

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

**I.T.A. No. 2380/Kol/2016**  
**Assessment Year: 2012-13**

|                               |     |                                       |
|-------------------------------|-----|---------------------------------------|
| Rahul Kheria (PAN:AMVPK4998C) | Vs. | Income-tax Officer, Wd-45(1), Kolkata |
| Appellant                     |     | Respondent                            |

|                       |                                 |
|-----------------------|---------------------------------|
| Date of Hearing       | 13.06.2018                      |
| Date of Pronouncement | 11.09.2018                      |
| For the Appellant     | Shri S. M. Surana, Advocate     |
| For the Respondent    | Shri Pinaki Mukherjee, Add. CIT |

**ORDER**

**Per Shri A.T.Varkey, JM**

This appeal preferred by the assessee is against the order of Ld. CIT(A)-13, Kolkata dated 01.08.2016 for AY 2012-13.

- Though the assessee has raised as many as five grounds of appeal but the sole issue involved in this appeal of assessee is against the action of Ld. CIT(A) in confirming the addition made by the AO on account of commission/service charges.
- Briefly stated facts are that the assessee is engaged in trading of cotton and iron and steel through the business venture named as M/s. Sharp International and M/s. Peacon International respectively. Both these business units are proprietorship concern of the assessee. In respect of commission expenses claimed in the accounts of M/s. Sharp International, the assessee disclosed gross sales of Rs.10,25,08,000/-. From the list of parties to whom goods were sold and as furnished by assessee, the AO found that the sale was made to only three parties. Rs.10,19,91,795/- worth of cotton was exported to a party

in Hong Kong, namely- M/s. Sunhing Lee Textiles Ltd. and fabrics worth Rs.5,16,200/- was sold to two Indian parties, namely- M/s. Parlwar (sale amount being Rs.4,66,313/-) and M/s. Metro Enterprises (sale amount being Rs.49,892/-). Among the various expenses incurred and claimed as deduction included in the profit & loss accounts was Rs.30,06,163/- towards commission. The assessee was first asked by notice u/s 142(1) of the Act issued on 11/11/2014 to furnish among other details and documents, the following in respect of the commission expenses-

*"Names and complete postal addresses of the agents / brokers to whom commission paid. Please state the purpose of paying such commission in detail. If the said commission was paid for procuring sale contracts then furnish confirmation from the parties to whom goods sold who will certify that the goods were purchased by them only due to the services provided by the said agents / brokers. Also furnish evidence in support of deduction and deposit of TDS on commission. Please note that failure to furnish any of these details and documents shall be considered as insufficient evidence and render disallowance of commission charges from total income. "*

According to AO on 24.02.2015 the AR appeared and claimed payment of commission to five parties as under:

|                                   |            |
|-----------------------------------|------------|
| i. H. Yam                         | 5 83,560/- |
| ii. Swaraj Vanijya M. Ltd.        | 5,08,194/- |
| iii. Metro Niketan Pvt. Ltd.      | 5,35,938/- |
| iv. Bihariji Consultancy Pvt Ltd. | 6,77,483/- |
| v. Kamini Ferrous Ltd.            | 7,00,988/- |

4. According to AO, section 37(1) of the Act clearly stipulates that a business expense shall be allowed as 'deduction' if it is of revenue nature and expended wholly and exclusively for the purpose of business. The details were sought from the assessee in order to verify whether the commission paid to the parties mentioned above was wholly and exclusively for the purpose of business or not. The AO observed that Commission means a form of payment to an agent for services rendered. According to AO commission is usually paid to agents and brokers for procuring sale order or to facilitate some other works which eventually will result in higher sale and profits. The AO, therefore, sought to cross examine such agents / brokers as well as the parties from whom sale orders were received or the parties with whom such agents were in contact to facilitate assessee's works. According to AO, only after such cross examination, it would be possible to verify whether assessee's

claim that commission paid to the five parties were expended wholly and exclusively for the purpose of business or not is authentic and genuine. For that purpose the assessee was requested to furnish the details such as purpose of paying commission, parties from whom sale orders were received through the respective agents / brokers, agreement for commission, etc. The AO observed that assessee had furnished only the evidence in support of deduction of tax at source against such expenses. According to AO, TDS is only a secondary condition for allowing a business expense as deduction and if an expense is not subjected to TDS as required as per the provisions of chapter -XVII of the Act, such expense under certain conditions are liable to be disallowed u/s 40(a)(ia) of the Act. But the primary condition to be satisfied for claiming deduction of a business expense a business expense shall be allowed as 'deduction if it is of revenue in nature and expended wholly and exclusively for the purpose of business. According to AO, it is also irrelevant whether the other party has disclosed the corresponding income as his taxable income or not. According to AO, the logic is simple; expense for one is naturally income for other. The AO after detailed hearing and discussion which is written in the assessment order observed that it is clear that the assessee failed to establish that the commission claimed to have been paid to the four parties, viz. Swaraj Vanijya, Metro Niketan, Bihariji Consultancy and Kamini Ferrous were wholly and exclusively expended for the purpose of business as the explanation provided by him were not justified and without any supporting evidence. The AO also tried to verify the same from the end of the respective agents also. For that he issued summons u/s 133(6) of the Act to all the four parties to furnish the following details.

- i) Copy of acknowledgment of I. T. Return filed by you for the AY 2012-13;
- ii) Nature of services provided by you to M/s. Sharp International during the FY 2011-12 for which they paid you commission;
- iii) If you arranged sales on behalf of M/s. Sharp International, then furnish the name and complete postal address of the person to whom you contacted for getting the sale order;
- iv) The Memorandum and Articles of Association by which your company was formed;
- v) Audited accounts of your company for the FY 2011-12.

5. After detailed enquiry and considering the Inspector's report and enquiry and assessee's inability to furnish the necessary details and documents as made in detail in the assessment order, the AO came to the conclusion that the payment of commission to the five parties viz.- (i) Swaraj Vanijya Pvt. Ltd., (ii) Metro Niketan Pvt. Ltd., (iii) Bihariji Consultancy Pvt, Ltd., (iv) Kamini Ferrous Ltd. and (v) Govardhan Nirman Pvt. Ltd. as claimed by the assessee was false, concocted and an arrangement of mutual understanding of providing adjustment entries by one party to another party. According to AO, the circumstantial evidences clearly indicate that such payments were in no way expended exclusively and wholly for the purpose of business which is the basic condition for eligibility of an expense as deduction u/s 37(1) of the Act. Hence, the commission paid to the above five parties was disallowed for not satisfying the conditions laid down in section 37(1) of the Act and added back to total income .

6. In respect of commission expenses claimed in the accounts of M/s. Peacon International, the AO has observed as under:

*“M/s. Peacon International which deals in trading of scrap iron. In the audited accounts of this concern, assessee has disclosed gross sales of Rs.2,41,46,011/-, purchases of Rs.2,20,26,409/- and commission expenses of Rs.2,76,346/-. As per details furnished during the course of hearing it was noticed by the AO that goods were purchased mainly from M/s. Jessop & Co. Ltd. Commission was stated to have been paid to M/s. Govardhan Nirman Pvt. Ltd. of 55, Chowringhee Road, Kolkata.”*

7. On 24/2/2015 AR furnished a letter stating therein that M/s. Govardhan Nirman Pvt. Ltd. was paid commission of Rs.2,76,346/- for arranging purchase. According to AO, since the assessee failed to furnish the details of parties from whom purchase was made and for whom the said company had provided him services so as to call for payment of commission. According to AO, commission is usually paid to agents and brokers for procuring sale order or to facilitate some other works which eventually will result in higher sale and profits. The AO therefore sought to cross examine the said agent as well as the parties from whom sale orders were received or the parties with whom such agents were in contact to facilitate assessee's works. According to AO only after such cross examination, it would have been possible to verify whether assessee's claim that commission paid to the said company Govardhan was expended wholly and exclusively for the purpose of business or not is authentic and genuine. On 12/3/2015, i.e. almost at the fag end of the financial

year, assessee informed that the commission was paid for getting purchase from M/s. Jessop & Co. Ltd. According to AO, it is extremely unusual that a businessman will employ agent to purchase goods. AO was of the opinion that commission is generally paid to obtain sell orders or for providing other facilities. The assessee also furnished a copy of written agreement entered into with M/s. Govardhan Nirman and executed on 01.04.2011. It was disbelieved by AO to be an act of afterthought and was of the opinion that it was prepared only recently and in no way appeared to be four years old as claimed by assessee. All these facts and the delay of almost four months in providing the details after these were first requisitioned from assessee, compelled the AO to conclude that assessee's claim was false and the time of four months was taken by him just to prepare the necessary details and documents.

8. So, AO summoned both agents M/s. Govardhan Nirman Pvt. Ltd. and the seller party - M/s. Jessop & Co. Ltd. for cross examination to verify assessee's claim and to know about the exact nature of services provided by the said agent. Inspector was deputed to serve the notice but the addresses were found to be incorrect.

9. In respect to M/s. Jessop & Co. Ltd. the AO did not believe the confirmation sent by the company because it was vague. The reply of M/s. Jessop & Co. Ltd. is given as under:-

*"We hereby confirm that M/s. Peacon International had purchased scrap iron from us during the financial year 2011-12. We had sold the goods to M/s. Peacon International. They might have availed the services of M/s. Govardhan Nirman Pvt. Ltd."*

According to AO, if any agent was involved in business dealings, the company would have surely known about it, therefore, the AO discarded the confirmation from M/s. Jessop & Co. Ltd.

10. So, the AO disallowed the commission claim made by the assessee as false, concocted and an arrangement of mutual understanding of providing adjustment entries by one party to another party. Hence, the commission paid to the above five parties and detailed as under is disallowed for not satisfying the conditions laid down in section 37(1) of the Act and added back to total income.

|                             |     |             |
|-----------------------------|-----|-------------|
| i. Swaraj Vanijya Pvt. Ltd. | --- | 5,08,194.00 |
|-----------------------------|-----|-------------|

|                                     |     |                    |
|-------------------------------------|-----|--------------------|
| ii. Metro Niketan Pvt. Ltd.         | --- | 5,35,938.00        |
| iii. Bihariji Consultancy Pvt. Ltd. | --- | 6,77,483.00        |
| iv. Kamini Ferrous Ltd.             | --- | 7,00,988.00        |
| v. Govardhan Nirman Pvt. Ltd.       | --- | <u>2,76,346.00</u> |
| Total                               |     | 26,98,949.00       |

11. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who upheld the action of the AO. Aggrieved, assessee is before us.

12. We have heard rival submissions and gone through the facts and circumstances of the case. The sole issue is regarding the allowability of the claim of commission paid to aforesaid five parties for the reasons elaborately discussed above and is not repeated for sake of brevity. Assailing the decision of lower authorities the Id AR brought to our notice the following facts (1) that all the five parties submitted their copy of bill which contained their PAN. (2) Tax was deducted at source and paid in time. (3) Summon u/s 133(6) were served on all the parties, and all of them replied having received the commission. (4) Inspector deputed found the parties at the given address and also-found that the companies are group companies of Mohan Motors (who are the biggest distributors of Motor Vehicles in Kolkata) and have wide range of connections all over India. (5) All of them duly included the income in their return of income and paid taxes thereon and that (6) There was no evidence that the money has come back to assessee

13. We note that the assessee has paid commission to M/s. Swaraj Banijya Pvt Ltd & Metro Niketan Pvt Ltd for arranging two exporters to undertake the balance export obligation which resulted in transfer of LC to those exporters also, and commission was paid to M/s. Behariji Consultancy Pvt Ltd and Kamini Ferrous Ltd for arranging purchase of the export quality cotton and to Govardhan Nirman Pvt Ltd against purchase of Iron & Steel scraps from M/s. Jessop and Co. Ltd.

14. We note that the assessee is exporting fine quality of cotton to Hongkong. Apart from that the assessee also purchase and sell cotton in India. We note that the assessee arranges export order through Hongkong Agent Mr. H. Yam. According to assessee the foreign buyer accepts only the finest quality of the cotton. And the finest quality cotton in

India is mainly grown in the State of Andhra Pradesh and Maharashtra and it was brought to our notice that the assessee has no office in Maharashtra and Andhra Pradesh. We note that during the year total export and local sale of cotton was more than Rs 10 Crores. The export was also of substantial quantity which is proved from the fact that duty draw back received by the assessee was more than Rs10 lakhs. The assessee for the purpose of purchasing the finest quality of cotton engaged and took the services of the two agents viz. M/s. Behariji Consultancy Pvt Ltd and Kamini Ferrous Ltd. We note that the payments were made by account payee cheques and TDS was duly deducted. We note that the purchase price of cotton from the parties for which the commission was paid to both the parties was also made by account payee cheques and thus purchased cotton was exported. These facts having not been disputed we note that the role of agents for sale and purchase of goods cannot be ignored and for the services rendered they are entitled to be compensated as per agreement. We note that the assessee obtained the export orders through foreign agent Mr. H. Yam for supply of cotton to M/s Sun Hing Lee Textiles Ltd Hongkong whom assessee claims to have never met, but the fact of export has been believed. The export of cotton was made from the purchase thus made through the agents M/s. Behariji Consultancy Pvt Ltd and Kamini Ferrous Ltd and for the services rendered the commission was paid to them through bank after TDS. The AO's observation that commission is not paid for effecting purchase cannot be accepted as such. It is common knowledge that commission is demanded by agents for purchase of flats and even for real estate transactions, even commission is there for commodity purchase in the commodity exchange, commission is there for stock exchange broker for purchase of shares and securities and commission is there even for purchase of foreign currency and agents collect commission for facilitating purchase of air/railway tickets for tour and travel. The presumption of AO that commission cannot be paid for purchase cannot be accepted without material to support the AO's view. We note that all evidences of purchases were submitted including copy of bills, transport details and export of such goods. We note that the bills of the parties did contain their VAT No. as well as telephone numbers of those parties and therefore the commission payment made through bank after TDS to M/s. Behariji Consultancy Pvt Ltd and Kamini Ferrous Ltd for arranging purchase of the export quality cotton from far flung regions of Maharashtra etc was a business expense and needs

to be allowed as 'deduction' since it is of revenue nature and expended wholly and exclusively for the purpose of business.

15. Coming next to the commission claimed to have been paid to M/s. Swaraj Vanijya Pvt Ltd and Metro Nikentan Pvt Ltd we note that was paid by assessee to the agents for their service in arranging two exporters to undertake assessee's export obligation which assessee could not himself fulfill which occasioned transfer of L.C in those exporters name too. As we have stated earlier the foreign agent Mr. H.Yam placed export orders with the assessee and during the year he placed export orders to the tune of 31,41,455 USD under contract No. SL/COT/101/2011 and another order for 10,47,185 USD under contract No. SL/COT/103/2011 placed at paper book page 29 and 30. So assessee could have exported the cotton for this export order or he was entitled to nominate some other person for export. Accordingly Mr. H. Yam arranged full value of L.C for Export orders given to the assessee and such L.C. is found placed at page 31 and 32 of the paper book. The assessee through the services rendered by the agents viz. M/s Behariji Consultancy Pvt. Ltd and Kamini Fashions could only procure cotton of the export value of 10,35,940 USD and 10,45,604 USD only making total export of 20,91,544 USD as against the order of 41,88,640 USD. Since the assessee could not procure the required quantity of fine cotton in order to fulfill the export obligation, had to search for some party to meet the export obligations. Accordingly the services of the two agents viz.M/s Swaraj Vanijya Pvt Ltd and Metro Nikentan Pvt Ltd was taken and they arranged two parties to undertake the remaining export obligation which assessee could not do on his own viz. M/s. Harman Kotex&Seeds Pvt Ltd and Luxminarayan Udyog Pvt Ltd . The assessee thereafter arranged with his Singapore Agent H Yam to make M/s. Harman Kotex Seeds Pvt Ltd and M/s. Luxminarayan Udyog Pvt Ltd as second beneficiary of the L. C. so that they can export the cotton. The Singapore agent persuaded the buyer and in the LC those two parties were made second beneficiaries of the LC who ultimately exported the remaining quantity of the order of the fine quality of cotton to the foreign buyer. The two agents were therefore paid commission for arranging the two parties namely M/s. Harman Kotex&Seeds Pvt Ltd and Luxminarayan Udyog Pvt Ltd who under took the balance export obligation to those ultimate exporters. It was in that connection that the commission was paid to the two agents. This is evident evidences

placed from page 40 to page 50 of PB and thereafter page 51 which shows that the export for balance quantity of the order was made by M/s Harman Kotex and page 55 export by M/s Luxminarayan Udyog. The AO misunderstood the fact as if the commission was paid for transfer of L. C. and that L. C. cannot be transferred whereas it was transfer of the export order along with the transfer of L. C. A perusal of various documents place at paper book page no. 29 to 85 goes on to show that it was transfer of the surplus order for export along with the L. C to be used by them. Moreover we note that on this transfer of surplus export order, the assessee earned Rs. 16,17,406/- which was duly credited in P.L. Account which fact is evident from perusal of paper book page 3 under the head "service charge on export order". Therefore, the service of the agent in the aforesaid facts and circumstances are for business purpose and therefore, the commission paid was a business expense and needs to be allowed as 'deduction' since it is of revenue nature and expended wholly and exclusively for the purpose of business.

