

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 2359/Del/2017
(Assessment Year: 2012-13)

M/s. New Delhi Tyre House, 31-32, Jungpura Extn, Market, New Delhi PAN: AAAFN2881J	Vs.	ACIT, Circle-54(1), New Delhi
(Appellant)		(Respondent)

ITA No. 3218/Del/2017
(Assessment Year: 2012-13)

ACIT, Circle-54(1), New Delhi	Vs.	M/s. New Delhi Tyre House, 31-32, Jungpura Extn, Market, New Delhi PAN: AAAFN2881J
(Appellant)		(Respondent)

Assessee by :	Shri KVSR Krishanan, CA
Revenue by:	Shri S. S. Negi, Sr. DR
Date of Hearing	07/04/2021
Date of pronouncement	16/04/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assessee as well as Ld ACIT circle 54 (1) New Delhi for assessment year 2012-13 against order of the CIT appeals – 18 New Delhi dated 15 2 2017.
2. The assessee has raised the following grounds of appeal in ITA No. 2359/Del/2017 for Assessment Year 2012-13:-

- “1. The Ld. CIT(A) has erred in law and on facts in disallowing a sum of Rs 7,00,000/- paid as commission to Mrs. Inderjeet Kaur and Smt. Parvinder Kaur. The appellant contends that it has provided sufficient evidences justifying the claim for allowability as allowable business expenditure.
2. The Ld. CIT(A) has erred in law and on facts in confirming the addition of Rs. 2,27,250/- being creditor unconfirmed. The appellants contends

there is no cessation of liability nor any unilateral entry of writing off. The liability still exists. Therefore the addition should be deleted.

3. *The Ld. CIT(A) has erred in disallowing a sum of Rs. 1,75,679/- being 1/10 of expenses incurred in the business of appellant. Ld. CIT (A) has disallowed the expenditure based on his own assumptions and presumptions without any evidence for non-business purposes. Hence, the addition of Rs. 1,75,679/- made by the AO should be deleted.'*
 4. *Without prejudice to Ground No.3, .disallowance of 1/10 of expenses incurred in the business of the appellant is excessive.*
 5. *The above grounds are independent and without prejudice to one another.”*
3. The revenue has raised the following grounds of appeal in ITA No. 3218/Del/2017 for Assessment Year 2012-13:-
- “1. *Whether on the facts and circumstances of the case, in respect of the addition of Rs. 2,19,48,840/- wherein the assessee has not passed any entry through P&L A/s and has directly shown the payment received in the balance sheet. The Ld. CIT (A) has erred in not appreciating that closure of the appellate proceedings the assessee has neither paid to the sub-dealer nor has returned back to the M/s Exxon Mobil. The only part of the receipt which has not been paid was added to the income of the assessee.*
 2. *Whether the directions given by the ld.CIT (A) to AO as regards examination of discharge of liability in the form of payment to the sub-dealers back to the Exxon Mobil, would come into the category of setting aside of the matter which does not comes under the purview of powers of the Ld. CIT(A) u/s 251 of the IT Act, 1961.*
 3. *The Ld. CIT(A) has erred in specifying the time period which is to be considered as subsequent period as enough time has already passed after making assessment.”*
4. Brief facts of the case shows that the assessee is a firm engaged in the business of trading in auto parts, accessories, and lubricants. It filed its return of income on 29.09.2012 declaring income of Rs. 1,12,83,346/-. The case of the assessee was selected for scrutiny and consequently the assessment order u/s 143(3) of the Act was passed on 23/03/2015.
5. The ld AO made the following disallowances:-
- a. Disallowances of Rs. 7,00,000/- paid as commission to Ms Parminder Kaur and Ms Inderjeet Kaur whom commission is paid by assessee but AO has stated that those parties have not done any work for the assessee and the alleged commission was paid only to reduce the taxable income of the assessee. No written agreement was entered into and both the parties were ignorant of the business and mode of

commission payment. Furthermore, the assessee could not produce one of the parties before the AO.

- b. The addition of Rs. 2,19,48,840/- wherein, as per Form Nos. 26AS the assessee was shown to have been received a sum of Rs. 2,90,80,000/- from M/s. Exxonmobil Lubricants Pvt. Ltd on which TDS of Rs. 5,81,600/- was deducted but the above receipt was not found included in the profit and loss account of the assessee. The ld AO after considering MAP agreement (distributor MAP agreement) noted that the payment received is not the liability of assessee to be taken straight way to the balanced sheet and the assessee was not legally obliged to pass on the entire amount received under the agreement to its customers. Therefore the ld AO included the sum of Rs. 2,19,48,840/- to the total income of the assessee from the alleged receipt of Rs. 2,90,80,000/- less the sum of Rs. 71,31,160/- paid by the assessee for marketing of the above product.
 - c. An addition of 2,27,250/- was made on account of amount outstanding in the name of Grace Enterprises from whom assessee failed to file any confirmation. Therefore, the AO held that sundry creditor shown by the assessee is not genuine and hence the above addition was made.
 - d. The assessee has debited Rs. 1,38,359/- as telephone expenses, Rs. 4724044/- on tour and travel expenses, Rs. 9,38,909/- on repairs and maintenance and Rs. 2,07,481/- on depreciation on car. The AO disallowed one-tenth of the total expenditure for personal use by the partners amounting to Rs. 1,75,679/-. The assessment was framed at a total income of Rs. Rs. 3,43,35,120/-.
6. The assessee preferred an appeal before the CIT (A). The ld CIT (A) as per order dated 15/02/2017 admitted certain additional evidence filed by the assessee after obtaining the remand report of the AO as well as the rejoinder filed by the assessee. He confirmed the addition of Rs. 7 lakh commission following the order of the ld CIT (A) in case of the assessee for assessment year 2011-12. With respect to the addition of Rs. 2,19,48,840/- he deleted the addition holding that the assessee is merely a pass-through entity, the incentive is actually payable to the sub dealer, and therefore the assessee is

under an obligation towards this to the sub dealer. He gave a direction to the AO that in subsequent period if such liability are discharged the addition may be deleted. With respect to the addition of Rs. 2,27,250/- with respect to Grace Enterprises he sustained the addition holding that there is a cessation of liability. With respect to the disallowances of one-tenth of the various expenditure following the decision of the CIT (A) for assessment year 2011-12, he confirmed the disallowance. Therefore, the revenue is in appeal against deletion of the addition of Rs. 2,19,48,840/- whereas the assessee is in appeal against the various disallowances confirmed by the CIT (A).

7. First coming to the appeal of the Id AO. The identical issue arose in the case of the assessee where in the co-ordinate bench in ITA No. 3986/Del/2015 and in ITA No. 2421/Del/2015 for assessment year 2011-12 has dealt with the identical issue. The co-ordinate bench has dealt with this issue in para Nos. 4 to 5 of that order dealing with this as under:-

4. Having heard both the sides and gone through the relevant material on record, we find from running account of the assessee with M/s Exxonmobil Lubricants Pvt. Ltd. that it received a sum of Rs. 1,91,65,000/- vide four cheques dated 17.05.2010, 23.07.2010, 16.09.2010 and 30.12.2010. These four amounts were awarded to the assessee under four different distribution MAP Agreements. Copy of the first agreement for a sum of Rs.10.60 lac is available in the paper book, which provides that Exxonmobil Lubricants Pvt. Ltd. wanted to provide the assessee with funds to assist it in marketing of MOBIL and/or ESSO products. Clause 4 of the Agreement provides that: "Distributor (the assessee) shall amortize or repay MAP payment in accordance with the Second Schedule." Clause 6 of the Agreement, which is relevant for our purpose, reads as under:-

"6. Right to demand immediate payment EMLPL may at its option demand immediate payment of an amount equal to the Unamortized Balance multiplied by the Amortization Rate, upon the happening of one or more of the following events:

- (a) If Distributor ceases to trade;*
- (b) EMLPL terminates the Distributor Agreement for any reason;*
- (c) If EMLPL decides in its sole and unfettered discretion not to renew the Distributor Agreement for any reason;*
- (d) If Distributor breaches this Agreement or the Distributor Agreement, and in respect of a breach capable of being remedied, fails to remedy such breach within 7 days of written notice from EMLPL;*

- (e) *If Distributor becomes bankrupt or insolvent, or is unable to pay its debts as they fall due, or enters into any arrangement or composition with its creditors, or has a winding up petition presented against it, or a receiver, receiver/manager or liquidator is appointed, either voluntarily or compulsorily, other than for the purposes of reconstruction; or*
- (f) *If Distributor does not purchase the Annual Target Volume during a Contract year.”*

