be made on the basis of assumption and presumption. Since the Assessing Officer was not having any material with him for the disallowance of the said purchase, therefore, we are of the view that the learned CIT(A) has rightly deleted the said addition in accordance with law. Accordingly, the finding of the learned CIT(A) on this issue is quite justifiable and reasonable which does not require to be interfered with at this appellate stage.

8. In the result, the appeal filed by the **Revenue is hereby ordered to be dismissed**

Order pronounced in the open court on 13th July, 2016.

Sd/-
(R.C.SHARMA)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(AMARJIT SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 13th July, 2016

MP

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai