

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.12.2015

CORAM:

THE HONOURABLE **MR.JUSTICE M.JAICHANDREN**
AND
THE HONOURABLE **MRS.JUSTICE S.VIMALA**

T.C.A.No.483 of 2008

The Commissioner of Income-Tax,
Tamil Nadu-VII, Madras

... Appellant

vs.

M/s. Textile Dye Chem Corporation,
150 Montieth Road, Egmore,
Chennai – 600 008

... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, as against the order of the Income Tax Appellate Tribunal, C Bench, Chennai, dated 24.08.2007 passed in I.T.A.No.740/Mds/2007.

For Appellant : Mr. M.Swaminathan

For Respondent : Mr. P.Senthil Kumar

J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

This Tax Case Appeal has been filed by the Revenue, as against the order of the Income Tax Appellate Tribunal, 'C' Bench,

Chennai, dated 24.08.2007, made in I.T.A.No.740/Mds/2007.

Brief facts:-

2. The assessee is a business concern dealing in chemicals. In respect of the assessment year 2003-2004, return of income was filed by the Assessee disclosing taxable income of Rs.26,57,330/- while claimaing deduction towards payment of commission. It was taken up for scrutiny and during finalization, under Section 143 (3) of The Income Tax Act, 1961, (hereinafter will be referred to as "the Act") the claim for commission was disallowed to the extent of Rs.65,27,747/-, which are allegedly paid to: (i) M/s. Auto India Group – Rs.47,38,406/-; (ii) TCS & Co., - Rs.12,57,380/-; (iii) M/s. O.P.Steels Limited – Rs.5,31,961/-.

2.1. While processing the claim, the Assessing Officer, on enquiry, found that the business concerns belonging to Auto India Group were not traceable and in the absence of details, such as, details of services rendered, identification of persons, who rendered such services and the justification for the expenditure, it is difficult to come to a conclusion that the expenditure is wholly and exclusively could have been incurred for the purpose of business and hence, disallowed the claim for deduction on account of

payment of commission.

2.2. In respect of commission paid to M/s.O.P.Steels Limited, the finding is that even though the business concern exists, as the percentage of commission paid was at 12.54%, the claim was doubted and the deduction was not allowed.

2.3. As against this order, the Assessee preferred an appeal before the Commissioner of Income Tax (Appelas) and the appeal was dismissed. As against that order, the Assessee preferred appeal before the Income Tax Appellate Tribunal and the Tribunal has held that the Commission paid to the corporate entities, through banking channel, whose Permanent Account Numbers (PANs) have been furnished to the Assessing Officer cannot be doubted and disallowed without proper enquiries. Aggrieved over this order, the Department has preferred this Appeal, raising the following substantial question of law:-

“Whether on the facts and in the cricumstances of the case, the Income Tax Appellate Tribunal was right in law in justifying the commission paid to the tune of Rs.67,27,747/- to its Commission Agents, even though the assessee could not produce any true and correct particulars of the Commission Agents?”

3. The procedure for computation of income from profits and gains of business or profession has been prescribed under Section 29 of the Act. For computing assessable income from business that provides for certain statutory deductions, which are provided under Sections 30 to 43C of the Act. The provisions of Sections 44 to 44D of the Act provide for computation of profits and deduction of expenditures in certain cases. Section 37 of the Act provides for the deduction of all expenditures, wholly and exclusively laid out or expended for the purpose of business, where such expenditure is not expressly covered by any other specific provisions of the Act. The guidelines for deduction of an expenditure has been furnished in the decision of the Kerala High Court reported in the case of **Ram Bahadur Thakur Ltd. v. CIT (2003) 261 ITR 390 (Ker.) (FB)**, which reads as under:-

“10. In order that a particular item of expenditure may be deductible under this sub-section the following conditions should concur (1) the expenditure should not be of the nature described in [Sections 30 to 36](#), (2) it should have been incurred in the accounting year, (3) it should be in respect of a business which was carried on by the assessee and the profits of which are to be computed and assessed,

(4) it should not be in the nature of personal expenses of the assessee, (5) it should have been laid out or expended wholly and exclusively for the purpose of such business and (6) it should not be in the nature of capital expenditure.”

4. It is the contention of the learned counsel for the Assessee / respondent that the assessee met with business expenditure to the extent of Rs.67,27,747/- towards payment of commission of which it is entitled to deduction, as per the provisions of Section 37 of the Act. But the contention of the Revenue is that, there is no proof to show that the expenditure incurred was wholly and exclusively for the purpose of business and therefore, the assessee is not entitled to deduction.

5. Therefore, the issue to be decided is, whether the assessee is entitled to the benefit of commission, purportedly paid by the assessee to its commission agents.

6. It is an admitted fact that the deduction towards commission was claimed on the averment that: (a) commission was paid to Auto India Group, (b) TCS & Company, and (c) O.P.Steels

Limited. In respect of these claims, while confirming the disallowance ordered by the Assessing Officer, the Commissioner of Income Tax held that the primary onus of proving a transaction squarely lies on the person claiming the same and as the Assessee has not discharged the primary onus of proving the transaction, the Assessing Officer was right in disallowing the deduction claimed. On the contrary, the Income Tax Appellate Tribunal, considering the following facts and circumstances, upheld the claim of the Assessee:

- (a) commission has been paid to corporate entities;
- (b) commission has been paid through Banking Channel;
- (c) PANs have been furnished.

