

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “B” BENCH AHMEDABAD

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER,
AND SHRI S. S. GODARA, JUDICIAL MEMBER.

ITA Nos. 1981 & 2404/Ahd/2015
(Assessment Year:2011-12)

M/s. Stallion Laboratories Pvt. Ltd.
8th Floor, Dev Path, B/h Lal Bungalow,
C.G. Road, Navrangpura, Ahmedabad – 380009

Appellant

Vs.

ITO,
Ward-8(2) / Ward-4(1)(2),
Ahmedabad

Respondent / Cross Objector

PAN: AACCS6205N

आवेदक की ओर से/By Assessee : Shri Ketan H Shah, A.R.
राजस्व की ओर से/By Revenue : Shri James Kurian, Sr. D.R.
सुनवाई की तारीख/Date of Hearing : 02.01.2017
घोषणा की तारीख/Date of
Pronouncement : 06.01.2017

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

The assessee and Revenue have instituted instant cross appeals for assessment year 2011-12 against the CIT(A)-9, Ahmedabad's order dated 29.05.2015, in appeal no. CIT(A)-9/374/Wd.8(2)/14-15, deleting disallowance of commission payments of Rs.67,77,001/- as made by the

Assessing Officer in assessment order dated 20.03.2014 with a direction to first verify the rate of the above commission payment and restrict the same to that @ 3%, in proceedings under section 143(3) of the Income Tax Act, 1961; in short “the Act”.

2. We come to rival pleadings first. The assessee’s sole substantive ground pleads that the CIT(A) has erred in directing the Assessing Officer to verify its above commission payments and hold the same as allowable @ 3%. The Revenue’s grievance on the other hand is that the CIT(A) ought not to have deleted the above commission payments disallowance as made by the Assessing Officer.

We come to relevant facts first.

3. The assessee/a company is engaged in pharmaceutical business. It made commission payments to 13 parties totaling to Rs.67,77,001/-. The Assessing Officer disallowed the same in assessment order after holding that although the assessee has filed all the relevant details alongwith confirmations, PAN particulars, TDS deductions, commission/liasoning agreements of the above payees who had also filed their responses in furtherance to scrutiny notices, there was no proof of the payees services rendered to the assessee. He further observed that mere payment and furnishing of the above particulars would not render the impugned commission payments as allowable in absence of actual proof of the marketing /liasoning services rendered.

4. The assessee preferred appeal. The CIT(A) partly accepts its contentions as follows:

“2.3

Decision:

I have carefully perused the assessment order and the submissions given by the appellant. The AO has given proper opportunity to the appellant and asked for the confirmations from the parties to whom commission and distribution charges have been paid. The show cause for commission paid account of Rs. 42,32,375/- has been given.

Further, in the assessment order, the AO has relied on following case laws:

- (i) *Assam Pesticides Vs. CIT [227 ITR 846], Gauhati HC*
- (ii) *CIT Vs. Premier Breweries Ltd. [279 ITR 51 (Ker.)]*
- (iii) *Bhargav Refrigeration Industries Pvt. Ltd. Vs. ITO [28 TTJ 587], ITAT, Delhi Bench*
- (iv) *ITO Vs. Maddi Laxmaiah & Co. (P) Ltd. [31 ITJ 71 (Hyd)]*

Sr	Name	Address	PAN No.	Amount	TDS	NET
1	Jigna Sanidh Shah (OLD)	121,Manekbaug Society, Ambawadi, Ahmedabad	ANKPS7883 E	597,000.00	59,700.00	537,300.00
2	Jadumani Dash (OLD)	Plot No.90, Lane No.3, Jagannath Vihar, Baramunda, Bhubneshwar - 751003	AIEPD5322Q	117,635.00	12,116.00	105,519.00
3	Spectrum ' Enterprise(OLD)	ShopNo.1-A, 4No. Ganesh Park (Anand Park),Chinchwad Gaon, Pune-411033	ACLPL1316K	259,680.00	26,747.00	232;933.00
4	Venus International (OLD)	B/603, Corrola Jewel, Military Road, Marol, Andheri (E), Mumbai	AAYPM2525 L	48,200.00	4,820.00	43,380.00
5	Vijay J. Shah (OLD)	26/B, Jain Merchant Society, Paldi, Ahmedabad - 380007	ANTPS6602 C	2,777,426.00	279,303.00	2,498,123.00
6	B. Bhushan Kumar (NEW)	11/202, Phase-V, Brahmmand CHS Ltd., Azad Nagar, Thane(W), Mumbai	APMPK7685 Q	20,460.00	2,108.00	18,352.00
7	Sky Trade Services(NEW)	103, Haash Complex, Nr. Nagri Eye Hospital, Ellisbridge, Ahmedabad	AHCPN377Q	2,844.00	---	2,844.00
8	Kalpesh Shah (NEW)	306, Shantinath, Nr. Ashirvad Flats, Beh. Dharam Cinema, Mehsana.	BHHPS5254F	20,000.00	2,000.00	18,000.00
9	ANUPAM PARMAR (NEW) Distribution Exp.	2, Vardhmannagar, College Road, Jaynagar, Bhuj, Kutch	APHPP5938 G	381,930.00	7,639.00	374,291.00
			TOTAL	4,225,175.00		

