

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'D' BENCH
MUMBAI BENCHES, MUMBAI**

BEFORE SHRI R.K. PANDA, A.M. AND SHRI VIJAY PAL RAO, J.M.

**ITA No. 136/Mum/2009
(Asst Year 2005-06)**

M/s Diamond Tool Industries, 108, Udyog Bhavan, Sonawala Road, Gorregaoon (East), Mumbai 400 051.	Vs	J.C.I.T. Circle 24(3), Pratyaksha Kar Bhavan,m C-11 Bandra Kurla Complex, Bandra (East), Mumbai. 400 051.
(Appellant)		(Respondent)

PAN NO. AAAFD4673L

Appellant by Shri Hariom Tulsiyan
Respondent by Shri C.G.K. Nair

Date of hearing	29.11.2011
Date of pronouncement	14.12.2011

ORDER

PER R K PANDA, AM

This appeal filed by the assessee is directed against the order dated 6.11.2008 of the Commissioner of Income Tax (A)- XXIV, Mumbai relating to Assessment Year 2005-06.

2. Ground of appeal No. 1 by the assessee relates to the denial of deduction u/s 80IB on interest received on margin money amounting to Rs. 42,263/-.

2.1 The ld. counsel for the assessee, at the outset, did not press this ground for which the ld. D.R. has no objection. Accordingly this ground by the assessee is dismissed as not pressed.

3. Ground of appeal No. 2 reads as under:-

“On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) erred in upholding the action of Joint Commissioner of Income-Tax in excluding sales tax incentives while computing the deduction under section 80IB amounting to Rs. 12,94,109/- and Rs. 84,687/- from the profit of Unit-1 and Unit –II respectively.”

3.1 Facts of the case in brief are that the A.O. noted that the assessee has received Sales Tax incentive of Rs. 12,94,109/- in respect of Unit I and Sales Tax incentive of Rs. 84687/- in respect of Unit II on which deduction u/s 80IB has been claimed. According to the A.O. Sales Tax incentive claimed is benefit given to the assessee by the State Government and this income also cannot be said to be derived from the business of the assessee as there is no direct nexus with the manufacturing activity of the assessee. Relying the decision of the Hon'ble Supreme Court in the case of CIT v Sterling Foods reported in [1999] 237 ITR 579 and in the case of Pandian Chemicals Ltd. v. CIT reported in [2003] 262 ITR 278, the A.O. held that Sales tax incentive is not income derived from the business for the purpose of deduction u/s 80IB.

3.2 In appeal, the ld. CIT(A) relying on the decisions in the case of Nahar Exports Ltd. v. CIT reported in [2007] 288 ITR 494 (P&H), the decision in the case of CIT v. J.V. Exports Ltd. reported in [2006] 286 ITR 603 (Del), the decision in the case of Liberty India v. CIT reported in [2007] 293 ITR 520 (P&H), the decision in the case of Rohan Dyes v. ITO reported in [2007] 12 SOT 554 (Bom) and the decision in the case of ACIT v. K.S. International reported in [2007] 293 ITRE (AT) 39 (Del) held that Sales Tax incentive is not different from export incentives, therefore, deduction u/s 80IB cannot be allowed on Sales Tax incentive. Aggrieved with such order of the ld. CIT(A) the assessee is in appeal before us.

4. The ld. counsel for the assessee submitted that Sales Tax incentive has got direct nexus with the sale and therefore has a nexus with the profit of the industrial undertaking. For example, he submitted that the assessee collects Rs. 100/- for Sales Tax, pays Rs 25/- to the Government and retains Rs. 75/- as incentive allowed by the State Govt. Therefore, it has got a direct nexus. Referring to the decision of Hon'ble Bombay High Court in the case of CIT v. Vidyut Corporation reported in [2010] 324 ITR 221 (Bom) he submitted that interest on borrowed payment from debtors was held to be part of sale price and derived from the industrial undertaking. He submitted that following the same ratio, the Sales tax incentive so collected by the assessee has to be considered as part of sale price. Referring to the decision of Hon'ble Gauhati High Court in the case of CIT v. Meghalaya Steels Ltd. reported in [2011] 332 ITR 91 (Gauhati) he submitted that the Court held that the payment of Central Excise duty had a direct nexus with the manufacturing activity and similarly the refund of the excise duty also has a direct nexus with the manufacturing activity. The issue of payment of the Central Excise duty would not arise in the absence of any industrial activity. Accordingly it was held that the refund of excise duty had to be taken into account for purposes of section 80IB. He accordingly submitted that the assessee is entitled to deduction u/s 80IB on sales tax incentives.

5. The ld. D.R., on the other hand, referring to the decision of Hon'ble Supreme Court in the case of Liberty India Ltd. vs. CIT reported in 317 ITR 218 submitted that the Sales Tax incentive has to be held as not derived from the industrial undertaking.

