

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ "डी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN (AM) AND SANJAY GARG, (JM)
सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं श्री संजय गर्ग, न्यायिक सदस्य के समक्ष

आयकर अपील सं./I.T.A. No.5920/Mum/2013
(निर्धारण वर्ष / Assessment Year : 2010-2011)

Income Tax Officer-25(3)(2), C-11, Room No.306, Pratyakshakar Bhavan, Bandra-Kurla Complex, Bandra (E), Mumbai-400051.	बनाम/ Vs.	Shri Deepak Popatlal Gala, 13, Laxmi Villa Bunglow, Thakur Complex, Opp.Police Stn. Kandivali (E), Mumbai-400067
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.6203/Mum/2013
(निर्धारण वर्ष / Assessment Year : 2010-2011)

Shri Deepak Popatlal Gala, 13, Laxmi Villa Bunglow, Thakur Complex, Opp.Police Stn. Kandivali (E), Mumbai-400067	बनाम/ Vs.	Income Tax Officer-25(3)(2), C-11, Room No.306, Pratyakshakar Bhavan, Bandra-Kurla Complex, Bandra (E), Mumbai-400051
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACPG5768P

अपीलार्थी ओर से / Revenue by	Shri Love Kumar
प्रत्यर्थी की ओर से/ Assessee by	Shri Bhupendra Shah

सुनवाई की तारीख / Date of Hearing : 11.3.2015
घोषणा की तारीख /Date of Pronouncement :27. .3.2015

आदेश / O R D E R

Per B.R.BASKARAN, Accountant Member:

These cross-appeals are directed against the order dated 22.07.2013 passed by the Id. CIT(A)-35, Mumbai and they relate to assessment year 2010-11.

2. The assessee is aggrieved by the decision of Id. CIT(A):
 - a) in confirming the disallowance of export commission;
 - b) in deleting the interest u/s 234B, 234C and 234D and setting aside the initiation of penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 (the Act).
3. The Revenue is also in appeal in respect of following issues :
 - a) Allowing interest expenditure claimed against the house property income;
 - b) Deleting the addition made u/s 69C of the Act relating to purchases.
4. We have heard the parties and perused the records. The assessee is a wholesaler in hardware items. He filed his return of income for the year under consideration declaring a total income of Rs.14.06 lakhs. However, the AO computed the total income at Rs.70.50 lakhs. In the appellate proceedings, the assessee got partial relief and hence both the parties are in appeal before us in respect of the issues cited above.
5. We shall first take up the appeal filed by the assessee. The first issue relates to the disallowance of export commission of Rs.14.39 lakhs claimed by the assessee. The AO noticed that the assessee has not deducted tax at source on the commission expenses claimed by him. It was noticed that the commission payment was made to one Shri Pinkesh Gala. The AO asked the assessee to furnish the details of commission paid along with the details of services rendered by the agent and also the reasons for not deducting the tax at source. The assessee submitted that the Shri Pinkesh Gala is a non-resident and he is operating from outside India. Further, it was submitted that the agent does not have any permanent establishment in India. Accordingly, it was submitted that the

commission income did not accrue to Shri Pinkesh Gala in India and hence it is not taxable in his hands in India. Accordingly, it was submitted that there was no requirement to deduct tax at source from the payment made to Shri Pinkesh Gala. However, the AO took the view that the commission agent has earned income from business connection in India and further the AO also invoked Explanation-II given below to Section 195 of the Act. Accordingly, the AO took the view that the assessee should have deducted tax at source from the Commission payment and since there was failure to do so, he disallowed commission expenditure of Rs.14.39 lakhs by invoking the provisions of section 40(a)(i) of the Act. The AO also placed reliance on the decision rendered by Authority for Advance Ruling in the case of M/s SKF Boilers and Driers Pvt.Ltd. The Id.CIT(A) also confirmed the same.

6. Before us, the Id. AR placed reliance on the decision of Mumbai Bench of the Tribunal in the case of M/s Indo Industries Limited V/s ITO in ITA No.183/Mum/2014 (AY-2010-11) dated 14.11.2014, wherein the Tribunal has held that commission paid to the agents located outside India does not require deduction of tax at source. We notice that the co-ordinate Bench of the Tribunal has followed the decision rendered by the Hon'ble Delhi High Court in the case of EON Technology Pvt Ltd (343 ITR 366) (Del) and also the decision rendered by the Hon'ble Supreme Court in the case of GE India Technology Centre Private Limited reported in 327 ITR 456 (SC). On the other hand, the Ld D.R placed strong reliance on the order of the Ld CIT(A) and also submitted that the assessee has failed to furnish the details relating to alleged commission payment.

7. The Hon'ble Supreme Court in the case of GE India Technology Centre Private Ltd (supra) has made it clear that the TDS is required to be deducted from the payments made to a non-resident, only if any part of

the payment is chargeable to tax in India. Hence, there should not be any confusion over the principles that were discussed by Hon'ble Supreme Court on this issue. The said principles have to be applied to the facts prevailing in a particular case. However, we notice that the assessee has failed to furnish the details relating to commission payments and the services rendered by the agent to the assessee. In the absence of such details, one cannot ascertain about the nature of payment, whether Shri Pinkesh Gala has rendered services from outside India, whether the commission payment is chargeable as income in his hands in India. Without ascertaining about the nature of payment, it would be difficult to apply the Circulars of CBDT and also the decisions of Hon'ble Supreme Court or High Courts or Tribunal. Accordingly, we are of the view that this issue requires fresh examination at the end of the AO. Accordingly, we set aside the order of Id. CIT(A) on this issue and restore the same to the file of the AO with a direction to examine the same afresh by considering about the applicability of the decisions referred supra to the facts prevailing in the instant case. The assessee is also directed to furnish all the details relating to expenditure that may be called by the AO.

8. The issue relating to charging of interest under the provision of the Act is consequential in nature and the issue relating to initiation of penalty proceedings is premature and hence they do not require any adjudication at this juncture.

9. In the appeal by the Revenue, the first issue relates to the allowance of interest of Rs.1,50,000/- claimed by the assessee against the House property income. The assessment order shows that the assessee has agreed for the disallowance of the interest so claimed, since it was pointed to him by the AO that the housing loan was not taken in respect of house against which the interest expenditure was claimed. However, the

Id. CIT(A) has allowed the claim without looking into the above facts. Once agreed, the assessee cannot be considered to be aggrieved by the said addition. Accordingly, we set aside the order of the Id. CIT(A) on this issue and restore the addition made by AO.

10. The next issue relates to disallowance made out of purchases and assessed u/s 69C of the Act. We heard the parties and perused the record. The total purchase expenditure claimed by the assessee during the year under consideration was Rs.7,36,27,555/-. The AO noticed that the Sales Tax Department of Government of Maharashtra has listed out names of certain dealers, who were alleged to have been providing accommodation entries without doing actual business. The AO noticed that the assessee made purchases to the tune of Rs.38.69 lakhs from two parties named M/s Umiya Sales Agency Pvt Ltd and M/s Mercury Enterprises, whose names found place in the list provided by the Sales Tax Department. The AO placed full reliance on the enquiries conducted by Sales Tax Department in respect of the parties, referred above. Accordingly, the AO took the view that the purchases to the tune of Rs.38.69 lakhs have to be treated as unexplained expenditure. Accordingly, he assessed the same u/s 69C of the Act.

11. The Id. CIT(A) deleted the addition and hence the Revenue is in appeal before the Tribunal.

12. The Id. DR strongly placed reliance on the order of Assessing Officer.

13. On the other hand, the Id. AR submitted that the additions made in the case of some other assesses on identical reasons have been deleted by the Co-ordinate Benches of the Tribunal in the following cases :

- a) Ramesh Kumar and Co V/s ACIT in ITA No.2959/Mum/2014 (AY-2010-11) dated 28.11.2014;
- b) DCIT V/s Shri Rajeev G Kalathil in ITA No.6727/Mum/2012 (AY-2009-10) dated 20.8.2014; and
- c) Shri Ganpatraj A Sanghavi V/s ACIT in ITA No. 2826/Mum/2013 (AY-2009-10) dated 5.11.2014

In all the above said cases, the Co-ordinate Benches of the Tribunal has held that the AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case also, the assessing officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. We notice that the Id.CIT(A) has taken note of the fact that no sales could be effected without purchases. He has further placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of CIT Vs. M.K. Brothers (163 ITR 249). He has further relied upon the decision rendered by the Tribunal in the case of ITO Vs. Premanand (2008)(25 SOT 11)(Jodh), wherein it has been held that where the AO has made addition merely on the basis of observations made by the Sales tax dept and has not conducted any independent enquiries for making the addition especially in a case where the assessee has discharged its primary onus of

showing books of account, payment by way of account payee cheque and producing vouchers for sale of goods, such an addition could not be sustained. The Ld CIT(A) has also appreciated the contentions of the assessee that he was not provided with an opportunity to cross examine the sellers, which is required to be given as per the decision of Hon'ble Kerala High Court in the case of Ponkunnam Traders (83 ITR 508 & 102 ITR 366). Accordingly, the Ld CIT(A) has deleted the impugned addition. On a careful perusal of the decision rendered by Ld CIT(A) would show that the first appellate authority has analysed the issue in all angles and applied the ratio laid down by the High Courts and Tribunals in deciding this issue. Hence, we do not find any reason to interfere with his order on this issue.

14. In the result the appeal of the revenue is partly allowed and the appeal of the assessee is treated as partly allowed for statistical purposes.

Pronounced accordingly in the open court on 27th Mar, 2015.

घोषणा खुले न्यायालय में दिनांक: 27th March, 2015 को की गई ।

Sd

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(संजय गर्ग/SANJAY GARG)

(बी.आर.बास्करन / B.R. BASKARAN)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai: 25th March, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai