

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA no.2810Mum./2013
(Assessment Year : 2009-10)

ITO 10(2)(3),
431, Aayakar Bhavan,
Mumbai 400 020

..... Appellant

v/s

Astamed Healthcare P.Ltd.
C-201 Ghatkopar Indl. Ghatkopar (W),
Mumbai 400 086
PAN AADCA8559Q

..... Respondent

Assessee by : Shri. Rajesh Kumar Yadav
Revenue by : Mr. Poojan Mehta

Date of Hearing -27.02.2017

Date of Order -28.02.2017

ORDER

PER: SHAMIM YAHYA

This appeal by the revenue is directed against order of CIT-A dated 21.01.2013 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under:

1. "On the facts and circumstances of the case and in law, the Id. CIT(A) erred in holding that the commission paid was for sales

other than to Karnataka Antibiotic Pharmaceuticals Ltd Bangalore. Whereas as per the debit note raised by Artek Home care Pvt Ltd. clearly specifies that the commission was paid on account of supply of material as per list to Karnataka Antibiotic Pharmaceuticals Ltd Bangalore".

2. The Ld CIT(A) ought to have considered the fact that the Karnataka Antibiotic Pharmaceuticals Ltd Bangalore has denied any transactions of purchase through Artek Home Care Pvt Ltd.

3. The Ld CIT(A) also erred in not considering the fact that there was no commission paid by the assessee in previous year in spite of the similar type of transactions with Karnataka Antibiotic Pharmaceuticals Ltd Bangalore

4. The CIT(A) has erred on facts and therefore the findings on facts is perverse,

5. The appellant prays that the order of the CIT(A)'s on the above ground be setaside and that of the assessing officer be restored.

6. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

3. Brief facts of the case read as under:

The facts of the case were that the appellant was engaged in the business of manufacturing pharmaceutical products such as Capsules,

Tablets, Ointment and Syrup. The appellant claimed commission payment of Rs.91,13,314/- paid to M/s Artek Home Care P. Ltd. (AHCPL). The appellant explained to the AO that M/s. Artek Home Care P. Ltd. act was License Agent for Karnataka Antibiotics Pharma Ltd. (KAPL). The appellant furnished copy of MOU dated 14.04.2008 to the AO wherein it was stated that the appellant M/s. Astanied Helathcare were manufacturers of pharma products for KAPL on loan license basis and Artek Home Care procured orders so that the goods could be manufactured from KAPL. On this basis the appellant justified the commission payment. The AO noticed that in the income and expenditure account the appellant had shown sales and labour charges received on the receipt and opening stock and purchases on the consumption side. From the details, the AO noticed that there was no evidence of manufacturing activity being undertaken by the appellant. On further enquiries by the AO, the appellant filed details of commission paid and the confirmation issued by the said commission agent M/s. Artek Home Care P. Ltd. dated 31 .03.2009 to the appellant company. The narration in the said confirmation reads as under - "Being commission charges on supply of materials as per the list of KAPL, Bangalore. This means on supply of material of KAPL, the appellant had been debiting the commission to expenditure account." During assessment proceedings, the AO issued letters u/s.133(6) to M/s. Karnataka Antibiotics Pharma Ltd. and Aaron Healthcare and Export Pvt. Ltd. MIs. Karnataka Antibiotics Pharma Ltd. stated that the purchases of goods were directly made by them from the appellant but not through agent. The AO observed that the commission had

been paid on sales made to M/s. Karnataka Antibiotics Pharma Ltd. by the appellant whereas M/s. Karnataka Antibiotics Pharma Ltd. had denied that they had purchased through agent. The AO also observed that in last year also M/s. Karnataka Antibiotics Pharma Ltd. made purchases from the appellant in which year the appellant had not made any commission payments to any person. The AO held that a mere existence of agreement between appellant and M/s. Artek Home Care P. Ltd, was of no relevance particularly in view of categorical denial by M/s. Karnataka Antibiotics.

The AO held that no documentary evidences whatsoever had been brought on record to suggest that M/s. Artek Home Care P.Ltd. had in any way helped in procuring business or in business generation from M/s. Karnataka Antibiotics Pharma Ltd. In the absence of any documentary or substantive evidence of rendering of service, furnishing of contract and debit note issued by commission agent M/s. Artek Home Care P.Ltd. were not sufficient to prove direct service had been rendered wholly and necessarily for business purposes. There was no evidence of rendering of services by the commission agent M/s. Artek Home Care P.Ltd. In the facts and circumstances, the payment of commission made to M/s. Artek Home Care Pvt. Ltd. of Rs.91,13,314/- was disallowed by the AO u/s.37 of the Act on the ground that the appellant had not been able to prove that these payments were wholly and necessarily incurred for the purpose of business.

4. Upon assessee's appeal Ld. CIT-A noted the assessee submission regarding the mode of operation. He also noted that the appellant further submitted that during assessment proceedings, it had filed exhaustive

details to justify the genuineness of the commission expenses such as confirmation of accounts, debit note, evidence of accounting payee cheque payments, TDS on commission paid, service tax on commission, MOU executed with agent M/s. Artek Home Care and other relevant documents. The appellant further explained that the commission agent M/s. Artek Home Care, in response to notice issued by AO u/s. 13((6) of the Act, filed several details and confirmation to the AO. However, the AO ignored such documents and made disallowance.