5.1 The ld. counsel for the assessee, in his rejoinder, submitted that the Hon'ble Gauhati High Court in the case of Meghalaya Steels Ltd. (supra) has considered the decision of Hon'ble Supreme Court in the case of Liberty India Ltd. (supra).

6. We have considered the rival arguments made by both the sides, pursued the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We find the Hon'ble Gauhati High Court in the case of Meghalaya Steels Ltd. (supra) after considering the decision of Hon'ble Supreme Court in the case of Liberty India (supra) has held that Central Excise Duty has a direct nexus with the manufacturing activity and similarly the refund of the Central Excise duty also had a direct nexus with the manufacturing activity. The issue of payment of Central Excise Duty would not arise in the absence of any industrial activity. It was, accordingly, held that the refund of excise duty has to be taken into account for purposes of section 80IB. Following the ratio of the said decision, we are of the considered opinion that there is an inextricable link between the manufacturing activity, the payment of sales tax and the sales tax incentive. Therefore, in our opinion, such sales tax incentive which has been retained by the assessee from the Sales Tax collected has to be held as derived from the industrial undertaking and consequently is eligible for deduction u/s 80IB of the Act. In this view of the matter, the order of the Id. CIT(A) is set aside and the A.O. is directed not to exclude the sales tax incentive of 12,94,109/- and Rs. 84,687/- from the profit of Unit-1 and Unit -II respectively while calculating deduction u/s 80IB of the Act. The ground raised by the assessee is accordingly allowed.

7. Ground No. 3 by the assessee reads as under:-

“On the facts and in the circumstances of the case and in law, the Commissioner of Income-Tax (Appeals) erred in upholding the disallowance of a sum of Rs. 11,57,549/- in respect of commission paid to Shatul Commercial Co. Pvt. Ltd. a group concern of the appellant.”

7.1 Facts of the case in brief are that the assessee is engaged in the business of manufacturing of all types of stone cutting tools in its factory at Goa. During the course of assessment proceedings, the A.O. noted that the

assessee has paid an amount of Rs. 66,07,486/- as commission on sale which includes commission of Rs. 34,72,646/- to Shatul Commercial Co. Pvt. Ltd., which is a group concern of the assessee. The above commission works out to 3.75% on consignment sale of Rs. 8,69,62,266/-. The A.O. noted that the assessee has paid commission @ 1.5% to 3% to other parties whereas the same is 3.75% to the related party. He, therefore, asked the assessee to justify the payment of higher commission paid to related party and explain as to why the excess commission paid to the related party should not be disallowed.

7.2 It was explained by the assessee that M/s Shatul Commercial Co. Pvt. Ltd. have rendered services on all India basis, it gets market information and feedback etc. and also rendering and provide technical support on all India basis. Therefore, the payment of higher commission to the related party cannot be equated with a local party. However, the A.O. was not convinced with the explanation given by the assessee. He observed that if the services mentioned in the submission of the assessee are available from the commission agent then there is no justification for the writing off of the sale amount of Rs. 77,35,966/- during the year on the ground of non-performance of equipment supplied. He noted that no copy of agreement with the commission agents was filed to substantiate the claim of the assessee regarding the services rendered by the commission agent. After comparing the commission paid on sale to other parties, the A.O. noted that payment of commission in excess of 2.5% given to Shatul Commercial Co. Pvt. Ltd. is excessive. He therefore disallowed an amount of Rs. 11,57,549/- u/s 40A(2) of the Act. In absence of the unit-wise details of the sales effected to Unit I and Unit II, he allocated the disallowance at Rs. 6,01,686/- for Unit I and Rs. 5,55,863/- for Unit II.

7.2 Before the Id. CIT(A) the assessee reiterated the same submissions as made before the A.O. However, the Id. CIT(A) was also not convinced with

the argument of the assessee and upheld the action of the A.O. While doing so, he noted that the assessee has paid commission to 5 parties. The quantum of commission was given on the basis of sales effected to them. Quantum of sales effected through M/s Shatul Commercial Co. Pvt. Ltd. at Rs. 869 lacs is comparable with the quantum of sales effected through M/s Shanti Udyog at Rs. 852 lacs. The rate of commission paid to M/s Shanti Udyog which is an un-related party was 1.5% whereas the rate of commission paid to M/s Shatul Commercial Co. Pvt. Ltd. which is a related party was 3.75% of sales. Therefore, he was of the opinion that the commission paid to M/s Shatul Commercial Co. Pvt. Ltd. was definitely much higher in comparison to the commission paid to M/s Shanti Udyog though both helped in effecting almost equal quantum of sales. He further noted that the rate of commission paid to M/s Shatul Commercial Co. Pvt. Ltd. was excessive even if some extra services claimed to have been rendered by it are considered. He observed that the A.O. was reasonable to allow the commission in respect of M/s Shatul Commercial Co. Pvt. Ltd. @ 2.5% as against 1.5% of commission paid to Shanti Udyog. He accordingly upheld the order of the A.O. Aggrieved with such order of the Id. CIT(A), the assessee is in appeal before us.

