IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2370 OF 2013

The Commissioner of Income Tax-8 .. Appellant

v/s.

M/s. Vritti Impex Pvt. Ltd. .. Respondent

Mr. Arvind Pinto for the appellant
None for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 26th APRIL, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 3rd July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. This appeal raises the following questions of law for our consideration :-

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) and thereby not sustaining the disallowance made by the Assessing Officer of the payment of Rs.1,13,24,831/- claimed by the assessee, without*

appreciating that the assessee had failed to substantiate the allowability of the said expenditure in terms of Section 37(1) of the Act ?

(ii) Without prejudice to the Revenue's stand that the impugned deduction claimed by the assessee on account of payment to Mr. J.V. Smith is not allowable, whether on the facts and circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT(A) and thereby not sustaining the finding of the Assessing Officer that the impugned payment constitutes fees for managerial and professional services and hence in the nature of fees for technical services as envisaged in Section 9(1)(vii) of the Act read with Explanations thereto and therefore, disallowable in terms of Section 40(a)(i) of the Act for failure on the assessee's part to deduct tax at source therefrom?

3. Re. Question no. (i) :-

(a) During the subject assessment year, the respondent assessee paid commission of Rs.1.13 crores to one Mr. John V. Smith for the purposes of promoting sales of plywood in foreign countries. The Assessing Officer disallowed the payment of commission of Rs.1.13 crores. This *inter alia* on the ground that the agreement is on the letter head of the respondent assessee and not on a non-judicial stamp paper nor it is registered with a competent Authority. Besides, the agreement mentions the name of the agent as Mr. John V. Smith when the commission has been paid to Mr. Jonathan Smith. Moreover, the agreement refers to Mr. John V. Smith as Export and Marketing consultant but expenditure is claimed on account of commission of sales. Therefore, it made the agreement and the consequent payments made suspect. On the aforesaid basis, the Assessing Officer in his order dated 30th September, 2010 *inter alia* came to the conclusion that the document is a dubious document and therefore expenditure of Rs.1.13 crores paid as commission for sales was disallowed under Section 37 of the Act. This resulted in adding Rs.1.13 crores to respondent assessee's income.

(b) Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals). On examination of all facts it records that commission is being paid to Mr. John Smith since 2002 and it is for the first time in the subject assessment year that it is sought to be disallowed. Besides, it records that the commission at 6.5% was fixed in the year 2002 and was not to be so for all time. This is evident from the Agreement itself which clearly stipulates that it is presently fixed at 6.5% and is subject to variation by agreement of the parties. The fact that Mr. John Smith describes himself as a marketing consultant cannot be the basis of deciding the nature of commission paid to him. In the course of appellate proceedings, the respondent assessee filed details to establish that Mr. John Smith and Mr. Jonathan Smith are one and the same person and the commission was in fact paid to this person as shown in his bank account. The aforesaid information was forwarded to the Assessing Officer for his remand report. The Assessing Officer pointed out that as the documents are self serving and that an appellate authority should not entertain further evidence. The Commissioner of Income Tax (Appeals) on consideration of all the facts finally came to the conclusion that the payment of Rs.1.13 crores was in fact made by the respondent to Mr. John Smith / Mr. Jonathan Smith and received by him. It also found that 12% of export sales did aggregate to Rs.1.13 crores which establishes a direct connection between export sales and the payment of commission made to Mr. John Smith / Mr. Jonathan Smith. Therefore, holding that payments stand established. In view of the above finding of fact, the Commissioner of Income Tax (Appeals) by order dated 6th November, 2011 deleted the dis-allowance and allowed the same under Section 37 of the Act.

(c) Being aggrieved with the order of the Commissioner of Income

Tax (Appeals) The Revenue carried the issue in appeal to the Tribunal. On consideration of facts, the Tribunal by the impugned order concurred with the view of the Commissioner of Income Tax (Appeals). This resulted in the dismissal of the Revenue's appeal.

(d) We find that two Authorities have taken a concurrent view that the expenditure of Rs. 1.13 crores is for business purposes i.e. increasing its sales and was in fact incurred. Therefore, allowable as deduction under Section 37 of the Act. The view taken by the Commissioner of Income Tax (Appeals) as well as the Tribunal is essentially a finding of fact. The view taken is a possible view on the facts and the same has not been shown to be perverse and / or arbitrary in any manner.

(e) In the above view, question (I) as formulated does not give rise to a substantial question of law for our consideration. Accordingly, question (i) not entertained.

4. Re. question (ii) :-

(a) Mr. Arvind Pinto, learned Counsel for the Revenue very fairly states that the issue raised herein stands concluded against the

Revenue and in favour of the respondent assessee by the decision of this Court in *CIT Vs. Gujarat Reclaim & Rubber Products Ltd.* (Income Tax Appeal No.2116 of 2013) rendered on 8th December, 2015 and *Director of Income Tax (IT)-I Vs. M/s. Credit Lyonnais* (Income Tax Appeal No. 2120 of 2013) decided on 22nd December, 2016.

(b) In the above view, question (ii) as formulated does not give rise to any substantial question of law. Thus not entertained.

5. Accordingly, appeal is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**