			AS PER AO *	4,232,375.00		
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(*) *Appears to be calculation mistake by the AO.*

The AO has emphasized that the mere payment by itself does not qualify for deduction in computing the income unless, the necessity for such payment was also shown as for the purpose of business. No recourse to section 40(A)(2)(b) of the I. T. Act, 1961 has been taken for related parties.

On the other hand, the appellant has filed different case laws and distinguished the decision of Swadeshi Cotton Mills Co. Ltd. reported at [63 ITR 57 (SC)] and instead felled on the decision of Anupam Synthetics reported at [104 TTJ 119 (Del.)]. The appellant has filed confirmation from the parties, TDS details, full addresses with PA No. and submitted that in their Pharma business the commission payment is a usual practice and without the payment of such commission, the conducting of business is not expedient. Therefore, it is claimed that the expenditure incurred is genuine through banking channel and the same has been done as it was necessity Of its business. The fact remains that the AO has not proved that this was non-genuine expenditure. The AO also could not extract positive evidences for revenue by recording statements u/s. 131 of the I. T. Act, 1961 of the commission agents to prove that no such services were rendered to the appellant. The full details were on record and the AO could have done the same as he is bestowed with such powers which would have been very much within the Departmental procedure. I have also gone through the copy of each of the appointment letters issued by the appellant company to the commission agents. The specific work or territory of operation is mentioned in such appointment letters. The working of commission / distribution charges to be paid along with brief note for each of the parties, has also been placed on record and gone through the other details submitted and not reproducing for sake of brevity (PP 13 to 33 of PB). A copy of ledger account giving details about TDS is also filed. The information submitted by appellant is reproduced in tabular form below:

In reference to Distribution Expenditure of Rs.3,81,930/- paid to Shri Anupam Parmar, it is found that the assessee has submitted copy of agreement entered into with him. The A.O. came to the conclusion that no service has been rendered without examining Shri Parmar and also without examining aforesaid commission agents. It is further found that the assessee has made payment according to the agreement entered into and in reference to all the above nine parties TDS has been deducted. Confirmation received from all the parties which are also on record alongwith TDS certificate in Form No.16A. It is further found that the assessee has given reply dated 22.12.2012 placed on Paper Book Page 13 to 15, wherein in Para 9, it inter alia requested the A.O to kindly examine aforesaid all nine parties in case addition was contemplated.

As per records, the AO has not examined any of the nine parties and went on to make addition as per precedents of the case. The appellant has been able to discharge its onus [63 TTJ 191 (Del.)] - Instrumed (India) International Vs. ITO and successfully shifted the burden to prove on revenues as has been held in a/ [159 ITR 78 (SC)] - Orissa Corporation. The appellant has also filed relevant judgment to advance its argument in the case of Bharat Bijli Ltd. reported at [71

ITD 412 (Mum.)]. I am inclined to accept the argument of appellant and rely on the ratio laid down by Hon'ble Gujarat High Court in the case of Rohini Builders reported at [256 ITR 360 (Guj.)]. The ratio laid down by ITAT, Ahmedabad in the case of Deputy Commissioner of Income Tax Vs. Tyco Valves & Control India (P) Ltd. [(2013) 81 DTR (Ahd) (Trib) 48] is relevant and has been relied,

"Assessee having furnished the statement of commission payment giving the names of the commission agents and the services rendered by them as well as voucher numbers, dates of payments, PANs of the agents, amount of invoices, rate of commission, etc. and the AO having not found the payment of commission to be bogus payments, deduction thereof is allowable."

