

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/449/2004
RAMESH KUMAR NANGALIA KARTA (HUF)
VS.
COMMISSIONER OF INCOME TAX-XVI, KOLKATA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : SEPTEMBER 9, 2022.

Appearance:
Mr. Ananda Sen, Adv..
... for appellant
Mr. Prithu Dudhuria, Adv..
...for respondent

The Court:- This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 24th September, 2003 passed by the Income Tax Appellate Tribunal "C" Bench, Kolkata (Tribunal).

The assessee has raised the following substantial questions of law for consideration.

1. Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in law in not appreciating that all the necessary particulars for verification of the allowability of the claim of deductibility of the Commission payment in computation of income were found out and verified in the order of the First Appellate Authority, that is the Commissioner of Income Tax [Appeals] and whether the Tribunal was justified in law in upholding the disallowance of claim for deduction of the Commission payment made by the Assessing Officer and whether the finding arrived at was perverse ?

2. Whether, on the facts and in the circumstances of the case, the order of the Tribunal was perverse, in so far as, it completely ignored the satisfaction recorded by the Commissioner of Income Tax [Appeals] in his order about the due discharge of onus by the Assessee before the Assessing Officer in the matter of furnishing all necessary particulars in support of claim of deduction of commission payment for which the onus shifted, thereafter, to the Assessing Officer which the Assessing Officer failed to discharge ?
3. Whether, on the facts and in the circumstances of the case, the order of the Tribunal was correct in the ignoring non-rejection of the books of account by the Assessing Officer and the fact that the persons, to whom Commissions were paid, were Income Tax Assesseees for which the claim of payments were verifiable and the payment were assessed in their hands ?
4. Whether in view of the fact that the agreement entered into by the appellant with different parties for agency service and the said agreement being never questioned and also genuineness being not in dispute and payments have been also actually made by account payee cheques by different parties whose identities are not in dispute, the commission paid to the different parties for the services rendered in terms of the said agreement was lawfully disallowed by the Tribunal and whether such disallowance is without any material and/or evidence and is otherwise unreasonable and perverse merely because there were alleged discrepancies in the two letters arising out of typographical errors ?

The present appeal was initially filed by the assessee against the order passed by the Tribunal dated 29th April, 2004, which is an order which was passed under Section 254(2) of the Act. Subsequently, the assessee sought leave of this Court to file the appeal challenging the main order passed by the Tribunal and the Division Bench by order

dated 11th May, 2015 granted leave to the appellant to challenge the main order passed by the Tribunal dated 24th September, 2003, subject to payment of costs. The cost has been remitted and the assessee has filed a supplementary affidavit dated 12th July, 2022 challenging the main order passed by the Tribunal and the said affidavit is taken on record.

We have heard Mr. Ananda Sen., learned Advocate appearing for the assessee/appellant and Mr. Prithu Dudhoria, learned standing Counsel for the respondent/revenue.

The question involved in the instant case is whether the commission paid by the assessee to various agents was allowable as deduction under Section 37 of the Act. The assessee during the course of assessment proceedings supplied the relevant details about the payment of commission, explained the nature of services rendered by the commission agents, relevant bills and vouchers were also produced, the payments which were made through account payee cheques were also furnished and the assessing officer did not find any defect in the books of accounts nor rejected the same. On the contrary, to examine the genuineness of the claim of the assessee summons were issued under Section 131 of the Act and statements were recorded from the *Karta* of the assessee who had in clear terms stated above the circumstances under which the commission was paid to various companies for not only the purpose of securing the materials but also for rendering the services of recovering payments and facilitating the business activities of the assessee. However, the assessing officer took up a few of the transactions and held that the payment made by the assessee were not in connection with the business and profession of the assessee but for some other reasons and, therefore, the claim was held to be not tenable. The assessee preferred appeal before *COMMISSIONER OF INCOME TAX (APPEALS) 17, KOLKATA [CIT(A)]* contending that full particulars of the commission agents of purchase and sales were provided to the assessing officer at the time of

hearing, all the payments were made through account payee cheques of the thirteen commission agents, who procured business for the assessee were being income tax assessee and PAN numbers were available with the income tax officers. The books of accounts produced before the assessing officer and more particularly the payment of commission was not unique assessment year under consideration but has been paid in the previous years and the subsequent years, which were never disallowed by the assessing officer. The CIT(A) after considering the evidence placed before it was satisfied that the payments effected by the assessee were in the nature of commission and accordingly reversed the order passed by the assessing officer.

Aggrieved by the same, the revenue preferred the appeal before the learned Tribunal.

On perusal of the order of the learned Tribunal we find that the argument made by the revenue as well as the assessee has been elaborately set out and the documents which were made available before Tribunal were also examined. However, the Tribunal took up for consideration only one transaction with M/s Hi-Tec Coir Foam and in our view has made a hair splitting exercise and disbelieved the payment of commission on the ground that the assessee has failed to prove or establish that M/s. Hi Tec Coir Foam had actually rendered services to the assessee. In respect of other commission agents the Tribunal has not discussed the facts which are already on record. The legal position being that the initial burden is on the assessee to establish that payments were in the nature of commission. In the previous paragraphs we have set out as to what are the records which were produced before the assessing officer as well as before CIT(A). None of the records, documents, books of accounts were disputed by the assessing officer rather accepted. In such circumstances, the burden of proof shifts to the revenue and it is for the revenue to establish that payments which have been made by the assessee

were not in the nature of commission. This has not been done by the revenue in the case on hand.

At this juncture, it would be relevant to take note of the decision of the Hon'ble Supreme Court in *ALUMINIUM CORPORATION OF INDIA LTD. V. COMMISSIONER OF INCOME TAX* [1972] 86 ITR 11 (SC), wherein the Hon'ble Supreme Court after noting the decision in *SWEDESH COTTON MILLS CO. LTD. Vs. COMMISSIONER OF INCOME TAX*, [1967] 63 ITR 57 (SC) and the decision in *COMMISSIONER OF INCOME TAX V. WALCHAND & CO. (P) LTD.* [1967] 65 ITR 381 (SC) held that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue. The Rule laid down in the decision of *WALCHAND & CO. (P) LTD.*(*supra*) was followed by the Hon'ble Supreme Court in *J.K. WOOLLEN MANUFACTURERS V. COMMISSIONER OF INCOME-TAX*, [1969] 72 ITR 612 (SC).

In *COMMISSIONER OF INCOME TAX V. HEWITT ROBINS (NEW YORK)*, [1982], 9 *Taxman* 250(CAL) the Division Bench of this Court confirmed the order passed by the Tribunal which held that the commission paid to those two companies was but reward for the assistance rendered by them in securing the contracts and since the payment of such commission was incidental to the assessee's business which consisted in taking up contracts and executing them as no-profit making machinery was set up or any advantage or asset by an enduring nature came into existence as a sale of those payments and those payments were not a condition precedent to the assessee executing the contracts and earning profits therefrom and accordingly held the payments to be of revenue in nature. In *Landis + GYR Ltd. vs. Commissioner of Income Tax, Kolkata-I*, (2017) 77 *taxmann.com* 253(Cal.) the Division Bench of this Court went one step ahead and held that where agents procured orders for the assessee and made themselves liable

to recover price of goods sold by them, the commission paid to them would be liable as deduction under section 37 of the Act.

We need to point out that as against the said decision, the revenue has preferred appeal before the Hon'ble Supreme Court and leave has been granted as reported in *(2018) 97 taxmann.com 140 (SC), Commissioner of Income Tax, Kolkata-I vs. Landis + GYR Ltd.* Thus, the commercial expediency, the nature of business activity done by the assessee, are all to be taken into consideration while examining the nature of payment which has been effected.

The assessee in no uncertain terms has stated that apart from facilitating procuring of raw material, the agents also facilitated in securing speedy payment to the assessee. This factor has not been taken note of by the Tribunal, which, in our opinion, is a very vital factor to decide the sustainability of the claim of the assessee. That apart, the Tribunal was of the view that most of the companies with which the assessee had business transactions were all Government of India concerns. However, the Tribunal has failed to note that the Assessing Officer has noted the names of all the 13 customers with whom the assessee had transactions and many of them are private limited companies and are not government entities. Thus, when the payments made by the assessee were for the purpose of procuring the business and to get the supplied items to be ensured that they have delivered to the customers and arrangement for speedy payment, the payment is in the nature of commission. That apart, for the earlier and subsequent assessment years the payments were never disallowed by the Assessing Officer.

Thus, we find the learned Tribunal committed an error in reversing the order passed by the CIT(A).

For the above reasons, the appeal filed by the assessee is allowed.

The order passed by the learned Tribunal is set aside and the order passed by the CIT(A) stands restored and the substantial questions of law are answered in favour of the appellant/assessee.

Consequently, the order passed by the Learned Tribunal dated 29th April, 2004 also stands set aside.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)