16. The commission claimed to have been paid to M/s. Govardhan Nirman Pvt Ltd was for purchase of Scrap from M/s Jessop and Co. Ltd. The AO has issued notice U/s. 133(6) to M/s Jessop and Co and we note that the said Jessop replied to the notice. The AO however doubted the reply by Jessop on the ground it was a reputed company so the logo in the letter-head should have been in different colors etc which action of AO cannot be countenanced. We note that the AO has disallowed the commission simply on surmises without bringing any evidence on record to the contrary but on presumption that the Jessop companies building was in dilapidated condition etc or that the telephone made by the AO was not picked up by the employee of Jessop Co. Ltd cannot be a ground for disallowing the commission. Furthermore, we note that the parties to whom commission was paid were not relatives of the assessee. There is no evidence that the commission paid has come back to the assessee. Our attention was drawn to the following cases wherein it has been held that if there is no evidence to show that the agents were relatives of the assessee and that the commission paid has not come back to the assessee, then it cannot be said that the commission paid was not genuine. For the said proposition we rely on the Judgment of the Hon'ble Kolkata High Court in the case of Commissioner of Income Tax Vs Inbuilt Merchants Pvt Ltd in ITAT No. 225 of 2013, GA No. 2825 of 2013 wherein it was taken

note by the Hon'ble High Court that with the advancement of the Technology it has become possible to sell goods throughout the country through Internet and for this purpose agents are required throughout the country and so the assessee has to recruit the agents. The Hon'ble High Court took note that it may not be possible for the assessee in such cases to know them personally. And since the assessee has furnished the address of the agents which they have provided to the assessee to the AO and payments were admittedly made by cheque after deduction of Tax, the Hon'ble High Court after taking note that apart from the payment by cheque there were other evidence like (a) Books of account maintained by the assessee in ordinary course of business. (b) Deduction of tax at source. (c) Deposit of the money deducted at source (d) Particulars of the recipient were duly disclosed. Accordingly, the Hon'ble Court confirmed the action of Tribunal allowing the commission paid to agent in that case and dismissed the departmental appeal. Similar view was taken by the Hon'ble High Court in the case of Alba Hydronics Pvt Ltd. by the Hon'ble Calcutta High Court in ITA No. 549 of 2004 holding that the revenue could not demonstrate either the money was not paid or the money paid was later routed back to the assessee. Hence the commission paid to agent was allowed. Similar view was taken in the case of Printer House by Hon'ble Delhi High Court reported in 188 ITR Taxman 70 wherein it was held that when there was no evidence that the commission was paid to relatives and family members and that there was no evidence that the commission paid has come back to the assessee no disallowance can be made. Similar view has also been taken in the case of Ambica Forging by Hon'ble Punjab & Haryana High Court that when there was no evidence that the commission was paid to relatives and the commission paid has come back to the assessee, no disallowance can be made. We note in the present case before us, the assessee had made all the payments to the parties from whom purchase was made by account payee cheques, the purchases made can be verified from the purchase bills, sales tax numbers and transport documents. The books of accounts were not rejected. We note that all the five parties to whom the assessee paid commission had submitted their copy of bill which contained their PAN details. Tax was deducted at source by the assessee and deposited with the Government. Summon u/s 133(6) were served on all the parties/agents, and all of them confirmed to have received the commission. Inspector deputed found the parties at the given address and also found that the companies are group companies of Mohan Motors

(who are the biggest distributors of Motor Vehicles in Kolkata) and have wide range of connections all over India. And all the five agents have duly included the income in their return of income and paid taxes thereon and that there was no evidence to show that the money has come back to assessee or the agents were related parties. Therefore, the service of the agents in the aforesaid facts and circumstances are for business purpose and therefore, the commission paid was a business expense and needs to be allowed as 'deduction' since it is of revenue nature and expended wholly and exclusively for the purpose of business and, therefore, the AO is directed to allow commission expenditure incurred by the assessee.

17. In the result, appeal of assessee is allowed.

Order is pronounced in the open court on 11th September, 2018  
Sd/-  
(Dr. A. L. Saini)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated : 11th September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Shri Rahul Kheria, 18/1, Maharshi Devendra Road, 6<sup>th</sup> Floor, Room No. 85, Kolkata-700 007.
2. Respondent ITO, Ward-45(1), Kolkata.
3. CIT(A)-13, Kolkata. (sent through e-mail)
4. CIT – , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary