

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ITA No. 325 of 2017 (O&M)

Date of Decision: 29.08.2018

Smt. Malti Gupta, Prop. Caliber Institute for Further Education

.....Appellant

Versus

Commissioner of Income Tax, Jalandhar (Punjab)

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL, JUDGE
HON'BLE MR. JUSTICE AVNEESH JHINGAL, JUDGE

Present: Mr. Divya Suri, Advocate
for the appellant.

Mr. Vivek Sethi, Senior Standing
counsel for the respondent-revenue.

AVNEESH JHINGAL, J.

The assessee has filed the present appeal under Section 260A of the Income Tax Act, 1961 (for short 'the Act') against the order of Income Tax Appellate Tribunal, Amritsar Bench (for short 'the Tribunal'), dismissing the appeal of the assessee. The assessment year involved is 2009-10.

2. As per the appellant, following substantial questions of law, arise for consideration:

1. Whether under the facts and circumstances of the case, while arriving at the 'chargeable income' u/s 29 considering the Provisions of Section 37(1) r.w. Section 40A(2)(b), the disallowance of business expenditure to the persons/recipients of the amount on which TDS deducted u/s 194H, is an unreasonable action since the books of accounts not rejected u/s 145 hence a misapplication of jurisdiction, while the recipient's income is chargeable to tax u/s 5 of the Income Tax Act, 1961?

II. Whether under the facts and circumstances of the case, the claim for allowing business expenditure u/s 37(1) is confined to the

same set of customers and that too with regularity while the allowance of expenditure on new customers is restricted, even though such finding does not have the sanction of Statute, Rule, Notification Circular, Instruction and pursuant to David & Co. P. Ltd. vs. CIT (1979) 118 ITR 261 (SC), CIT vs. Chandulal Keshavlal & Co. AIR (1960) SC 738, Usher's Wiltshire Brewery Ltd. vs. Bruce (1914) 6 Tax Cases 399 (HL), Eastern Investments Ltd. vs. CIT AIR (1951) SC 278?

III. Whether under the facts and circumstances of the case, while examining the 'chargeable Income' there can be permitted 'multiple taxation' of same transactions at the hands of payer and payee, by invoking the 'harmonious rule of interpretation'?

3. The appellant is acting as an agent of colleges in Australia and other countries for sending the students abroad. She has been charging commission from the students. The appellant filed the Income Tax Return for assessment year 2009-10 on 29.09.2009 declaring income of Rs.96,26,030/-. During the relevant year, the appellant earned commission of Rs.1,78,17,732/- by sending the students abroad. Expenses to the extent of Rs.81,30,000/- were claimed as commission paid to the persons who referred the students to the appellant. The case was taken up for scrutiny. A notice under Section 143(2) of the Act and questionnaire were issued on 27.08.2010 and 25.04.2011. The Assessing Officer (A.O.) directed the appellant to supply the complete list of the students sent abroad by her along with their addresses. The list was not supplied by stating that hard disk of computer containing the relevant data had crashed. The A.O. was not convinced and disallowed 50% of expenses claimed i.e. commission paid by the appellant. Apart from other additions, A.O. made an addition of Rs.40,65,000/- vide assessment order dated 26.12.2011.

4. Aggrieved of the assessment order, an appeal was filed before the Commissioner of Income Tax (Appeals) [for short 'CIT (A)].

5. In appeal proceedings, after availing two opportunities, the appellant was able to produce only 21 persons out of 43 to whom commission paid was claimed as expenses. The CIT(A) partly allowed the appeal vide order dated 04.08.2014 but disallowance of 50% of expenses of commission paid was upheld. The relevant portion of the order of the CIT (A) is reproduced below:

" On careful consideration of the rival contentions, I am of the opinion that the assessee has absolutely failed to prove that the recipient of commission has actually rendered any service to the assessee. None of the 42/13 recipients of commission could tell the complete particulars of even a single student which they have referred to the assessee what to talk of all the students. The assessee has also not provided any details of the students along with their complete postal address on the plea that the data in respect of the students saved in computer hard disc has been destroyed. In my considered opinion, the admission by the recipient of commission will not alter the position as it will not prove that these persons have actually rendered any service to the assessee unless and until it is cross verified from the students who have been sent abroad or their legal representatives. No independent verification in respect of the persons who have referred the students to the assessee can be made in the absence of relevant details of students which the assessee failed to provide. The commission has also been found to be paid to different persons of the same business family which is also a very peculiar situation. It is also interesting to note that all the persons of a family have given similar reply in their statements. In spite of repeated requests made by the Assessing Officer, the assessee could not provide the desired details of students from whom independent verification can be made with regard to services rendered by the recipient of commission. The recipients of commission who were examined by the Assessing Officer have also failed to provide the complete particulars of the students who were referred by them to the assessee. The audit report is also not reliable as the payment of commission to the specified persons has not been mentioned in the report. The assessee has also paid commission to her daughter who was a student at the relevant time. The basis question which is required to be answered is that as to whether the recipient of commission has rendered any service to the assessee?