5. Ld. CIT-A appeal held as under:

"I have considered the facts of the case and submissions of the appellant during appellate proceedings. The A.O. disallowed commission relying on the confirmation letter received u/s. 133(6) from M/s. Karnataka Antibiotics Pharma Ltd. (KAPL) in which KAPL stated that they have no business connection with agent of appellant i.e. M/s. Artek Home Care P. Ltd. (AHCPL). The AO. during assessment proceedings had sought confirmation from M/s. AHCPL and M/s. KAPL u/s.133(6) for the commission payments by the appellant. M/s. AHCPL had confirmed the payments alongwith account copy, TDS paid and also service tax paid details. M/s. KAPL had denied any connection with M/s. AHCPL, hence A.O. disallowed the commission paid to M/s. AHCPL by the appellant stating that though no service was rendered by the M/s. AHCPL, commission paid was disallowed. The facts mentioned above shows that appellant had entered into loan license agreement with M/s. KAPL for manufacturing and marketing of the pharmaceutical products in Maharashtra. For marketing

products appellant had entered into an agreement with M/s. AHCPL to procure the orders from Government Departments and Hospitals. For this service rendered appellant pays commission to the M/s. AHCPL. This agreement was between M/s. AHCPL only, appellant received service of M/s. AHCPL and procured orders from Government Department and Hospitals and same was diverted to the M/s. KAPL for selling their products in Maharashtra. A.O. had not considered these facts while disallowing the amount for commission payment. When M/s. KAPL denied any business connection with M/s. AHCPL, A.O. treated it as a commission payment by appellant to M/s. AHCPL without rendering any services hence disallowed the amount. The main issue here to be considered is M/s. AHCPL is not an agent of M/s. KAPL it is only the agent of the appellant so there is no question M/s. KAPL having any connection with M/s. AHCPL. The A.O. had not considered the relevant findings which is available in the record and which is furnished by the appellant during assessment proceedings.

Further to the above during appellate proceedings M/s. AHCPL had confirmed the payment received and same was offered as income in the return of income. M/s. AHCPL had also deducted TDS for the payment of commission to M/s. KAPL and service tax has also been paid by the M/s. AHCPL. Once service tax is paid it is to be assumed that M/s. AHCPL had rendered service to the appellant. Service tax is levied only for the services rendered during the year by the Central Government.”

6. Ld. CIT-A also referred to few ITAT decision and concluded as under:

"Applying the above cases to the facts of our case it is clear from the facts the AO had considered the findings which is not relevant for disallowance and also ignored the confirmation of M/s. ADPCL, TDS deduction on the commission payment, service tax paid by the appellant, hence AO's disallowance is deleted. This ground of appeal is allowed. Relief to the appellant is Rs.91,13,314/-."

7. Against the above order revenue is an appeal before us. We have heard the Ld. DR. An adjournment petition was filed on behalf of the assessee seeking further time as the counsel was away. After careful consideration we find that the appeal is lying before the ITAT for almost two years. Adjournment have been sought for one reason or another. We don't find any reasonable cause to grant further adjournment in this case. Hence we proceed to adjudicate the issue by hearing the Ld. DR and perusing the records.

8. Upon careful consideration we find that Ld. CIT-A in this case hence found that the mode of operation and the agreements between the assessee and the concerned parties has not been appreciated by the assessing officer. However, Ld. CIT-A has not at all addressed the AO's finding that no documentary evidence was brought on record to suggest that AHCPL have in any way helped in procuring business or in business generation from KAPL. AO has also noted that "in the absence of any documentary or substantive evidence of rendering of service, furnishing of contract and debit note issued by Artek Home Care P Ltd. (AHCPL) would not prove that the services have been rendered wholly and necessarily for

business purpose. The most important element is the rendering of service which is lacking in this case. It has been held in various judgments that mere existence of agreements between the assessee and its selling agents or payment of certain amounts does not bind the assessing officer to hold that the payment was made exclusively and wholly for the purposes of business. Reliance is placed on following Hon'ble Supreme Court decisions

1. Lakshmi Naryan Madanlal Vs CIT 86 ITR 439(SC),
2. Swadeshi cotton Mills Ltd Vs CIT 63 ITR 57(SC)"

9. We find that Ld. CIT-A has not at all addressed this aspect of assessing officer observation. Payment of service tax only is not conclusive satisfaction of AO's, requirement. It is not the case that Ld. CIT-A himself verified that proper services were rendered by the concerned party to justify the commission payment. Hon'ble Apex Court in the case of Kapoor Chand Shrimal 131 ITR 451 has held that that an appellate authority has the jurisdiction as well as duty to correct all errors in the proceedings under appeal and to issue, if necessary appropriate direction to the authority against whose decision the appeal is preferred to dispose off the whole or any part of the matter afresh, unless for bidden from doing so by the statute.

10. Accordingly, in the background of aforesaid discussion and precedent we set aside the issue to the file of the Ld. CIT-A. LD. CIT-A is directed to examine the issue of evidences regarding rendering of services by the concerned party as recorded by the assessing

officer. Needless to add assessee should be granted adequate opportunity.

In the result this appeal by the revenue stands allowed for statistical purposes.

Order pronounced in the Open Court on 28.02.2017

Sd/-

**RAVISH SOOD
JUDICIAL MEMBER**

Sd/-

**SHAMIM YAHYA
ACCOUNTANT MEMBER**

MUMBAI, DATED: 28.02.2017

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Nishant Verma
Sr. Private Secretary*

By Order

(Dy./Asstt.Registrar)
ITAT, Mumbai