6.1. The Tribunal was of the view that the materials produced by the Assessee was sufficient to discharge the onus of proof and if it is the contention of the Revenue that the commissions paid are bogus, it is for the Revenue to prove the same as per the ratio emanating from the Hon 'ble Apex Court decision in the case of **K.P.Varghese v. Income Tax Officer, Ernakulam and another, 131 ITR 597 (SC).**

6.2. This finding of the Income Tax Appellate Tribunal is under challenge, by the Revenue.

7. Supporting the findings of Income Tax Appellate Tribunal,

the learned counsel for the Assessee relied upon the decision of the decision of the Hon'ble Apex Court reported in **159 ITR 78 (CIT v. Orissa Corporation Limited)**, whereunder it has been held as follows:-

“In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence.”

7.1. Yet another contention of the assessee is with reference to the finding regarding the reasonableness of the expenditure.

Contending that, in applying the test of commercial expediency, for determining whether an expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue, the decision reported in **CIT, Bombay v. Walchand and Company Private Limited, 65 ITR 381** is relied upon by the Assessee / respondent.

8. Per contra, the learned counsel appearing for the Revenue / appellant would submit that the Income Tax Department has taken all possible steps to find out the whereabouts of the concern, to whom, the commission has been allegedly paid and those concerns were not in existence and when this fact was not disputed by the assessee itself, nothing is left for the Revenue to disprove the case of the assessee and therefore, the order of the Income Tax Appellate Tribunal has to be set-aside.

9. Contending that the materials placed by the Assessee would not exonerate the assessee from onus of proof and even in cases where there is proof for payment of commission, yet it is for the Assessee to show that the payment was made exclusively and

wholly for the purpose of assessee's business. In support of the same, the decision reported in **(2015) 56 Taxman.com 351 (SC) (Premier Breweries Limited v. Commissioner of Income-Tax, Cochin)** is relied upon, whereunder the decision in *Lachminarayan Madan Lal vs. Commissioner of Income Tax West Bengal, 1972 (86) ITR 439* was referred to, which runs thus:-

"The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made. It is still open to the Income tax Officer to consider the relevant facts and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under Section 37 of the Act."

10. The learned counsel for the Revenue / appellant further pointed out that, on an earlier occasion, the very same Assessee / respondent admitted that the claim for payment of commission made was bogus and in the light of the prior conduct of the

assessee, the present transaction has to be scrutinised.

10.1. No doubt, the prior conduct of the assessee with regard to the admission made is not praise-worthy; however, when there are documents produced in respect of the claim made, in this case, prior conduct cannot be the ground to disallow the claim of the assessee.

10.2. It is not a case where there is total lack of documents. The assessee has produced the agreement between the assessee and its Commission Agents, the Books of Accounts, Permanent Account Numbers (PANs) of the Agents, Bank Statements and the Credit Note pertaining to those agents. Even after the production of these records, the Revenue contended that the Commission Agents are not traceable and therefore, it is for the Assessee to produce those Commission Agents.

10.3. The learned counsel for the Assessee submitted that it is not possible to produce the Commission Agents, long after the transaction, but it is possible for the Revenue to find out the Commission Agents, when PANs have been made available and if need be, the Revenue can invoke the powers under Section 131 of the Act.

10.3.1. The powers of the Income-Tax Authorities are as follows:-

Powers of the Income-Tax authorities.- For the purpose of enabling the Assessing Officer, Deputy Commissioner (Appeals), Deputy Commissioner, Commissioner (Appeals) and Chief Commissioner or Commissioner to discharge their functions so as to arrive at the correct income or loss of an assessee it has been enacted in Section 131 (1) of the Act that all those officers shall have the same powers as are vested in a civil court in respect of-

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including a bank officer;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions.

11. At this juncture, it is also necessary to point out the effectiveness of the PAN, in helping the Income Tax Authorities to identify the PAN Holder as well as to track the financial transactions.

11.1. PAN, or Permanent Account Number, is a unique 10-digit alphanumeric identity [allotted to each taxpayer](#) by the Income

Tax Department under the supervision of the Central Board of Direct Taxes. It also serves as an identity proof. PAN is mandatory for financial transactions such as receiving taxable salary or professional fees, sale or purchase of assets above specified limits, buy mutual funds and more.

11.2. The primary objective of PAN is to use a universal identification [key to track financial transactions](#) that might have a taxable component to prevent tax evasion. The PAN number remains unaffected by change of address throughout India.

12. Having considered the value and utility of the PAN, viz-a-viz, the power of the Income-Tax Authorities, it may not be difficult for the Income Tax Department to track the transactions of the Commission Agents.

13. Considering the scope of submissions made on both sides and also considering the scope of enquiries that can be made utilizing the power under section 131 of the Income Tax Act, 1961, we are of the view that the matter must be remanded back to the Assessing Officer, with liberty to both sides to place materials with reference to the contentions raised on both sides. Having regard to

the limited scope of remand, the Assessing Officer shall pass orders as expeditiously as possible.

14. In the result, this Tax Case Appeal is partly allowed. The order of the Income Tax Appellate Tribunal is set-aside and the matter is remitted back to the Assessing Officer, with a direction to conduct further enquiry with regard to the claim made towards deduction on commission payments and to pass orders in accordance with law and on merits.

(M.J.J.) (S.V.J.)
07.12.2015

Internet : Yes/No
Index : Yes/No
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To

1. The Income Tax Appellate Tribunal,
'C' Bench, Chennai
2. The Commissioner of Income Tax (Appeals),
Chennai
3. The Assistant Commissioner of Income Tax,
Circle – IX, Chennai

M.JAICHANDREN, J.
and
S.VIMALA, J.

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