

Court No. - 35

Case :- INCOME TAX APPEAL No. - 186 of 2013

Appellant :- M/S Brijbasi Hi-Tech Udyog Ltd.

Respondent :- Commissioner Of Income Tax, Agra And Another

Counsel for Appellant :- Suyash Agarwal

Counsel for Respondent :- C.S.C. (Income Tax Dep.), Gaurav Mahajan

Hon'ble Bharati Sapru,J.

Hon'ble Saumitra Dayal Singh,J.

This is an income tax appeal filed by the assessee against the order of the Income Tax Appellate Tribunal, Agra Bench, Agra dated 18.01.2013 for the assessment year 2005-06.

It was admitted on the following question of law:-

“Whether the ITAT was correct to hold that the commission of Rs. 33,69,903/- paid to Sheikh Safat Ahmad Proprietor M/s S & S Traders, Srinagar (J & K) for rendering services to the appellant, as per agreement is not allowable expenditure under section 37(1) of the Income Tax Act?”

The facts of the case as noted by the Tribunal are that the assessee is engaged in the business of manufacture of Firefighting Vehicles, and supply of the same amongst others to Ministry of Defence, Indian Air Force, Ordnance Factory, Indian Oil Corporation, Gas Authority of India Limited and other Government and non-Government Organisations, etc. During the course of assessment proceedings of the assessment year 2005-06, the Assessing Officer put the assessee to notice in respect of business expenditure of Rs. 33,69,903/- claimed by the assessee towards payment of commission to one Sri Sheikh Safat Ahmad Proprietor M/s S & S Traders, Srinagar at the rate of 10% of sales effected through him to the Director of Fire &

Emergency Services, Jammu & Kashmir, Srinagar.

In reply the assessee claimed it had supplied certain firefighting vehicles to the Jammu & Kashmir Firefighting department against award of tender in respect which the said Sheikh Safat Ahmad had provided liasoning and other services to the assessee.

It further appears in the course of assessment proceedings the Assessing Officer had required the petitioner to produce Sheikh Shafat Ahmad but that the said person was not produced and the assessment was completed disbelieving the claim of commission paid to Sheikh Shafat Ahmad. It is also to be noted that while rejecting the said claim commission the Assessing Officer relied on a letter said to have been received by the Assessing Officer from the Director General of Fire and Emergency Services, Jammu & Kashmir, Srinagar wherein the said authority had stated as under:-

“As per records, no person by name of Shri S. Ahmad/Shri Showkat Ahmad/Proprietor/Partner/ Employee of M/s S & S Traders has been attending on behalf of/aged of M/S BHUL.”

However, it is admitted case between the parties that the said letter dated 29 September, 2007 was never supplied to the assessee and that he was not confronted with it.

In appeal, before the CIT(Appeals), the assessee raised the issue of being denied opportunity to rebut the document relied upon by the Assessing Officer in the shape of the letter between the Director General of Fire and Emergency Services, Jammu & Kashmir, Srinagar. Also, upon submissions made by the assessee in appeal, the CIT (Appeals) called for remand report from the Assessing Officer. Then, before the Assessing Authority, in the course of the preparation of the remand report, Sheikh Shafat Ahmad appeared and was examined by the Assessing Officer. Various questions were put to him specifically in

respect of payments made and received by him from the assessee and the work that he had done to entitle him to such payments. The assessee and also Sheikh Shafat Ahmad stated that the payments had been made through bank and that tax has also been deducted at source on such payments. The correctness of this fact is not disputed by the revenue. Sheikh Shafat also stated that he had amongst others provided service to the assessee in the nature of tender enquiry, submission of tender, follow-up tenders, procurement of orders, release of payment and after sale services. However, he could not produce certain documentary evidence that had been called for by the Assessing Officer chiefly in the nature of books of account, certificate of competence etc. Also, his returns for A.Ys 2005-06, 2006-07 and 2007-08 were filed late and certain other queries were according to the assessing authority not answered satisfactorily by said Sheikh Shafat Ahmad.

The CIT(Appeals) allowed the appeal filed by the assessee on the ground "that there is no evidence to prove that the payee Shri Sheikh Shafat Ahmad had not rendered any services to the appellant.....". Hence. he deleted the disallowance of Rs. 33,69,903/-. In further appeal by the department, the Tribunal has reversed the orders of the CIT(Appeals) and upheld the disallowance made by the Assessing Officer.

We have heard Sri Rakesh Ranjan Agarwal, Senior Advocate assisted by Sri Suyash Agarwal, learned counsel for the assessee and Sri Gaurav Mahajan, learned counsel for the department and have also perused the record.

From the order of the Tribunal it transpires that the Tribunal has got swayed by the fact that the Sheikh Safat Ahmad did not appear before the Assessing Officer in the first instance and that he did not

produce any documentary evidence to establish the nature and value of services performed by the assessee when he appeared before that authority in the remand report stage.

The Tribunal while allowing the appeal of the department has held that the findings of the CIT(Appeals) accepting the claim of the assessee is based on his own assumption and presumption. According to the Tribunal the assessee did not discharge the burden cast on it to establish that the expenditure claimed was for purpose of business.

Having said that the Tribunal itself proceeded to reverse the order of the CIT (Appeals) by reasoning that the expenditure was not allowable because the assessee having made supplies to a government department could claim such expenditure if it had incurred it on an agent of commensurate capacity of salesmanship, capacity and level. Also, according to the Tribunal in such a contract the recovery of sale consideration was not doubtful. Traveling further, the Tribunal has further reasoned "when supply is made to Government Departments, commission is not allowable unless it is established that commission was for services other than services related to supply of goods to Government Department". Senior Counsel would submit that such a finding is in the teeth of the judgment of this court reported in ***DCIT Vs. Super Tannery (India) Ltd. (2005) 274 ITR 338 (Allahabad)*** wherein it was held as under:

"The court takes judicial notice of the fact that nowadays it is very difficult to get back lawful amount from the Government and other departments without incurring unavoidable expenses. A part from it, a lot of harassment is also caused. As a prudent businessman, the assessee had engaged a commission agent and had incurred a sum of Rs. 2,37,000, which is approximately 10 per cent of the amount, it cannot be said to be excessive or uncalled for. If an assessee, in order to avoid delays and harassment to get money which is lawfully due to him at an

early date in order to enable him to use the same in his business, utilises the services of a third person or a middle man, it cannot be said that the expenditure has not been laid out for the purpose of business. Moreover, the nature of expenditure has to be seen from the view point of the assessee and the Assessing Officer has neither the expertise of running a business nor has any specialisation to sit in judgment over the assessee as to whether such an expenditure was incurred for commercial expediency or not. A part from it, there is no provision to disallow a part of such expenditure on the ground of excessiveness when the expenditure has been found to be genuine."

Also, applying the above ratio, this court has again in CIT Vs. M/s Motilal Duli Chand (ITA NO. 97 of 2002) decided on 10.3.2015 dismissed the departmental appeal in a case where such an expenditure had been allowed by the Tribunal.

We are of the opinion that while the Tribunal may be right in its reasoning that the CIT(Appeals) has not considered the matter in entirety and may have hastily recorded the finding in favour of the assessee, we are unable to accept the reasoning given by the Tribunal to reject the claim, the said reasoning being based purely on conjectures. We feel there was sufficient evidence on record to reach a final finding on the issue involved in this matter.

However, the Tribunal has failed to consider the evidence but has recorded its findings based on its personal notions and view all extraneous and not-desirable to be considered while deciding issue of genuineness and allowability of particular payments made by the assessee in the peculiar circumstances of his business. Such an approach cannot be approved.

We may observe that in view what has been held in the case of DCIT Vs. Super Tannery (India) Ltd. (2005) 274 ITR 338 (Allahabad) it cannot be said that such an expenditure if found to have been actually incurred is not allowable. The finding of the Tribunal to the contrary is

clearly unsustainable. What remains to be seen is whether as a fact such expenditure was allowable under Section 37(1) of the Income Tax Act. It is thus to be established that the said expenditure had been incurred for the business purposes. For purpose of recording a finding on this issue, one way or the other, material evidence in the shape of agreement for sale of firefighting vehicles, payments made through banking channel, TDS having been made by the assessee, Sheikh Safat Ahmad had been assessed to tax (though upon return filed late) and his statement made by him before the Assessing Officer in the remand report proceedings and other evidence exist on record. They alongwith such other evidence as exists on record were required to be examined and weighed by the Tribunal before it could record its finding on the allowability of the commission claimed by the assessee.

The Tribunal also appears to have chosen to read certain parts of the statement given by the Sheikh Safat Ahmad in isolation and not in entirety of the facts and circumstances of the case. In so far as the finding of such payment having been made for the business purposes or it is genuine we find that the Tribunal has not considered the entire material in light of the particular facts of the case but has got swayed by certain inconsistencies and deficiencies noted by making a microscopic examination of the statement of Sheikh Shafat Ahmad as if it (Tribunal) were examining the case of that person whereas in the instant appeal it was only required to see if the expenditure claimed to have been borne by the assessee was genuine. If the answer on this issue were in favour of the assessee, then it would be of little consequence (in these proceedings) how Sheikh Shafat Ahmad has dealt with the money received by him from the assessee.

In view of the above, we find that the order of the Tribunal is not

sustainable and is, therefore, set aside and the matter is remitted to the Tribunal to decide the appeal afresh after affording opportunity of hearing to the parties.

Upon remand, the Tribunal may decide the matter in accordance with law within a period of six months from the date of production of certified copy of this order. The parties will produce a copy of the order to the Tribunal within two weeks from today.

The questions of law raised in the memo of appeal is answered accordingly. The appeal is accordingly disposed of.

Dated:03.03.2017

Mini/A.Singh