The question remained unanswered even during the course of appellate proceedings. Not a single payee of commission could tell the complete particulars of even a single student. The confirmations filed by all of the recipients of commission are stereo-typed. In my opinion, any payment cannot be allowed as expenses unless and until it is made for the purposes of the business. In the case of the assessee, it has not been proved that the payment of commission is for the purposes of the business of the assessee as it has not been established that the recipient of commission has actually rendered any service to the assessee in lieu of receipt of commission. In view of these facts and in the circumstances of the case, I am of the considered opinion that the assessee has absolutely failed to prove that the recipient of commission have actually rendered any service to the assessee in lieu of receipt of commission. It cannot also be said that there is no loss to revenue. There is certainly a loss to the revenue as commission has been taxed at lower rates in the case of majority of the recipients. Moreover, independent verification from students cannot be made in the absence of relevant details which have neither been provided by the assessee nor by the recipient of commission for the reasons best known to assessee. In my further opinion, the relevant details in respect of students were not provided just to thwart further verification at the end of Assessing Officer. I also endorse the view of the Assessing Officer that the books of amount maintained by the assessee are not reliable as these do not contain even the basic data with regard to complete particulars of students who have been sent abroad."

6. Further appeal was filed before the Tribunal. The Tribunal vide order dated 24.06.2016 dismissed the appeal. Relevant portion of the order of Tribunal is quoted below:

"8. We have heard the rival parties and have gone through the material placed on record. We find that it is an undisputed fact that the recipients of commission had accepted to have received the amounts from assessee. The assessee has been claiming before authorities below that she used to pay Rs.20,000/- per student for any referral by any person but neither the assessee nor the recipients of commission were able to reveal the names and addresses of students for whom the commission was paid. Since, assessee had credited the amounts at the close of year she must be having some record for the purpose of calculation of commission

payable to each person as in the absence of this information how she could have credited the amounts of Rs.7,00,000/- onwards which relates to more than 35 students when calculated @ Rs.20,000/- per student and how the recipients of such huge amounts remembered the amount of commission to be received in the absence of any record. The failure of the assessee and recipients to provide such information itself creates doubt about the genuineness of such expenditure. The commission amount credited in the accounts of various persons ranges from Rs.20,000/- to Rs.10,20,000/-. In some cases the figure of commission to a particular person is Rs.7,00,000/-, Rs.7,50,000/- and Rs.10,20,000/- Therefore to give credit of these amounts at the close of year in the accounts of payees @ Rs.20,000/- per student there must have been some record available with the assessee or with the payees. Therefore, the incurrence of such huge expenditure was not established by assessee. The assessee though had paid the amounts in subsequent years but that does not mean that this was an expenditure of the assessee as assessee could not prove the genuineness of expenditure. The payment of expenditure through cheques and deduction of tax therefrom does not necessary mean that assessee had incurred the expenditure. The Hon'ble Gauhati High Court in the case of Assam Pesticides and Agro Chemicals vs. CIT 227 ITR 846 has held that mere payment does not entitle the assessee to deduction unless it is proved that the payment was for business considerations. The assessee might have booked this expenditure to reduce the incidence of taxation by distributing the income in the hands of other persons having lower bracket of tax as the payees are individuals. We also observe from the findings of Id. CIT(A) that assessee had paid commission to the husband, daughter and other close relatives of assessee. From the findings of authorities below we also find that the commission was paid to different members of a family. For example a commission of Rs.4 lacs has been paid to members of Malhotra family all living at 24 Defence Colony, Jalandhar. Similarly, an amount of Rs.5,60,000/- has been paid to three members of Kapoor family living at 131-A New Jawahar Nagar, Jalandhar. Similarly, an amount of Rs.3,20,000/- has been paid to Gupta family living at 25, Golden Colony, Phase-I, Deep Nagar, Jalandhar Cantt. Further an amount of Rs.3,00,000/- has been paid to Khanna family living at H. No.423/C, Street No.10, Near Samsung Service Station, Jalandhar and Rs.17,20,000/- has been paid to Sud Family living at Civil Lines, Jalandhar.

9. Therefore, all these facts and circumstances prove that assessee had not incurred this expenditure for the purpose of business and therefore, were not allowable."

7. Hence, the present appeal by the appellant-assessee.

8. Learned counsel for the appellant contended that the Tribunal erred in dismissing the appeal as the assessee was able to substantiate the commission paid by her. He further argued that the authorities failed to carry out independent verification of the students sent abroad. On the other hand, learned counsel for the revenue urged that the authorities have recorded findings of fact and no substantial question of law as claimed arises.

9. The contentions raised by learned counsel for the appellant is not well founded.

10. The appellant claimed that she had paid commission for referring the students to her. The details of the students sent abroad was withheld on the ground that hard disc of the computer had crushed. No account was produced to substantiate that the record was being kept as to how much commission was paid to each of the persons, especially when the commission was paid on last day of the year. In spite of the opportunities provided by the CIT(A) also the assessee was able to produce only 21 persons out of 43 who had received the commission. The recipients of commission, who appeared in the proceedings, were not able to give detail even of a single student which they had referred to the appellant. The deduction of TDS and payment made by cheque in itself would not be sufficient for claiming the deduction when even prima-facie business consideration for the amount paid was not proved. It is pertinent to note that the commission had been paid to the husband and daughter of the assessee

and to the members of the families of certain persons who were neither connected with education nor were engaged in sending students abroad.

11. It would be appropriate to note that despite failure of the appellant to substantiate the claim of expenses, the Assessing Officer disallowed only 50% of the expenses paid as commission.

12. The contention of learned counsel for the appellant that the authorities could have done independent verification from the students, cannot be accepted. On failure of assessee to provide the relevant details like father's name, postal address etc, it was not possible for the A.O. to have undertaken any such verification.

13. All the three authorities below have recorded consistent findings of fact for disallowance of 50% of the commission claimed as expenses. The appellant has failed to show any infirmity in the findings of fact recorded much less to prove perversity. The order passed by the Tribunal warrants no interference.

15. No substantial question of law arises in the present appeal.

16. The appeal is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

29.08.2018
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Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No