5. *As per the above clause, Exxonmobil Lubricants Pvt. Ltd., has a right to demand immediate payment if the conditions given hereinabove are violated. First Schedule to the Agreement provides that the effective date of MAP Agreement is 01.06.2010 and the maturity date is 31.05.2011. Similarly, there is next Agreement for Rs.21.25 lac, whose effective date is 1st July, 2010 and maturity date is 30th June, 2011. Similar is the position in so far as the effective and maturity dates of other two Agreements are concerned. Total amount under these four Agreements comes to Rs.1,91,65,000/- , which pertains to part of the year under consideration and the remaining part to the subsequent year. The assessee, in turn, is passing over the amount of incentive given under the MAP Agreement to the sub-distributors at the time of their lifting the goods, which payment, during the year, totaled at Rs.1.29 crore and odd. The remaining amount of Rs.62.03 lac will be adjusted against payment to be made in the subsequent year by the sub-distributors at the time of their further purchase. It is relevant to note that the MAP payment received by the assessee comes with certain conditionalities, such as, the assessee has to provide bank guarantee and there is an obligation to lift the stocks. In case the assessee does not succeed in lifting the stock etc., the proportionate part would not be available to it for onward payment to sub-contractors. The assessee has been consistently following this practice of accounting the amounts under MAP Agreement and the same has been accepted in the assessments completed u/s 143(3) for the two immediately preceding assessment years, namely, 2009-10 and 2010-11. The ld. CIT(A) has recorded a categorical finding to this effect in para 1.6 of the impugned order, which has not been controverted by the ld. DR. In the absence of any factual difference in the manner of receipt, disbursement or accounting of the marketing assistance payment received under the MAP Agreements in the preceding year vis-à-vis the year under consideration, we are satisfied that the ld. CIT(A) rightly appreciated the facts and was justified in deciding this issue in favour of the assessee. We, therefore, uphold the same.”*

8. The coordinate bench has upheld the order of the CIT (A) for assessment year 2011-12 deleting the above additions. Both the parties confirmed that there is no change in the facts and circumstances of the case and the issue is identical. In view of this, respectfully following the decision in assessee's

own case for assessment year 2011-12, we uphold the order of the Id CIT(A) deleting the addition of Rs. 2,19,48,840/-. In view of this, the ground No. 1 and 2 of the appeal of the AO are dismissed.

9. In the result, appeal of the revenue is dismissed.
10. Now we come to the appeal of the assessee
11. Ground no 1 is against the confirmation of disallowance of commission expenditure of Rs. 7 lacs paid to two ladies.
12. The Id AR submitted that the assessee has submitted the payment details, PAN of the recipient and a new fact of the confirmation from the sub-dealer of the assessee that commission was to be paid on their account on sales made to them to two ladies. He therefore submitted that the above commission expenditure has been wrongly disallowed by the lower authorities. He also relied upon the several judicial precedents.
13. The Id DR submitted that for assessment year 2011-12 assessee has paid commission to the same ladies of Rs. 4 lakhs each in that year and after the complete examination of the fact the Id CIT (A) confirmed the disallowances. When the matter reached to the co-ordinate bench, the order of the CIT (A) was confirmed. He submitted that in para 6 and 7 of the order of the ITAT for assessment year 2011-12 in case of the assessee above disallowance is confirmed by ITAT. He stated that the issue is squarely covered against the assessee.
14. We have carefully considered the rival contentions and find that the co-ordinate bench has dealt with this issue in earlier year as per para number 6 and 7 of that order as under:-

“6. Ground No.1 of the assessee's appeal is against the disallowance of a sum of Rs.8 lac paid as commission to Smt. Inderjeet Kaur and Smt. Parvinder Kaur. The assessee claimed to have paid a sum of Rs.4 lac each as commission to two ladies, namely, Smt. Inderjeet Kaur and Smt. Parvinder Kaur, which was debited to the Profit & Loss Account. On being called upon to produce the recipients of the commission, the assessee failed to produce them, which resulted in the disallowance of Rs.8 lac. The Id. CIT(A) upheld the assessment order on this issue.

7. Having heard both the sides and gone through the relevant material on record, it is found that the assessee failed to lead any evidence about the genuineness of transactions of payment to these two ladies. The Id. AR explained the nature of such payments by explaining that some sub-distributors insisted on making payment to these two ladies as a part of

their incentive under the MAP Agreement. It, therefore, becomes manifest that such commission is simply a part of the payment made to the distributors which was received by the assessee under the MAP Agreements from Exxonmobil Lubricants Pvt. Ltd. for onward payment to customers. Since the assessee is neither offering the receipt of incentive ITA Nos.3986 & 2421/Del/2015 from Exxonmobil Lubricants Pvt. Ltd., as income, nor payments made to sub-distributors as expense, a part of such payment, termed as commission, to these two ladies cannot, therefore, cannot have a different shade from the angle of deductibility. It is further observed that the assessee failed to adduce any evidence of rendering of services by these two ladies, which necessitated it to make such payments. We, therefore, uphold the impugned order on this score.”