The appellant has submitted copy of appointment letters issued to the commission agents stipulating conditions of their contract, the business plan has been executed and working of commission thereon submitted, indicates that the services have been rendered for appellant's business by these commission agents. In my opinion, the appellant has discharged its onus by filing all possible details including confirmations (of all the nine parties) and TDS and successfully established that the genuine expenditure has been expended for the business purposes. On the other hand, the AO could not gather the positive evidences for the department and taken decision based on presumptions and not on the facts on record. It is also noted that major amount has been paid to five old parties for which findings were also contained in my order for A. Y. 2009-10. In view of above facts of the case, I am inclined to accept the submission of the appellant and the ground of appeal is allowed.

Appellant's A.R. relied on the submission made for earlier A.Y. 2009-10 & 2010-11 as well as appeal orders passed by ld.CIT(A) for A.Y. 2009-10 & 2010-11 as the facts are identical for current A.Y. 2011-12. The appellant's A.R. filed details of commission statement, ledger account of commission expenses, debit notes, confirmation of accounts, Certificate in Form No.16A issued to the parties, copy of the agreement with parties as under:

<i>Sr.</i>	<i>Name of the party</i>	<i>Address</i>	<i>P.A. No.</i>	<i>Amount of commission</i>
<i>1</i>	<i>Anupam Parmar</i>	<i>B/60, Manokamna Tenament Nr. Kharawala Factory Isanpur, Ahmedabad</i>	<i>APHPP5938G</i>	<i>26,000/-</i>
<i>2</i>	<i>Gokul Traders</i>	<i>National Chambers Nr. City Gold Ashram Road Ahmedabad-3 80009</i>	<i>ABJPS1381E</i>	<i>1,86,167/-</i>
<i>3</i>	<i>Venus International</i>	<i>B-603, Corolla Jewel Military Road, Marol, Andheri, Mumbai</i>	<i>AAYPM2525E</i>	<i>1,12,452/-</i>

4	<i>Ketan Nareshchandra Thakkar</i>	<i>E-4, Kundan Flat Vibhag 2, Vasna Ahmedabad-7</i>	<i>AAAHPT3877B</i>	<i>1,31,444/-</i>
5	<i>Purvi Associates</i>	<i>817DevpathBldg B/H Lal Bunglow Ellisbridge, C.G. Road Ahmedabad</i>	<i>AELPS4823P</i>	<i>1,66,025/-</i>
6	<i>Sutaria Services</i>	<i>24 Asia House Nr.Swastik Cross Road, Navrangpura Ahmedabad</i>	<i>ACIPS7791Q</i>	<i>1,56,184/-</i>
7	<i>Ace Entepirise</i>	<i>A/402, Mangalya Tower Nr.Anjali Cross Road Bhatta, Paldi, Ahmedabad</i>	<i>ACMPT9447J</i>	<i>1,56,185/-</i>
8	<i>Vidur Corporation</i>	<i>304, Raturaj Chamber Swastik Cross Road Navrangpura Ahmedabad</i>	<i>ALEPT5316R</i>	<i>2,03,704/-</i>
9	<i>Rajendra B.Lattakar</i>	<i>Pune Maharashtra</i>	<i>AAKHR6322L</i>	<i>2,22,400/-</i>
10	<i>Shreejina Ketan & Co.</i>	<i>F/61 Satellite Center Ahmedabad- 15</i>	<i>AAEPT5628H</i>	<i>1,90,832/-</i>
11	<i>Mrs.Anantha Laxmi</i>	<i>Mysore</i>	<i>AGCPA3781A</i>	<i>5,82,043/-</i>
12	<i>Manlax Lifesciences Inc</i>	<i>124, Aashar Enclave Kolshet Road G.B. Road Thane West- 400607</i>	<i>APMPK7685Q</i>	<i>82,917/-</i>
13	<i>Vijay J Shah</i>	<i>1 9/A Jain Merchant Society, Mahalaxmi Five Roads, Paldi, Ahmedabad-7</i>	<i>ANTPS6602C</i>	<i>45,60,648/-</i>
	<i>Total</i>			<i>67,77,001/-</i>

I have gone through the assessment records and it is seen that though the appellant has filed requisite details but the A.O. has failed to take cognizance of the same and treated them unverified, which is not justified on the part of AO, as

all the confirmations are part of assessment records. The AO needs to be more care full in this regard. However, after perusal of the documents .furnished by the appellant's A.R. I am of the opinion that appellant has not discharged its onus fully in respect of commission payment made to the above mentioned parties. In the agreement entered with the parties, the rate of commission payable is not specifically mentioned. The appellant has also not produced either in the assessment proceedings or in the appellate proceedings details of sales made through these parties showing name of parties, area, city, country, qty. rate of commission etc. for the purpose of authenticity of such commission payments. The appellant has also failed to produce any evidence in the shape of documents, such as letter or email written by these persons to whom commission have been paid, that too on such a high rate, to the concerned parties in connection of procuring orders on behalf of appellant.

The appellant has also failed to produce the bills of concerned parties confirming that these persons were agents of appellant and liable for payment of commission. Moreover, while going through the assessment records, it is observed that rate of commission payment is ranging from 2% to 24% which seems to be on extremely higher side. There is no uniformity and basis for paying such commission to these persons. Moreover, the commission payment is also made to closely related party, viz. Shri Vijay J. Shah who is director in the appellant company. I have also observed that that every year major portion of commission, which is more than 50% of total commission payment made by appellant, has been paid to Shri Vijay J Shah, who is the director of the appellant company and he has been earning salary and interest income from the appellant company apart from commission. Generally, in this trade 2% to 3% commission is normal, whereas it is seen that the appellant has paid exorbitantly high commission to different persons particularly to its director Shri Vijay J Shah without any valid reason .

Accordingly following the appellate orders passed by ld.CIT(A) for A.Y. 2009-10 & 2010-11 in the case of appellant the addition made against commission payment of Rs.67,77,001/- is deleted with following remark. However in view of observation made by me, wrt to rate of commission paid by appellant company, the A.O. is directed to allow the claim of appellant after verifying the rate of commission payment and restricting the rate of commission payment @ 3%. Subject to this condition, this ground of appeal is partly allowed.”

5. Heard both sides reiterating their respective stands in support of and against the impugned disallowance. Learned Authorized Representative first of all invites our attention to the fact that the very issue had arisen in the preceding two assessment orders as well wherein a co-ordinate bench of this tribunal in Revenue's appeal ITA Nos. 1162 & 2145/Ahd/2013 decided on 02.03.2013 accepted assessee's contentions to hold that such commission expenses are a routine practice in pharmaceutical business in order to boost

the sales. He then states that neither the Assessing Officer nor the CIT(A) have given any cogent reason to adopt a different approach in the impugned assessment order. Ld. Departmental Representative at this stage strongly support Assessing Officer's action in order to restore the entire disallowance figure. We make it clear that there is not dispute that the assessee has actually made the impugned commission payments after deducting TDS thereupon at the prescribed rates in furtherance to various agreements with its payees for marketing and other alike services. It has further placed on record their confirmations by way of contra accounts and debit notes. The same is nowhere doubted before both the lower authorities since the Assessing Officer is of the view that there is no evidence of the actual services rendered followed by CIT(A)'s opinion that there is not prescribed rate of the commission payments in agreement concerned and further that these payments ranging between 2% to 24% are on extremely higher side. We further find that there is no distinction drawn between facts of the impugned assessment year vis-à-vis those in earlier years hereinabove. Coming to the CIT(A)'s observation terming the assessee's commission payments to be excessive, we notice that there is no comparative tabulation with market rate of such payments; if any before arriving at the said conclusion. We accordingly observe that the ld. CIT(A) has erred in directing the Assessing Officer to restrict assessee's commission payments @3% after observing that the said authority had not been careful before disallowing the impugned payments wherein the assessee has placed on record all possible details in order to discharge its onus on the one hand whereas the commission payments have been held to be excessive without any such comparison on the other. We thus accept assessee's arguments supporting its sole substantive ground and to direct the Assessing Officer to allow its entire claim of commission payments amounting to Rs.67,77,001/-. The Revenue's

contentions seeking to restore entire disallowance amount are accordingly rejected.

6. The assessee succeeds in its appeal ITA No.1981/Ahd/2015 whereas Revenue's appeal ITA No.2404/Ahd/2015 is dismissed.

[Pronounced in the open Court on this the 06th day of January, 2017.]

Sd/-
(PRAMOD KUMAR)
ACCOUNTANT MEMBER
Ahmedabad: Dated 06/01/2017

Sd/-
(S. S. GODARA)
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।