8. The Id. counsel for the assessee submitted that M/s Shatul Commercial Co. Pvt. Ltd. was earlier paid commission @ 2.5% and this year the same has gone up to 3.75%. Referring to paper book page 7-8 he drew the attention of the Bench to the copy of agreement between the assessee and M/s Abhinav Marble Mining Pvt. Ltd. and submitted that the area of operation of the commission agent is restricted to the districts of Rajsamand and Chittorgarh in the state of Rajasthan. Referring to the copy of agreement between the assessee and M/s Ram & Sons (a copy of which is placed at paper book page 10 & 11), he submitted that the area of operation of the said party is restricted to Borawar. Referring to the copy of agreement between the assessee and M/s Shanti Udyog (a copy of which is placed at

paper book page 13 to 15), he submitted that the area of operation of the commission agent is restricted to sales effected from Jaipur branch. Referring to the copy of agreement between the assessee and M/s Umrao Singh Sanghvi (HUF) (a copy of which is placed at paper book page 16 to 18), he submitted that the area of operation of the commission agent is restricted to Udaipur branch. He submitted that in the case of M/s Shatul Commercial Co. Pvt. Ltd. the area of operation is on all India basis. Therefore M/s Shatul Commercial Co. Pvt. Ltd. cannot be equated with other commission agents whose area of operation is restricted to parts of Rajasthan. The ld. counsel for the assessee submitted that comparison should not be made with a party having restricted operation area of part of Rajasthan. He submitted that before disallowing the commission as excessive u/s 40A(2)(b), the Revenue Authorities are bound to point out as to how it was excessive. He accordingly submitted that the commission disallowed by the A.O. and upheld by the ld. CIT(A) has to be deleted.

9. The ld. D.R., on the other hand, while supporting the order of the ld. CIT(A) submitted that no cogent reason has been given by the assessee for enhancing the commission rate from 2.5% to 3.75% during the current year. There is no justification whatsoever given by the assessee. There is also no increase in the rate of commission given to other parties. He accordingly supported the order of the ld. CIT(A).

10. We have considered the rival arguments made by both the sides, pursued the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. The only dispute in the impugned ground is regarding the allowability of the commission paid to M/s Shatul Commercial Co. Pvt. Ltd. at 3.75% of the turnover as against 2.5% in the preceding year. There is no dispute to the fact that M/s Shatul Commercial Co. Pvt. Ltd. is a related party. It is the case of the Revenue that when the rate of commission ranges from 1.5% to 3% in case of un-related parties,

higher commission has been given to the related party @ 3.75% which is excessive. Since the related party was given commission @ 2.5% in the preceding assessment year, therefore, the A.O. allowed the commission up to 2.5% of the turnover effected through the related party and disallowed an amount of Rs. 1157549/- u/s 40A(2) of the Act. We find the ld. CIT(A) upheld the action of the A.O. on the ground that another commission agent M/s Shanti Udyog which is an un-related party was given commission @ 1.5% on a turnover of Rs. 852 lacs whereas the rate of commission paid by assessee company to the related party M/s Shatul Commercial Co. Pvt. Ltd. @ 3.75% on a turnover of Rs. 869 lacs. Since the turnover effected by the related party as well as the un-related party are almost same, therefore, there is no justification in giving higher rate of commission to the related party. It is the submission of the ld. counsel for the assessee that the area of operation in the case of M/s Shatul Commercial Co. Pvt. Ltd. was on all India basis whereas in the case of un-related parties, it is restricted to part of area of Rajasthan. Therefore comparison cannot be made with all India operation and restricted area of operation. We do not find much force in the above submission of the ld. counsel for the assessee. The ld. CIT(A) has already given a finding that the quantum of sales effected through M/s Shanti Udyog was Rs. 852 lacs and they were paid commission @ 1.5%. The related party through whom the sales effected was Rs. 869 lacs has been paid commission @ 3.75% commission. From the analysis made by the A.O. in the body of the assessment order, we find the commission paid to unrelated parties ranges from 1.5% to 3% whereas commission in the case of related party is 3.75%. Even assuming that the related party has rendered some extra services such as giving market information feed back regarding changing trends as well as commercial information etc. and giving services on all India basis still such huge increase in the rate of commission appears to be in higher side. Considering the totality of the facts of the case and considering the fact that the commission to un-related parties varies from 1.5 to 3%, therefore, payment of commission @ 3% to the related party as against 2.5% allowed by the A.O., in our opinion, is reasonable and will

meet the ends of justice. We hold and direct accordingly. The ground raised by the assessee is accordingly party allowed.

11. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court 14.12.2011.

Sd/- (VIJAY PAL RAO) Judicial Member	Sd/- (R K PANDA) Accountant Member
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Place: Mumbai : Dated: 14.12.2011.
RK

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BY ORDER

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