15. We find that the assessee has paid commission to the same two ladies namely Ms. Inderjeet Kaur and Ms. Paramjit Kaur and assessee failed to lead any evidence about the genuineness of the transaction of payment of commission and any services rendered by them. In that order also the ld AR explaining the nature of payment with same distributors necessitated of making payment to these ladies as part of their incentive under MAP agreement. The coordinate bench also considered the same in para 7. As the co-ordinate bench after examining the facts held that the assessee failed to adduce any evidence of rendering of services by these persons, which necessitated to make such payments and therefore the disallowance was confirmed. We do not find any reason to deviate from the judgment, facts quoted by the ld AR are also duly considered therein. However, in view of any evidence of rendering of any services by the above two persons to the assessee, in absence of any change in facts and circumstances of the case this year, we respectfully following the decision of the co-ordinate bench confirm the disallowances of Rs. 7 lakhs of commission paid to them. In the result, the ground No. 1 of the appeal is dismissed.
16. Ground No. 2 of the appeal is against the confirmation of addition of Rs. 2,27,250/- outstanding in the account of Ms Grace Enterprises. The fact shows that the above amount is outstanding as liability in the books of account of the assessee and it has not been written back. Assessee could not produce the confirmation of those parties. Ld AR the submitted that merely because confirmation is not furnished it does not become a non-genuine creditor. He further submitted that there is no cessation of any

liability and the liability is still exists. He further submitted that provision of section 41(1) does not apply in the case because purchase was duly accounted in the earlier year and there is no cessation of such liability. The Id DR supported the order of the lower authorities.

17. On careful consideration of the facts of the case and the reasons given by the lower authorities, we find that the above amount was outstanding in the books of account of the assessee and assessee could not produce the confirmation of such outstanding sum. Out of several creditors, this was the only party whose confirmation could not be produced. Nonetheless, the fact was not denied that the liability arose on purchase of goods as trading transactions with this party in earlier year and liability still exists. It is not case that assessee has written back the above liability in its books of accounts; it is carried as liability in books. Thus, the liability to pay such sum is accepted by the assessee for this year. There is no evidence that the transaction resulting into credit in the name of the above party pertains to this year, in fact, it pertains to earlier year. Merely because the assessee could not furnish the confirmation of one of the several creditors naturally the liability to pay such party does not ceases to exist. In view of this, we reverse the order of the lower authorities directing the Id AO to delete the addition of Rs. 2,27,250/- outstanding in the name of Ms Grace Enterprises. In view of this, ground No. 2 of the appeal is allowed.
18. Ground No. 3 is on account of confirmation of disallowances out of telephone tours, and other expenses including depreciation on the car stating that involvement of the personal element of the partners of the firm cannot be ruled out. Both the lower authorities have confirmed the disallowances on that account.
19. On careful consideration and after hearing both the parties we find that the Id AO has made an ad hoc disallowances on this expenditure without pointing out any element of such personal expenditure. During the course of assessment, proceedings, the assessee has given complete details to the various queries raised by the AO. Ld AO has failed to point out any evidence of incurring personal expenditure of partners in the books of account of the partnership firm. Thus, the above disallowance made by AO was purely on adhoc basis without any evidences of personal expenditure of

partners claimed as deduction by assessee. The 1d CIT (A) has also confirmed the same without giving any reason. As the adhoc disallowances without any evidence is cannot be upheld, therefore, we reverse the orders of the lower authorities and direct the 1d AO to delete the disallowances of 1/10th of such expenditure of Rs. 1,75,679/-. Thus, ground No. 3 of the appeal is allowed.

20. Ground No. 4 to 7 were not pressed by the assessee and therefore same were dismissed.
21. Accordingly, appeal of the assessee is partly allowed.
22. In the result, appeal of the 1d AO is dismissed and the appeal of the assessee is partly allowed.

Order pronounced in the open court on 16/04/2021.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 16/04/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	16.04.2021
Date on which the typed draft is placed before the dictating member	16.04.2021
Date on which the typed draft is placed before the other member	16.04.2021
Date on which the approved draft comes to the Sr. PS/ PS	16.04.2021
Date on which the fair order is placed before the dictating member for pronouncement	16.04.2021
Date on which the fair order comes back to the Sr. PS/ PS	16.04.2021
Date on which the final order is uploaded on the website of ITAT	16.04.2021
date on which the file goes to the Bench Clerk	16.04.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	