

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “B”: HYDERABAD
(THROUGH VIRTUAL CONFERENCE)**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No. 798/H/2013 Assessment Year: 2009-10		
Income-tax Officer, Ward – 16(2), Hyderabad.	Vs.	M/s Pushpa Ispat Pvt. Ltd., Secunderabad. PAN – AADCP 6115 H
(Appellants)		(Respondent)
Revenue by:	Shri Sunil Kumar Pandey	
Assessee by:	Shri C.P. Rama Swamy	
Date of hearing:	04/02/2021	
Date of pronouncement:	09/04/2021	

ORDER

PER LAXMI PRASAD SAHU, A.M.:

This Revenue’s appeal for AY 2009-10 is directed against the CIT(A) - V, Hyderabad’s order, dated 28/02/2013 involving proceedings u/s 143(3) of the Income Tax Act, 1961 ; in short “the Act”, on the following grounds of appeal:

“1. CIT(A) ought to have not allowed relief to the assessee on payment of commission of Rs. 2,45,40,000 ignoring the remand report which is based on statements of the beneficiaries recorded and evidences gathered during the course of remand proceedings. The CIT(A) erred in not considering the remand report of

the Assessing Officer which is based on facts and evidences.

2. The CIT(A) ought to have considered that the payment of compensation of Rs. 3,05,10,500 between the assessee and the suppliers was only arrangement and speculative in nature. When the statement of the supplier proves beyond doubt that there was no loss to the supplier to make the assessee to pay the compensation.

3. Any other ground that may be urged at the time of hearing."

2. Brief facts of the case are that the assessee company engaged in the business of trading in iron and steel filed its return of income for the AY 2009-10 on 30/09/2009 admitting a total income of Rs. 29,68,550/-. The AO completed the assessment u/s 143(3) of the Act determining the total income of the assessee at Rs. 5,80,19,050/- by making the following additions:

1. Disallowance of compensation claimed of Rs. 3,05,10,500/-
2. Disallowance of commission of Rs. 2,45,40,000/-.

3. When the assessee preferred an appeal before the CIT(A) against the order of AO, the CIT(A) deleted the disallowances made by the AO and allowed the appeal of the assessee.

4. Against the order of CIT(A), the revenue is in appeal before us.

5. As regards the ground no. 1 regarding disallowance of commission of Rs. 2,45,40,000/-, the assessee debited an amount of Rs. 2,45,40,000/- on account of commission paid. On noticing that the recipients are from one family, the AO summoned some of the recipients of the commission and recorded the statements. In such statements, one Sri Arvind Kedia, brother-in-law of director of the assessee company stated that he could not explain the specific services rendered by him and his family members. The AO found that the recipients of commission hail from Bangalore and the supplies made by the assessee are to the parties in Raipur, Bhilai and places not close to Bangalore. The AO opined that how the persons sitting in Bangalore can get orders for the assessee at Hyderabad. In view of the above observations, he held that the claim is far from truth and concluded that the assessee failed to produce any evidence that the commission agents rendered any services in course of business and the assessee failed to furnish any evidence with regard to TDS deduction on these commission payments. He accordingly, disallowed the entire claim of Rs. 2,45,40,000/-.

6. Before the CIT(A), the assessee furnished detailed addresses of all the persons to whom commission was paid and also the evidences in support of deduction of TDS on

the commission payments along with the copies of returns filed by persons related to the Director of the assessee company. It was accordingly claimed that the payment of commission is genuine and the same be allowed.

7. As the said evidences were not filed during the assessment proceedings before the AO, the CIT(A) forwarded the same to AO for his comments. In the remand report, the AO stated that all the replies from the commission recipients are stereo-typed, they have not done any such business either before or after this transaction. When the remand report was put before the assessee, it was contended that they have deducted TDS on all the payments they made to their family members and these persons have admitted such receipts in their income tax returns and accordingly claimed that the payment of commission to these persons cannot be doubted.

7.1 After considering the submissions of the assessee as well as remand report of the AO, the CIT(A) directed the AO to delete the addition of Rs. 2,45,40,000/- by observing as under:

"7.3 I have gone through the assessment order, submissions of the appellant and remand report. From the evidences filed by the appellant, I find that the doubts raised by the Assessing Officer in his assessment order over the genuineness and purpose of payment of commission were properly answered. The family

members of the appellant have admitted to have received the commission, shown this commission in their return of income along with claims of TDS made by the appellant. As regards the purpose, it was submitted by recipients that as they are relatives to the Director of the company, they helped the company in getting credit purchases and not. sales as opined by the Assessing Officer. Since the purpose and the genuineness of payment of commission was proved beyond doubt, I do not find any reason in the action of the Assessing Officer to disallow the entire claim of commission payment by referring to six recipients of commission, who are relatives to the Director of the company. Accordingly, I direct the Assessing Officer to delete the addition of Rs. 2,45,40,000/-."

8. Before us, the ld. DR relied on the order of AO and submitted that the CIT(A) ignored the remand report submitted by the AO which is based on statements of beneficiaries recorded and evidences gathered during the course of remand proceedings and allowed relief to the assessee by not considering the remand report, which is not proper.

9. On the other hand, the ld. AR of the assessee besides relying on the order of the CIT(A) submitted that the assessee substantiated its claim by filing all the evidences before the CIT(A) and, therefore, CIT(A) after considering the same, directed the AO to delete the addition.

10. After considering the submissions of both the parties and perusing the material on record as well as the orders of revenue authorities, we observe that in the remand report the AO stated all the replies from the commission recipients are stereo-typed, they have not done any such business either before or after this transaction. The important aspect the CIT(A) missed while directing the AO to delete the addition is that he ignored the remand report submitted by the AO which is based on the statements of beneficiaries recorded and evidences gathered during the course of remand proceedings. In this connection, we refer to the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More, 72 ITR 807 SC. For the sake of clarity we extract the full judgment of the Hon'ble Apex Court as under:

"1. Durga Prasad More--hereinafter called "the assessee"--was assessed by the Income-tax Officer, Calcutta, to tax under the [Indian Income-tax Act](#), 1922, in the assessment year 1945-46 in the status of individual resident and ordinarily resident in British India. In proceedings for reassessment of the income of the assessee, the Income-tax Officer added to the total income of the assessee for the assessment year 1945-46 an amount of Rs. 2,20,000 remitted from Nawalgarh in Rajasthan--then without British India--by three demand drafts to Calcutta in the months of February and March, 1944. The plea of the assessee that the three demand drafts represented the assessee's cash balance which was sent from Calcutta in November, 1941, and was brought back in the months of February and March, 1944, was disbelieved. The order of the Income-tax Officer was affirmed by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal, Calcutta Bench 'A'. The High Court of Calcutta answered the following questions :

"(1) Whether there was any evidence on record to sustain the finding of the Tribunal that the said sum of Rs. 2,20,000 remitted from Nawalgarh to Calcutta during the year of account constituted income from some undisclosed sources ?

(2) Whether the Tribunal was entitled to reject the evidence on behalf of the assessee on mere scepticism instead of any tangible evidence to support its findings ?"

2. Submitted by the Tribunal under [Section 66\(2\)](#) of the Income-tax Act, 1922, in the negative. The Commissioner of Income-tax has appealed to this court against the order of the High Court on the first question. The High Court recorded their answer on the second question in favour of the Commissioner and no appeal has been filed by the assessee against that order, and nothing more need be said in this appeal in that behalf.

3. Before the Income-tax Officer the assessee had contended that he had in November, 1941, a large cash balance in his Calcutta business and out of that balance he had transferred Rs. 3,00,000 to Nawalgarh. The reasons for the transfer according to the assessee were: (1) that there was a scare of Japanese invasion; and (2) that proceedings for recovery of a large amount of tax due by the firm of Messrs. Ram Sahaymal More--an unregistered firm--which the assessee was a partner were initiated by the income-tax authorities in the year 1941. The Income-tax Officer on a review of the evidence disbelieved the plea of the assessee and observed that "in the circumstances of the case, the three amounts aggregating to Rs. 2,20,000 not recorded in Calcutta books of account" represented "profits of undisclosed business activity in British India", and were on that account liable to be taxed as income of the assessee in the assessment year 1948. The order of the Income-tax Officer was affirmed by the Appellate Assistant Commissioner. He observed :

"As the assessee has failed to discharge the onus of proving satisfactorily that the remittances formed really a part of the cash balance as shown in the Calcutta account, the Income-tax Officer was perfectly justified in treating the sum of Rs. 2,20,000 as income from undisclosed source."

4. In appeal to the Tribunal, the order passed by the Appellate Assistant Commissioner was confirmed, after rejecting the case of the assessee that the amount of Rs. 2,20,000 was part of the cash balance on hand. The Tribunal recorded its conclusion as follows :

"In these circumstances we agree with the department in holding that the assessee has failed to prove the source of the money from which he made

the remittances under consideration. The amount has been rightly held to be an income from some undisclosed sources."

5. In the opinion of the High Court the Tribunal had "ample justification in holding" that the receipt of Rs. 2,20,000 was "profit from undisclosed source". But the High Court proceeded to observe that there was no evidence in support of the finding that the money represented "profit from an undisclosed business activity in British India," and on that view they recorded an answer in the negative on the first question. They observed :

"Applying these principles to the instant case, we find there is ample justification for the income-tax authorities to reject the assessee's explanation as unsatisfactory and to hold that the said receipt of Rs. 2,20,000 is a profit from undisclosed source. But, unfortunately, the Income-tax Officer, after rejecting the assessee's explanation, has come to the conclusion that the said amount is profit from business activity in British India, a finding which cannot be warranted without some evidence or information adduced by the department. The assessee was a resident of India and it was the statutory duty of the assessee to disclose his total world income, and, accordingly, the alleged receipt might have been income at Nawalgarh, or at some other place outside British India. The Appellate Assistant Commissioner and the Appellate Tribunal have confirmed the order of the Income-tax Officer, but they have in their order described the said sum as income from undisclosed sources. The very fact that they have confirmed the order of the Income-tax Officer shows that they have meant that this undisclosed source relates to the assessee's business activity in British India. If their objects are to reverse the finding of the Income-tax Officer on this point their orders could have been sustained inasmuch as the assessee is a resident of India and his income from undisclosed source, whether earned in India or outside, is taxable in India. There is no dispute as to the fact that the said sum of Rs. 2,20,000 has been remitted from Nawalgarh to Calcutta. The explanation offered by the assessee to the effect that the said sum was a part of the cash balance of the Calcutta business in November, 1941, has been rejected, and rightly so, for the reasons stated earlier. The result of the rejection is that the money never went from Calcutta to Nawalgarh. The only conclusion in such a case is that the money represents profit from undisclosed source, But that is not the finding which the Income-tax Officer has arrived at. The rejection of the assessee's explanation does not necessarily follow that the particular receipt is an income from undisclosed business activity in British India."

6. But the Tribunal did not record a finding that the income was "from some undisclosed business activity in British India of the assessee. " The

assumption made by the High Court that the Tribunal held that the income was from some undisclosed business activity in British India was not warranted.

7. Again, the total income of the assessee was liable to be charged to tax at the rates in force under the appropriate [Finance Act](#). According to the [Income-tax Act](#) then in force, the total income of the (previous year of an assessee, who was resident in British India, included all income, profits and gains during such year which accrued or arose or were deemed to accrue or arise to him in British India during such year. The assessee was resident and ordinarily resident in British India in the relevant previous year, and the income brought to tax had accrued or arisen to him in British India. That was so found by all the authorities and the High Court also agreed with that view. If the amount of Rs. 2,20,000 represented income of the assessee of the previous year, it was liable to be included in the total income of the assessee, and an enquiry whether for the purpose of bringing the amount to tax the income was from a business activity or from other source was not relevant. The principle laid down by this court in [Commissioner of Income-tax v. M. Ganapathi Mudaliar](#) that "once it is found that "a receipt by the assessee " was income of the assessee it was not necessary for the revenue to locate its exact source " applies in our judgment alike to cases in which an entry is found in the books of account of the assessee, and to cases in which no such entry is found. It was not the plea of the assessee that the demand drafts represented income, which was either wholly or in part not chargeable to tax : if he intended to rely upon that plea it was for him to prove such a plea. It was not even attempted to be argued before the Tribunal that the source of the income affected its exigibility to tax. We are, therefore, unable to uphold the answer recorded by the High Court.

8. We allow the appeal, discharge the answer recorded by the High Court on the first question, and record an answer in the affirmative. The assessee will pay the costs of the Commissioner in this court and in the High Court."

10.1 In the case of Sumathi Dayal Vs. CIT, 1995 AIR 2109, the Hon'ble Apex Court's judgement is as under:

"1. These appeals filed by the assessee against the order dated February 24, 1977 passed by the Income Tax Settlement Commission hereinafter referred to as 'the Settlement Commission'), relate to assessment years 1971-72 and 1972-

2. The appellant carries on business as a dealer in art pieces, antiques and curios at Bangalore. During the assessment year 1971-72 the appellant received a total amount of Rs. 3,11,831 /- by way of race winnings in Jackpots and Treble events in races at Turf Clubs in Bangalore, Madras and Hyderabad. The said amount was shown by the appellant in the capital account in the books. The appellant filed a return on March 27, 1972 declaring an income of Rs. 27,829/-. The appellant also made a sworn statement on January 6, 1973 before the Income Tax Officer and on the basis of the said statement the Income Tax Officer made an assessment order dated March 27, 1974 wherein he held that the sum of Rs. 3,11,831 /- is not winnings in races and he treated the said receipts as income from undisclosed sources and assessed the same as income from other sources. For the assessment year 1972-73 the appellant showed receipts of Rs.93,500/- as race winnings in two Jackpots at Bangalore and Madras and the said amount was credited in the capital account in the books. The appellant filed a return declaring an income of Rs. 3,827/- on February 3, 1973. In his assessment order dated August 31, 1974 the Income Tax Officer included the amount of Rs. 93,500/- as income from other sources and assessed the income of the appellant on that basis. The appeals filed by the appellant against the assessment orders were disposed of by the Appellate Assistant Commissioner by order dated December 12, 1975 whereby the assessment of Rs.3,11,831/-as income under the head other sources for the assessment year 1971-72 and Rs. 93,500/- for the assessment year 1972-73 was confirmed. The appeals filed against the said order before the Income Tax Appellate Tribunal were withdrawn by the appellant under section 245M (2) of the [Income Tax Act](#), 1961 [hereinafter referred to as 'the Act'], and on August 6, 1976 she moved the application giving rise to this appeal, before the Settlement Commission wherein the appellant stated that she was agreeable to a reasonable addition on a reasonable basis should the Commission hold that the drawings of 1970-71 and 1971-72 were not adequate for purchase of Jackpot tickets, other expenses in connection with the races and losses, if any, estimated by the Settlement Commission to have been sustained by the appellant. On the said application the Commissioner of Income Tax submitted his report dated January 29, 1977 wherein he urged that the action of the Department in taxing the entire winnings as income from undisclosed sources should be upheld inasmuch the appellant lacked any knowledge of race techniques and the theory of probabilities precluded any systematic and continuous winnings at races on as many as 16 occasions during a period of less than two years. In his report, the Commissioner also submitted that the books of accounts did not indicate the expenditure on travel and other incidental expenses which had been incurred by the appellant for attending the races at Bangalore and Hyderabad. The Commissioner also asked for reopening

of the assessment year 1970-71 where the appellant had won a sum of Rs. 74,681/- and which was not brought to tax by the Income Tax Officer.

3. The matter was heard by three member of the Settlement Commission. By order dated February 24, 1977 two members of the Commission (Shri R.S. Chadda and Shri K. Srinivassan) upheld the assessment for the assessment years 1971-72 and 1972-73 made by the Income Tax Officer and confirmed by the Appellate Assistant Commissioner of Income Tax; but did not find it possible under [Section 245-E](#) to accede to the request of the Commissioner of Income Tax that the assessment for 1970-71, which was made without bringing to tax the alleged race winnings of Rs. 74, 681/-, may be reopened on the view that the assessment for 1970-71 was not so connected with the case pending before them as to make it necessary to reopen it for the proper disposal of the assessments for 1971-72 and 1972-73. The Chairman of the Settlement Commission, Shri C.C. Ganapathy, has, however, dissented from the said view.

4. Shri B.K.Mehta, the learned senior counsel appearing for the appellant, has submitted that the source of the receipt of the amounts has been established by the appellant by placing on record the certificates from the various race clubs which show that the said amounts were received by way of winnings from races and the burden lay on the Department to show that the said amounts were not winnings from races but was an income from other sources. The submission of Shri Mehta is that in the present case the Department has not adduced any evidence to discharge the said burden which lay on it and the majority view of the Settlement Commission is unsustainable inasmuch as it is based on no evidence and is founded on mere suspicion and surmises. According to Shri Mehta the Chairman of the Settlement Commission, in his dissenting opinion, has correctly applied the law. Shri Mehta has placed reliance on the decisions of this Court in [Parimisetti Seethramamma v. Commissioner of Income Tax, A.P.](#), (1965) 57 ITR 532; [Sreelekha Banerjee & Ors. v. Commissioner of Income Tax, Bihar & Ors.](#), (1963) 49 ITR 112; and [Commissioner of Income Tax, Orissa v. Orissa Corporation P. Ltd.](#), (1986) 159 ITR 78. Shri J. Ramamurthy, the learned senior counsel appearing for the Revenue, has supported the majority view and has submitted that having regard to the facts and circumstances of the case the receipts claimed to be winnings from races were income from other sources and that no case is made out for interference by this Court in appeal under [Article 136](#) of the Constitution.

5. It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income,

the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See : Parimisetti Seetharamamma (supra) at P. 5361. But, in view of [Section 68](#) of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably. (See : Sreelekha Banerjee (supra) at p. 120)

6. In the instant cases the amount is credited in capital account in the books of the appellant. The appellant has offered her explanation about the said receipts being her winnings from races. The said explanation has been considered in the light of the sworn statement of the appellant dated January 6, 1973 and other material on record. The Income Tax Officer and the Appellate Assistant Commissioner have not accepted the explanation offered by the appellant. The two members constituting the majority in the Settlement Commission have also taken the same view.

7. There is no dispute that the amounts were received by the appellant from various race clubs on the basis of winning tickets presented by her. What is dispute is that they were really the winnings of the appellant from the races. This raises the question whether the apparent can be considered as real. As laid down by this Court, apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. (See : [Commissioner of Income Tax v. Durga Prasad More](#), (1971) 82 ITR 540, at pp. 545, 547)

8. In this context it would be relevant to mention that in order to give effect to the recommendations of the Direct Taxes Enquiry Committee (under the Chairmanship of Justice K.N. Wanchoo, retired Chief Justice of India) the definition of "income" in [section 2\(24\)](#) of the Act was amended with effect from April 1, 1972 by the [Finance Act, 1972](#) so as to include within its ambit, winnings from lotteries, cross word puzzles, races including horse races, card games and other games of any sort or from, gambling or betting of any form or nature whatsoever. The reason underlying the said amendment was that exemption from tax that was enjoyed in respect of such winnings had provided scope for conversion

of "black" money into "white" income. The said exemption from tax available in respect of such winnings during the assessment years 1971-72 and 1972-73.

9. During the year 1970-71 (pertaining to assessment year 1971-72) between April 6, 1970 to March 20, 1971, the appellant claims to have won in horse races a total amount of Ass. 3, 11, 83 1/- on 13 occasions out of which 10 winnings were from Jackpots and 3 were from Treble events. Similarly, in the year 1971-72 the appellant won races on 2 occasions and both the times winnings were from Jackpot. In her sworn statement dated January 6, 1973, the appellant had stated that she started going for races from the end of 1969 and that she first won Jackpot on December 12 1969 on the first day she went to races. The appellant also stated that she worked out the combination on the basis of what her husband advised her but she used to add a few horses of her own although she admitted that she did not know anything about the performance of these horses before December 1969. As regards her husband, the appellant stated that he won once in Calcutta and once in Madras and he had similar wins also. The appellant had also stated that she had not gone to races in 1972. The appellant admitted that she had been buying Jackpot tickets of the value of Rs.2,000/-, Rs. 1,400/- and even tickets for Rs.3,000/- have been bought and that on the first day she won the Jackpot she purchased a Jackpot combination ticket for approximately Rs.2,500/- and that on November 8, 1970 she had bought two combinations, each for about Rs.2,000/-. The appellant also admitted that she had not claimed any loss in races and only winnings were shown and stated that she won similar amounts which were not accounted and the losses were met out of the said amounts. The appellant further stated that she had no record of her expenditure at the race course as against/ her claim of winnings.

10. Having regard to the said statement of the appellant, the two members, constituting the majority on the Settlement Commission, came to the conclusion that the apparent is not, the real and that the appellant's claim about her winning in races is contrived and not genuine for the following reasons:

- (i) The appellant's knowledge of racing is very meagre.
- (ii) A Jackpot is a stake of five events in a single day and one can believe a regular and experienced punter clearing a Jackpot occasionally but the claim of the appellant to have won a number of Jackpots in three or four seasons not merely at one place but at three different centres, namely, Madras, Bangalore and Hyderabad appears, *prime facie*, to be wild and contrary to the statistical theories and experience of the frequencies and probabilities.

(iii) The appellant's books do not show any drawings on race days or on the immediately preceding days for the purchase of Jackpot combination tickets, which entailed sizable amounts varying generally between Rs. 2,000/- and Rs. 3,000/-. The drawings recorded in the books cannot be co-related to the various racing events at which the appellant made the alleged winnings.

(iv) While the appellant's capital account was credited with the gross amounts of race winnings, there were no debits either for expenses and purchases of tickets or for losses.

(v) In view of the exceptional luck claimed to have been enjoyed by the appellant, her loss of interest in races from 1972 assumes significance. Winnings in racing became liable to income tax from April 1, 1972 but one would not give up an activity yielding or likely to yield a large income merely because the income would suffer tax. The position would be different, however, if the claim of winnings in races was false and what were passed off as such winnings really represented the appellant's taxable income from some undisclosed sources.

11. The majority opinion concludes that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

12. The Chairman of the Settlement Commission, in his dissenting opinion, has laid emphasis on the fact that the appellant had produced evidence in support of the credits in the form of certificates from the racing clubs giving particulars of the crossed cheques for payment of the amounts for winning of Jackpots, etc. The Chairman has rejected the contention regarding lack of expertise in respect of the appellant and has observed that the expertise is the last thing that is necessary for a game of chance and anybody has to go and call for five numbers in counter and obtain a Jackpot ticket and that books containing information are available which are quite cheap.

13. This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities. The Chairman of the Settlement Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. It is, in our view, a neutral circumstance, because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with her which she could surrender to the Race Club. The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning ticket is not an usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the

District Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972 whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc. was withdrawn. Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleged to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence.

14. In the circumstances, no case is made out for interference with the order passed by the settlement commission the appeals therefore fail and are accordingly dismissed with costs.

10.2 Considering the totality of the facts of the case as well as the ratios laid down by the Hon'ble Supreme Court in the said cases, we set aside the order of the CIT(A) and restore that of the AO wherein his categorical finding is that the claim is far from truth and concluded that the assessee failed to produce any evidence that the commission agents rendered any services in course of business. It also failed to produce that any agreement entered into between the parties regarding nature of works to be done, rates of commission, terms & conditions for payments, etc. We also

observe from the quarterly TDS returns that all the commissions have been debited only on 31/03/2009. It is also not clear that when the actual payments were made. From the details filed by the assessee in the paper book which contain 55 payees amounting to Rs. 2,45,40,000/-. It is also beyond our understanding that after discharging his/her work, they do not know how much commission they are going to get, but only they come to know the same on 31/03/2009 when the entries were passed in the books of account of the assessee. Considering all the attending facts as above, we are of the considered opinion that the ratios laid down by the Hon'ble Supreme Court in the above judgments (supra) are squarely applicable to the case of the assessee. Accordingly, we set aside the order of the CIT(A) and allow the ground raised by the revenue on this issue.

11. As regards ground No. 2 relating to disallowance of compensation claimed of Rs. 3,05,10,500/-, the assessee company had placed orders for manufacturing of MS Flats of 500 MT @ Rs. 45,500/-, MS Angles of 540 MT @ Rs. 46,400/- and MS Beams of 250Mt @ Rs. 53,000/-, to one supplier M/s Shalini Steels Pvt Ltd and MS Flats of 430 MT @ Rs. 45,400/- and MS Angles of 290 MT @ Rs. 46,450/- to M/s Vijay Iron Foundry. The purchase orders were placed between 10.08.2008 to 09.09.2008. On receipt of the work orders, the supplier companies stipulated some conditions

of payment vide their correspondence dated 13.09.2008. The supplier company, vide their letter dated 12.10.2008, had intimated the assessee that if the stock is not lifted as on the date the same would result in heavy losses. However, by this time i.e. October 2008, the rate of iron has fallen down steeply and expecting imminent losses on lifting the stocks as per the work orders given, the assessee as per the conditions stipulated by the suppliers paid the difference rate between the date of work order and to the date of cancellation. The difference in rate for this period worked out to Rs. 3,05,10,500/-. The bifurcation of the compensation claimed to have been paid is Rs. 2,00,10,500/- to M/s Shalini Steels Pvt Ltd and Rs. 1,05,00,000/- to Mis Vijay Iron Foundry.

11.1 The Assessing Officer observed that many discrepancies as to the non-mention of specification of products, difference in date of correspondence between the assessee company and the suppliers, correspondence relating to the lifting of stocks which was made in October and the initial agreed period of November/December, doubted the transaction between the assessee company and suppliers as sham transaction to suit the convenience of both parties and whether the correspondence were meant to be acted upon or were doctored. To clarify himself, the Assessing Officer summoned one of the supplier Mis Shalini

Steels Pvt Ltd. The MD of this supplier company, who is also running the affairs of the second supplier Mis Vijay Iron Foundry, appeared before the Assessing Officer and deposed that the correspondence right from placing the work orders and the cancellation are true and in reply to a specific question about the raw material purchases made for meeting the work orders given by the appellant, the MD Sri Suresh Kumar Singhal, replied that they have not made any purchases and it is a trade practice to correspond with the prospective purchasers. In reply to another question, while confirming the correspondence, he replied that in the trading practice we write letters that stock is available and purchases were made for you and in reality we have not purchased any material. When questioned about the loss, it was replied by the supplier that the loss is a notional loss. Going by these findings and discussing at length that discrepancies and deficiencies in the whole transaction, the Assessing Officer observed that the evidences produced in support of the claim of losses were concocted documents with a view to reduce the profit. He further relying on the statement of the MD of the supplier company wherein it was admitted that the loss is a notional one, the entire 'transaction are make belief affairs and bogus, the impugned loss occasioned due to compensation is not acceptable. Without prejudice to the above, the Assessing Officer also brought out an alternate view that the entire

transaction is of speculative nature and the loss arising out of the same cannot be allowed. Accordingly the amount of compensation of Rs. 3,05,10,500/- was disallowed and brought to tax.

