IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.314 of 2015 (O&M)
Date of decision:04.04.2016

Pawan Kumar Tah

……Appellant

Commissioner of Income Tax, Chandigarh

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr. Ved Jain, Advocate for the appellant in ITA Nos.314 to 317 of 2015.

Ms. Urvashi Dhugga, Advocate for the appellant in ITA Nos.298 , 328 and 337 of 2015.

Ajay Kumar Mittal, J.

1. Delay in refiling ITA Nos.314 to 317 of 2015 is condoned.

2. This order shall dispose of seven appeals bearing ITA Nos.314 to 317, 298, 328 and 337 of 2015. Four appeals have been filed by the assessee and three by the revenue against the common order dated 24.12.2014 passed by the Income tax Appellate Tribunal, Bench 'A', Chandigarh (in short, "the Tribunal") for the different assessment years.

However, the facts are being extracted from ITA No.314 of 2015.

3. ITA No.314 of 2015 has been filed by the appellant-assessee under section 260A of the income ax Act, 1961 (in short, "the Act") against the order dated 24.12.2014, Annexure A.3 passed by the Tribunal in ITA No.542/Chd/2012 for the assessment year 2008-09, claiming following substantial questions of law:-

(a) Whether, in the facts and circumstances of the case, the ITAT is correct in law, in holding that the commission paid cannot be considered to be an expenditure incurred wholly and exclusively for the purpose of business?

(b) Whether, in the facts and circumstances of the case, the ITAT is correct in law in holding that the commission paid was not genuine, despite the fact that initial burden of onus has been discharged by the assessee by giving the names of the persons to whom this commission has been paid, alongwith their address, confirmations, copy of accounts, TDS certificates etc. were also submitted?

(c) Whether in the facts and circumstances of the case, the ITAT is correct in law, in holding that the commission paid was bogus, despite the fact that the persons to whom the commission was paid, were duly examined by the Assessing Officer and they confirmed the fact of receiving the commission?"

In ITA Nos.315 to 317 of 2015 as well, identical three questions have been claimed.

4. In ITA No.337 of 2015 filed by the revenue, the following two substantial questions have been claimed:-

(a) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in allowing deduction on account of interest to assessee when funds given as interest free advances still remain with the person to whom advance has been made?

(b) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT Chandigarh was right in confirming the order of learned CIT(A) Chandigarh in deleting the addition of ₹ 2,22,78,800/- on account of unexplained cash credit under section 68 of Income Tax Act, without affording the opportunity to the Assessing Officer, particularly when the Assessing Officer made addition after examining the issues during scrutiny proceedings under section 143(3) of Income Tax Act, 1961 ?"

5. In ITA Nos.298 and 328 of 2015 filed by the revenue, the following question which has been claimed reads thus:-

"Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT had ignored the spirit of the provisions in the light of clarification issued by CBDT vide Circular No.5 of 2014 exercising power under section 119 of Income Tax Act, 1961 that Rule 8D read with Section 14A of the Act provides for disallowances of the expenditure even where tax payer in a particular year has not earned any exempt income the directions of Hon'ble ITAT are justified?"

6. A few facts relevant for the decision of the controversy involved as narrated in ITA No.314 of 2015 may be noticed. The assessee-appellant is carrying on the business of advertising and marketing services as proprietor in the name and style of M/s Ram Advertising services which is an accredited agency of the Indian Newspaper society. The assessee has been maintaining regular books of account. All the income and expenditure being incurred by the appellant is being accounted for in the books of

account which are being audited. The income tax returns are being filed regularly on the basis of the audited financial statements prepared every year. The appellant filed income tax return for the assessment year 2008-09 on 30.9.2008 declaring income of ₹ 10,54,900/- which was accompanied by audit report as required under section 44AB of the Act alongwith balance sheet, profit and loss account and other documents. The return was selected for scrutiny. During the course of assessment, the Assessing Officer raised the issue of commission of ₹ 23,17,999/- paid by the assessee. The assessee submitted a detailed reply alongwith necessary details. The names of the four persons to whom this commission had been paid alongwith their address, confirmations, copy of accounts, TDS certificates etc. were also submitted. The details about business in respect of which these commissions had been paid, were also filed. The Assessing Officer following its earlier order for the assessment year 2006-07, vide order dated 25.11.2010, Annexure A.1 held that the commission paid could not be considered to be an expenditure incurred wholly and exclusively for the purpose of business and accordingly disallowed the entire commission of ₹ 23,17,999/-. Aggrieved by the order, the assessee filed appeal before the Commissioner of income Tax (Appeals) [CIT(A)]. Vide order dated 29.2.2012,Annexure A.2, the CIT(A) upheld the order passed by the Assessing Officer. Not satisfied with the order, the assessee filed appeal before the Tribunal. Vide order dated 24.12.2014, Annexure A.3, the Tribunal upheld the order passed by the CIT(A) and disallowed the commission paid to three persons namely G.S.Sadana, Sanjay Sardana (HUF) and Sandeep Sardana(HUF). Hence the instant appeals.

7. We have heard learned counsel for the parties.

8. The issue relates to commission paid by the assessee. The argument was raised with regard to consistency that for the assessment years 2005-06 and 2011-12, the commission paid by the assessee was allowed as deduction. Consequently, the finding was sought to be challenged on the ground of perversity. It has been categorically recorded by the Tribunal after examining the entire evidence on record that the payment had been made by the assessee in a mechanical way. No commission had been paid by the assessee and it was only a bogus entry. The findings recorded by the Tribunal on this issue regarding commission paid to different persons by the appellant read thus:-

> "23. If Shri G.S.Sardana, was really doing liaisoning business for the assessee and had received commission of ₹ 9,60,053/- in the whole year and further such payment was received by about 10 cheques in various months then how it is possible that he does not know even the address of the assessee company because in reply to question No.2, he has stated that the office is in sector 22-B but he does not remember the SCO number. In reply to question number 7, Shri Sardana stated that he got the business of the assessee from the head office of the BSNL. If so, then he does not remember even the place where its head office is located because in reply to question No.8, he simply stated that it is located in Delhi and in reply to question No.9, he further admits that he does not remember the exact address at Delhi because he has never been to the head office. How it is possible that M/s Sardana who is going to head office of BSNL company able to obtaining the business for Shri Pawan Kumar Tah. In answer to question No.9, he has very categorically stated that he used to contact

the person suggested by Shri Pawan Kumar Tah to whose department Shri Pawan Kuamr Tah has already made presentation. If this is so, we fail to understand what is the role of Shri Sardana if the presentation was already made to a person by Shri Pawan Kuamr Tah i.e. assessee then he should have been able to contact such person directly. Further, if the suggestion is that some underhand payments were being handed over for which services of Shri Sardana were required then the same would be hit by explanation to Section 37(1) which reads as under:-

"Explanation - For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

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24. The above question answers very clearly show that Shri Sardana does not know anything about the business of BSNL, the location of their office, the addresses of their offices. He does not know any particular officer there. He has not visited any of the offices from where he had obtained business for assessee then we fail to understand what role he has performed particularly when no agreement or correspondence is existing between the assessee and Shri Sardana. It was contended before us that in such type of deals the only role is to introduce the person but Shri Sardana miserably fails even to name such persons who were introduced by him to the assessee. In fact the perusal of the entire statements clearly shows that he does not know anything about the BSNL and he also does not know any of their officers. Further, the pattern of payments which has been extracted by the Assessing Officer at page 25 is as

under:-

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The above also clearly shows that payment has been made in a mechanical fashion then how it is possible that payments to all three parties have been made on same date of the same amount. All these factors clearly shows that no commission has been paid by the assessee and it is only a bogus entry. The statements of other two persons i.e. Shri Sanjay Sardana and Shri Sandeep Sardana also are on the similar pattern and have been extracted by Assessing Officer at pages 18 to 20 and 21 to 24.

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26. It was also contended that some payments have been claimed and allowed in earlier two assessment years i.e. 2004-05 and 2005-06 as well as later year in assessment year 2011-12. We have carefully perused these assessment orders and interestingly both in assessment years 2004-05 and 2005-06 respectively, no questions have been raised by the Assessing officer in reply to commission. In assessment year 2011-12, the only inquiry made by Assessing officer was from Shri G.S.Sardana, therefore, it is again a case of no enquiry and because of a particular Assessing Officer does not make an enquiry and commits a mistake the same is not required to be followed in later years. In this regard, we would like to refer to the observations of Hon'ble Supreme Court in the case of ***CIT vs. British Paints India Limited,*** 188 ITR 44 (SC) which read as under:-

> "It is not only the right but the duty of the Assessing Officer to consider whether or not the books disclose the true state of accounts and the correct Income can be deduced therefrom. It is incorrect to say as contended on behalf of the assessee that the officer is bound to accept the system of accounting regularly employed by the assessee

> the correctness of which had not been questioned in the past. There is no estoppel in these matters and the officer is not bound by the method followed in the earlier years."
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> 29. After perusing the above reply the Assessing Officer observed that it becomes clear that business was procured for Shri Gian Chand Singla in the earlier years and commission has been disallowed because business pertain to earlier years. In respect of this commission, we find force in the contention of learned counsel for the assessee that it does not make difference in which year the business was procured particularly when there was dispute between the parties and commission has been settled through a compromise agreement. The Assessing Officer has not doubted the payment of commission to Shri Gian Chand Singla on any other context which means he has accepted the services provided by Shri Gian Chand Singla, therefore, in our opinion, this commission was allowable. Accordingly, we set aside the order of learned CIT(A) and hold that payment made to Shri Gian Chand Singla is allowable as commission paid to S/Shri Sandeep Sardana, HUF, Shri G.S.Sardana and Shri Sanjay Sardana HUF which has been correctly disallowed by Assessing Officer and CIT(A)."

9. Learned counsel for the assessee was unable to controvert the findings recorded by the Tribunal on the issue of commission which depends upon facts and circumstances of each transaction and cannot be claimed to be genuine on the principle of consistency having been allowed in the earlier year. Thus, no question of law arises in ITA Nos.314 to 317 of 2015 as claimed by the assessee.

10. With regard to question No.(a) in ITA No.337 of 2015, learned counsel for the parties have agreed that the said question has already been

remanded to the Assessing Officer. Thus, no substantial question of law arises. As regards question No.(b) in the said appeal with regard to deleting the addition of ₹ 2,22,78,800/- on account of unexplained cash credit under section 68 of the Act, we have scanned the order passed by the Tribunal. We find that the Tribunal being final fact finding authority is required to record its factual conclusion by recording convincing reasons which are missing in the instant case. The order passed by the Tribunal reads thus:-

> "62. In our opinion, the learned CIT(A) has correctly decided the issue. Basically assessee has floated various entities to obtain extra money from the banking system by issuing and circulating cheques which were got discounted from bank and money was handed over to the assessee which was later on paid after sometime. Even if assuming that there are certain non compliance with other laws that would not alter the basic nature of the transactions because money has come from bank through various propriety entities, therefore, we find nothing wrong with the order of learned CIT(A) and we confirm the same."

Therefore, the said issue is remanded to the Tribunal for passing a speaking order giving its own cogent reasons by assessing the evidence on record and examining the genuineness of the transactions after hearing the parties in accordance with law.

11. The question with regard to disallowance of expenditure even where tax payer in a particular year had not earned any exempt income raised in ITA Nos.298 and 328 of 2015 has already been remitted back to the Assessing Officer by the Tribunal and as such, no substantial question of law arises.

12. In view of the above, ITA Nos.314 to 317 filed by the assessee

and ITA Nos.298 and 328 of 2015 filed by the revenue are dismissed whereas ITA No.337 of 2015 filed by the revenue is partly allowed in the manner indicated above.

(Ajay Kumar Mittal)
Judge

April 04, 2016 **(Raj Rahul Garg)**
'gs' **Judge**