12. Before the CIT(A), the assessee claimed that there is every correspondence between them and the suppliers and pointing out to some nominal differences, the Assessing Officer started doubting the transaction and in pursuant of his doubt, he pinpointed out even to the difference in dates mentioned in the correspondence. Explaining the background and the reasons for such cancellation of the work orders, the assessee submitted that it was due to problems in the market and worsen economic scenario, crash in price of steel during the intervening gap of placing work orders and accepting the work orders, the same were cancelled. It was further submitted by the assessee that their financial condition at that time was not strong enough to discharge their commitment of the work order due to the sudden crash in prices of iron and with a view to reduce the losses they may have to incur by accepting the work orders, they cancelled the orders. According to the assessee, the period of payment of the said compensation also proves that it is only to avoid legal consequences from the suppliers, they followed to the demands of the suppliers and no ulterior motive is involved in the whole transaction,

as brought out by the Assessing Officer. Referring to the statement recorded from the MD of the supplier company, the assessee submitted that the supplier had agreed and confirmed the transaction with regard to the prevalent trade practices in the line of business and the term notional loss, as referred to by the supplier in his statement, need not be perceived as clinching evidence in respect of the total deal, since the terminology was used in his statement keeping the trade practices in the business and not the loss as is viewed in accounting terminology or for that matter in income tax matters.

13. After considering the submissions of the assessee, the CIT(A) directed the AO to allow the compensation loss claimed assessee, by observing as under:

"6.4 I have gone through the assessment order, enclosures annexed thereto, submissions of the appellant and the enclosures. From the above, I find that though there are some procedural deficiencies in the correspondence between the appellant and the suppliers, these cannot be concluded against them because the suppliers do depend on their own trade practices and do not work in a purely administrative set up. One more factor that leads me to go by the submissions of the appellant is that the market conditions cannot be visualized by them, being a small company. and the role that a company of this size cannot be much. As submitted by the appellant, if they can anticipate the conditions of iron & steel market three months earlier as expressed by the Assessing Officer, they would go for better deals into the open market bigger than this transaction, and would not go

for a bogus loss deal. Also, if what was expressed by the Assessing Officer over this issue is to be considered, no businessman would incur loss in any business by anticipating the market conditions well in advance.

6.5 Going by the correspondence between the suppliers and the appellant, sparing a few deficiencies that gave rise to the Assessing Officer, to hold otherwise, I find that this correspondence cannot be totally ignored. Further more, when legal proceedings were initiated by the supplier against the appellant, no outside judgment can prevail over a business deal than the view of the business man involved in such a situation. As rightly pointed out by the appellant, the decision to pay compensation was purely a commercial decision and nobody can step into the shoes of a business man and decide the transaction otherwise. On the period of paying the compensation also, the assessing Officer made some comments that support the final view taken by him. However, showing the amount of compensation as payable to the suppliers in the Balance Sheet for the year under consideration and paying the same in the month of January, 2010 and March, 2010, after receipt of legal notices from the suppliers in the month of December, 2009 goes to prove beyond doubt that the appellant acted as a prudent businessman. Though in principle, he accepted the liability for the year under consideration, he waited till such time that he recouped the losses arisen out of the transaction and to avoid legal consequences, he parted with the compensation during the next financial year. Going by the above discussion, I am not inclined to accept the view of the Assessing Officer that the cancellation of the work orders by the appellant and consequently paying compensation is an arranged transaction with a view to reduce profits or for the matter a speculative transaction. Accordingly, the Assessing Officer is directed to allow the compensation loss as claimed by the appellant at Rs. 3,05,10,500/-.

14. Before us, the ld. CIT-DR, in support of revenue's case, has filed written submissions, which are as under:

"During the financial year relevant to the assessment year 2009-10, the assessee has entered into number of transactions for supply of MS flats, MS angles, etc., with M/s. Shalini Steels (P) Ltd and Vijay Iron Foundry (P) Ltd. The transaction was for supply of steel products in the month of December, 2008 at the agreed price. The transactions entered into are contended by the assessee to be in the nature of hedging transactions in order to safe-guard the company and as a precautionary measure, in the course of business carried on by it and, therefore, they fall proviso in clause (a) to sub-section (5) to Sec.43 of I.T. Act. As the proof of the same, the assessee has furnished the orders of the General Manager, CPDCL which are in respect of supply of MS Channel of 100x50mm, MS Channel of 75x45mm, MS Angle of 65x65x6mm, MS Angle of 50x50x6mm, RS Joists of 175x85mm, RS Joists of 175x85m & RS Joists of 150x150mm, which are all specified items of steel products.

2. From the purchase orders given to Shalini Steels (P) Ltd & Vijay Iron Foundry (P) Ltd, it can be found that they are for purchase of MS angles, MS flats, etc., there is no description and specification of the material required by the assessee company which do not match the requirement of CPDCL. In view of the above, the transactions with M/s. Shalini Steels (P) Ltd and M/s. Vijay Iron Foundry (P) Ltd cannot be compared with the transactions in the invoices/bills furnished as additional evidence. It can also be seen from the correspondence between the supplier and the assessee company, the assessee company has only placed purchase order but never gave the size and specifications for the material required. The material was not manufactured by the supplier before the deal

was cancelled. Hence, the bills furnished as additional evidence in the paper books and the purchase order placed by the assessee company with M/s. Shalini Steels (P) Ltd and M/s. Vijay Iron Foundry (P) Ltd cannot be matched up.

3. Further, the second contention of the assessee is that the steel market is highly volatile and, therefore, the transactions have been entered into as a measure of insurance in the form of hedging transactions. This is also not true for the reason that the contract for supply to CPDCL at a particular rate has already been fixed by the orders of the General Manager of CPDCL. Secondly, from the date of purchase order to the companies, i.e., 10.08.2008 onwards, there is a steep fall in the price of steel in the market. When the price in the market is falling and below the price agreed for purchase from the two customers, there cannot be any benefit derived by the assessee if the contracts of purchase are cancelled. This is because, the purchase price is already fixed at a higher price. In other words, the assessee will not be a loser even going by the due date of supply of material, i.e., December, 2008, even though the purchase contract is fulfilled at the agreed price. There will not be any difference in losses because the assessee has paid the difference in the purchase price and the market value. The assessee has not demonstrated as to how he stands to gain by this type of hedging transaction which is rescinded prematurely even before the completion of the contract. On the contrary, the assessee can purchase at a lesser price in the open market and stand to gain by selling at the pre-fixed priced to CPDCL.

4. It has to be noted that the contract for purchase in respect of hedging transactions are for different items and they do not match the specifications relating to CPDCL order. Therefore, the transaction cannot be

treated as hedging transaction as per the decision in the case of Pankaj Oil Mills (115-ITR-824) (Gujarat Full Bench). Thirdly, there is no actual delivery. Fourthly, the amount paid by the assessee does not fall in the category of payment towards arbitration charges in lieu of dispute. The whole process of agreement to pay by way of acquiescence by the assessee shows that the payment is not towards mitigation of any litigation. Therefore, the entire loss has to be treated as speculative not fall within the parameters of proviso to clause (a) to sub-section (5) to Sec.43 of I.T .Act.

5. Another significant aspect to be noted is that in respect of any hedging transaction, the same should be backed by adequate availability of raw material/the material required under contract in the hands of the supplier so that the contract can be fulfilled in case delivery is required. This condition has not been met because it has been categorically stated by the Managing Directors of Shalini Steels {P} Ltd & Vijay Iron Foundry {P} Ltd in their sworn depositions that the supplier companies did not have the stock in the required quantities as on the date of cancellation. Nor at any other time within the contract period, was the material manufactured by the companies and informed to the Central Excise Authorities of the existence of the goods to be supplied. In such a situation, the ingredients of the hedging transactions are not fulfilled, therefore, on this count also, it has to be held that the loss incurred by the assessee is only in the nature of speculative loss."

In view of the above submissions, the ld. CIT-DR prayed for restoration of the AO's order.

15. The ld. AR of the assessee, on the other hand, relied on the order of the CIT(A) and submitted that the CIT(A) has

rightly appreciated the facts of the case and directed the AO to allow the compensation loss claimed by the assessee. He has relied on the written synopsis as well as relied on the case law which are as under:

"During the financial year relevant to the assessment year 2009-10, the assessee has entered into number of transactions for supply of MS flats, MS angles, etc., with M/s. Shalini Steels (P) Ltd and Vijay Iron Foundry (P) Ltd. The transaction was for supply of steel products in the month of December, 2008 at the agreed price. The transactions entered into are contended by the assessee to be in the nature of hedging transactions in order to safe-guard the company and as a precautionary measure, in the course of business carried on by it and, therefore, they fall proviso in clause (a) to sub-section (5) to Sec.43 of I.T. Act. As the proof of the same, the assessee has furnished the orders of the General Manager, CPDCL which are in respect of supply of MS Channel of 100x50mm, MS Channel of 75x45mm, MS Angle of 65x65x6mm, MS Angle of 50x50x6mm, RS Joists of 175x85mm, RS Joists of 175x85m & RS Joists of 150x150mm, which are all specified items of steel products.

2. From the purchase orders given to Shalini Steels (P) Ltd & Vijay Iron Foundry (P) Ltd, it can be found that they are for purchase of MS angles, MS flats, etc., there is no description and specification of the material required by the assessee company which do not match the requirement of CPDCL. In view of the above, the transactions with M/s. Shalini Steels (P) Ltd and M/s. Vijay Iron Foundry (P) Ltd cannot be compared with the transactions in the invoices/bills furnished as additional evidence. It can also be seen from the correspondence between the supplier and the assessee company, the assessee company has only placed

purchase order but never gave the size and specifications for the material required. The material was not manufactured by the supplier before the deal was cancelled. Hence, the bills furnished as additional evidence in the paper books and the purchase order placed by the assessee company with M/s. Shalini Steels (P) Ltd and M/s. Vijay Iron Foundry (P) Ltd cannot be matched up.

3. Further, the second contention of the assessee is that the steel market is highly volatile and, therefore, the transactions have been entered into as a measure of insurance in the form of hedging transactions. This is also not true for the reason that the contract for supply to CPDCL at a particular rate has already been fixed by the orders of the General Manager of CPDCL. Secondly, from the date of purchase order to the companies, i.e., 10.08.2008 onwards, there is a steep fall in the price of steel in the market. When the price in the market is falling and below the price agreed for purchase from the two customers, there cannot be any benefit derived by the assessee if the contracts of purchase are cancelled. This is because, the purchase price is already fixed at a higher price. In other words, the assessee will not be a loser even going by the due date of supply of material, i.e., December, 2008, even though the purchase contract is fulfilled at the agreed price. There will not be any difference in losses because the assessee has paid the difference in the purchase price and the market value. The assessee has not demonstrated as to how he stands to gain by this type of hedging transaction which is rescinded prematurely even before the completion of the contract. On the contrary, the assessee can purchase at a lesser price in the open market and stand to gain by selling at the pre-fixed priced to CPDCL.

4. It has to be noted that the contract for purchase in respect of hedging transactions are for different items

and they do not match the specifications relating to CPDCL order. Therefore, the transaction cannot be treated as hedging transaction as per the decision in the case of Pankaj Oil Mills (115-ITR-824) (Gujarat Full Bench). Thirdly, there is no actual delivery. Fourthly, the amount paid by the assessee does not fall in the category of payment towards arbitration charges in lieu of dispute. The whole process of agreement to pay by way of acquiescence by the assessee shows that the payment is not towards mitigation of any litigation. Therefore, the entire loss has to be treated as speculative not fall within the parameters of proviso to clause (a) to sub-section (5) to Sec.43 of I.T. Act.

5. Another significant aspect to be noted is that in respect of any hedging transaction, the same should be backed by adequate availability of raw material/the material required under contract in the hands of the supplier so that The contract can be fulfilled in case delivery is required. This condition has not been met because it has been categorically stated by the Managing Directors of Shalini Steels {P} Ltd & Vijay Iron Foundry {P} Ltd in their sworn depositions that the supplier companies did not have the stock in the required quantities as on the date of cancellation. Nor at any other time within the contract period, was the material manufactured by the companies and informed to the Central Excise Authorities of the existence of the goods to be supplied. In such a situation, the ingredients of the hedging transactions are not fulfilled, therefore, on this count also, it has to be held that the loss incurred by the assessee is only in the nature of speculative loss.

“ He relied on the following case law:

- 1. Pankaj Oil Mills Vs. CIT, [1978] 115 ITR 824 (Guj.) (FB)*

- 2. Araska Diamond (P) Ltd., Vs. ACIT, [2014] 52 Taxmann.com 238 (Mum.-Trib.)*
- 3. S. Vinodkumar Diamonds (P.) Ltd. Vs. Addl. CIT, [2013] 35 taxamann.com 337 (Mum.-Trib.)*

16. After considering the submissions of both the parties and perusing the material on record as well as going through the orders of revenue authorities, it is observed that during the financial year relevant to the assessment year 2009-10, the assessee has entered into number of transactions for supply of MS flats, MS angles, etc., with M/s. Shalini Steels (P) Ltd and Vijay Iron Foundry (P) Ltd. The transaction was for supply of steel products in the month of December, 2008 at the agreed price. The transactions entered into are contended by the assessee to be in the nature of hedging transactions in order to safeguard the company and as a precautionary measure, in the course of business carried on by it and, therefore, they fall proviso in clause (a) to sub-section (5) to Sec.43 of I.T. Act. From the purchase orders given to Shalini Steels (P) Ltd & Vijay Iron Foundry (P) Ltd, it can be found that they are for purchase of MS angles, MS flats, etc., there is no description and specification of the material required by the assessee company which do not match the requirement of CPDCL. In view of the above, the transactions with M/s. Shalini Steels (P) Ltd and M/s. Vijay Iron Foundry (P) Ltd cannot be compared with the transactions in the invoices/bills furnished as additional evidence.

16.1 As submitted by the Id. AR in his written submissions in respect of any hedging transaction, the same should be backed by adequate availability of raw material/the material required under contract in the hands of the supplier so that the contract can be fulfilled in case delivery is required. This condition has not been met because it has been categorically stated by the Managing Directors of Shalini Steels {P} Ltd & Vijay Iron Foundry {P} Ltd in their sworn depositions that the supplier companies did not have the stock in the required quantities as on the date of cancellation. Nor at any other time within the contract period, was the material manufactured by the companies and informed to the Central Excise Authorities of the existence of the goods to be supplied. In such a situation, the ingredients of the hedging transactions are not fulfilled, therefore, on this count also, it has to be held that the loss incurred by the assessee is only in the nature of speculative loss.

16.2 In his order, the CIT(A) before directing the AO to allow the compensation loss claimed by the assessee held that *"I am not inclined to accept the view of the Assessing Officer that the cancellation of the work orders by the appellant and consequently paying compensation is an*

arranged transaction with a view to reduce profits or for the matter a speculative transaction."

16.3 In view of the above observations, we do not find any infirmity in the order of the CIT(A) and upholding the same, we dismiss the ground raised by the revenue on this issue.

17. In the result, appeal of the revenue is partly allowed.
Pronounced in the open court on 9th April, 2021.

Sd/-
(S.S. GODARA)

JUDICIAL MEMBER

Hyderabad, Dated: 9th April, 2021.

kv

Sd/-
(L.P. SAHU)

ACCOUNTANT MEMBER

copy to :

1	ITO, Ward – 16(2), Room No. 615, 6 th Floor, Aayakar Bhavan, Basheer Bagh, Hyderabad – 500 004.
2	M/s Pushpa Ispat Pvt. Ltd., 5-2-202 & 205, Balaji Market, 1 st Floor, Distillery Road, Rani Gunj, Secunderabad.
3	CIT(A) - V, Hyderabad
4	CIT - IV Hyderabad
5	ITAT, DR, Hyderabad.
6	Guard File.

S.No.	Details	Date
1	Draft dictated on	
2	Draft placed before author	
3	Draft proposed & placed before the Second Member	
4	Draft discussed/approved by Second Member	
5	Approved Draft comes to the Sr. PS/PS	
6	Kept for pronouncement	
7	File sent to Bench Clerk	
8	Date on which the file goes to Head Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	