

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "L",
MUMBAI
BEFORE SHRI R.S.SYAL, ACCOUNTANT MEMBER
& SHRI I.P.BANSAL JUDICIAL MEMBER

ITA NO. 6756/MUM/2008(A.Y.2000-01)
ITA NO.6757/MUM/2008(A.Y.2001-02)
ITA NO.6758/MUM/2008(A.Y.2002-03)
ITA NO.407/MUM/2009(A.Y. 2005-06)

M/s. S.H.A.M.K. International Pvt.
Ltd. Suite 101, Golden Walls,
Plot No.581, 18th Road,
Khar (W), Mumbai - 400 052.
PAN:AABCM 9688A
(Appellant)

Vs. The Income Tax Officer 9(3)(1),
Aaykar Bhavan, MK Road,
Mumbai - 20.

(Respondent)

Appellant by : Shri G.L.Purnany
Respondent by : Shri Mahesh Shah
Date of hearing : 06/08/2012
Date of pronouncement : 10/08/2012

ORDER

PER I.P.BANSAL, J.M

All these appeals are filed by the assessee and they are directed against three separate orders passed by Ld. CIT(A),Cen-1, Mumbai dated 29/9/2008 for assessment years 2000-01, 2001-02 & 2002-03 and another order dated 29/11/2008 for assessment year 2005-06. Grounds of appeal in all these appeals read as under:

Grounds of Appeal for A.Y.2000-01:

“ The grounds of appeal are without prejudice to one another. Learned C.I.T (Appeals)/C/I and Learned ITO 9(3) (1) have erred in matter of fact as well as law as under:

1. Re-opening u/s 147/148 is without valid reasons.
2. Treating appellant as Permanent Establishment of a Foreign Company and treating receipts from them as business receipt and expenditure as business expenditure.
3. Rejection of Books of accounts u/s 145 on irrelevant and incorrect grounds
4. Making addition of Expenditure which is not charged to P&L A/c nor claimed any deduction there of at any time.
 - i. Addition of Expenses out of cash expenses 50,000/-
 - ii. Disallowance of Donation Rs. 3,65,242/-
5. Addition of Expenses charged to Profit & loss A/c Rs.50,000/- out of cash, conveyance & telephone expenses.
6. Addition of Rs 10,27,199/- on estimation basis 5% of total expenditure of Rs. 2,05,43,980/- as a new ground of addition and without considering over all facts.
7. An applicant craves for leave to add, omit or alter grounds of appeal
8. Prayer: All additions may be removed”

Grounds of Appeal for A.Y.2001-02:

“ The grounds of appeal are without prejudice to one another. Learned C.I.T (Appeals)/C/I and Learned ITO 9(3) (1) have erred in matter of fact as well as law as under:

1. Re-opening u/s 147/148 is without valid reasons.
2. Treating appellant as Permanent Establishment of a Foreign Company and treating receipts from them as business receipt and expenditure as business expenditure.
3. Rejection of Books of accounts u/s 145 on irrelevant and incorrect grounds
4. Making addition of Expenditure which is not charged to P&L A/c nor claimed any deduction there of at any time.
 - i. Addition of Expenses out of cash expenses 50,000/-
 - ii. Disallowance of Donation Rs. 3,70,038/-

5. Addition of Expenses charged to Profit & loss A/c Rs.75,000/- out of cash, conveyance & telephone expenses.

6. Addition of Rs 20,94,671/- on estimation basis 5% of total expenditure of Rs. 4,81,93,425/- as a new ground of addition and without considering over all facts.

7. An applicant craves for leave to add, omit or alter grounds of appeal

8. Prayer: All additions may be removed”

Grounds of Appeal for A.Y.2002-03:

“ The grounds of appeal are without prejudice to one another. Learned C.I.T (Appeals)/C/I and Learned ITO 9(3) (1) have erred in matter of fact as well as law as under:

1. Re-opening u/s 147/148 is without valid reasons.

2. Treating appellant as Permanent Establishment of a Foreign Company and treating receipts from them as business receipt and expenditure as business expenditure.

3. Rejection of Books of accounts u/s 145 on irrelevant and incorrect grounds

4. Making addition of Expenditure which is not charged to P&L A/c nor claimed any deduction there of at any time.

i. Addition of Expenses out of cash expenses 50,000/-

ii. Disallowance of Donation Rs. 3,76,177/-

5. Addition of Expenses charged to Profit & loss A/c Rs.75,000/- out of cash, conveyance & telephone expenses.

6. Addition of Rs 12,56,012/- on estimation basis 5% of total expenditure of Rs. 2,51,20,253/- as a new ground of addition and without considering over all facts.

7. An applicant craves for leave to add, omit or alter grounds of appeal

8. Prayer: All additions may be removed”

2. As it can be seen from the above grounds some of the grounds are common. For A.Y 2000-01 to 2002-03 the assessee is also assailing assessment on the invalidity of reassessment proceedings. The copy of reasons recorded for each of the assessment year has been placed at Page-4 of the paper book filed for the respective years. The main reason stated is that the assessee had received certain payments in the respective years from one UAE concern named as M/s. Miraj Pte. Ltd. (Sharjah ,UAE) on account of advertisement and business promotions and assessee had made certain expenditure against those receipts under various heads and all these entries were not routed through P&L Account. Certain donations were also debited which according to AO were not allowable as business expenditure. As no written agreement between assessee and the said concern was made available for receiving that money and making expenditure the AO has formed a belief that income chargeable to tax has escaped in the hands of the assessee. Year wise receipts and expenditure and also imports by the assessee from the said concern has been tabulized in assessment order and is reproduced below for the sake of convenience.

A.Y	Receipts from M/s. Miraj Pte. Ltd.	Expenditure on a/c. of Agency Promotion	Import by the assessee from M/s. Miraj Pte. Ltd.
2000-01	Rs. 2,86,04,581/-	Rs. 2,05,43,980/-	Rs. 1,42,34,490/-
2001-02	Rs. 5,88,73,000/-	Rs. 4,81,93,425/-	Rs. 1,53,60,024/-
2002-03	Rs. 3,30,58,750/-	Rs. 2,51,20,253/-	Rs. 33,70,764/-
2003-04	Rs. 97,80,000/-	Rs. 2,42,58,330/-	Rs. 64,38,763/-
2004-05	NIL	Rs. 2,21,24,210/-	Rs. 1,00,13,992/-

3. It can be mentioned here that in all these cases, no assessment was originally passed under section 143(3) of the Income Tax Act,1961(the Act) and the returns were only processed under section 143(1) of the Act. For assessment year 2005-06 the impugned assessment itself is framed under section 143(3) of the Act.

4. The Validity of reassessment was also challenged by the assessee before the Ld. CIT(A), who has recorded a finding that while issuing notice to the assessee the AO has taken care of procedural requirement of reopening of the assessment. The case was reopened with the prior approval of Additional CIT, Range 9(3). Notice under section 148 was issued and has been properly served on the assessee. A copy of reasons recorded were also supplied to the assessee. The reopening was on the basis of assessment framed for A.Y 2004-05, from where it was noticed by the AO from the bank statement obtained under section 133(6) that the assessee was receiving substantial amounts from M/s. Miraj Pte Ltd. which were not reflected in the bank statement pertaining to earlier assessment years. For the years under appeal no formal assessment under section 143(3) was passed which would mean that assessee was not subject to formal scrutiny, which was only done in A.Y.2004-05, during which certain factual aspects had come to the notice of AO on the basis of which AO came to know of an information obtained that there is an underassessment in the case of the assessee in respect of earlier years and in these circumstances it was only required to see that whether or not there was any bona fide belief in the mind of the AO which could make him to believe that income had escaped assessment. Adequacy of reasons could not be a ground for determining valid reopening of the assessment. Ld. CIT(A) has also referred to the decision of Hon'ble Supreme Court in the case of CIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., 291 ITR 500(SC) wherein it has been held that "reason to believe" would mean cause or justification. If AO had cause or justification to know or suppose that income has escaped assessment then it can be said that AO had reasons to believe that income has escaped assessment. Ld. CIT(A) has also referred to the decision of Hon'ble Supreme Court in the case of Central Province Manganese Ore Company Ltd. vs.

CIT,191 ITR 662 (SC) wherein it has been held that at the stage of initiation of action under section 147 of the Act, final outcome of the proceedings is not relevant but what is required is the existence of “reasons to believe” but not the established fact of escapement of income. Looking into the facts of the case Ld. CIT(A) has held that reassessment proceedings were rightly initiated by the AO. These findings of Ld. CIT(A) are challenged before us in respect of assessment year 2000-01 to 2002-03.

5. We have heard both the parties on this issue. The facts mentioned by Ld. CIT(A) in his order are not controverted by Ld. A.R. During the course of assessment proceedings for A.Y 2004-05 it had come to the notice of the AO that there were certain discrepancies in the bank account which lead the AO with the belief that certain income had escaped assessment in the hands of the assessee. Existence of information with the AO is not denied by the assessee. All these assessments were framed under section 143(1) of the Act only. In this view of the situation, after hearing both the parties, we are of the opinion that there is no infirmity in the order passed by Ld. CIT(A) vide which validity of reassessment proceedings has been upheld. We decline to interfere. This ground of the assessee for all the three years is dismissed.

6. Another common issue raised in all these appeals is regarding estimation of 5% agency income in the hands of the assessee out of expenditure incurred by the assessee from the funds received by it from M/s.Miraj Pte. Ltd. The table in respect of expenditure has already been reproduced in the above part of this order. For example for A.Y 2000-01 the AO took an amount of Rs.2,05,43,980/- being expenditure incurred by the assessee out of receipt of Rs.2,86,04,581/-. A sum of Rs. 10,27,199/- was added to the income of the assessee with the following observation.

“Since it has been held that the assessee is a permanent establishment and as per the directions of its principal has carried out various activities The assessee by not routing through the P&L account, the income and expenditure has purposely not offered the element of profit to tax The profit motive is also missing in the assessee’s case which is also not acceptable. For specialized services like direct marketing etc. a special fees is normally negotiated with the client. In addition for bulk purchases / services incentives are also given.

Since the assessee has not furnished any agreement with M/s. Miraj Pte. Ltd. for providing the services in respect of advertisement & business promotion and how much commission should be charged against the services. Further as stated above, there are many discrepancies found In expenses related to Agency Promotion which could not be perfectly determined since the assessee has not maintained the books of accounts separately for Its own business purposes & Agency Promotion purpose. Further the submission of the assessee that the venture of Agency Promotion carried out on behalf of M/s. Miraj Pte. Ltd. has not resulted in to any profit is also not acceptable. Thus it very clear that the assessee has not maintained its books of accounts properly by not routing this activity of Agency Promotion through its P&L A/c.

The sanctity of the books of accounts is of paramount importance and that they must always reflect the real & proper picture of each & every transaction entered into by the assessee on day-to-day basis. The system of accountancy does not change depending upon each assessee but is static & is uniformly applicable to every assessee and any kind of business. Therefore I reject the books of accounts of the assessee as per the provisions of section 145 of the I.T.Act, 1961.

9. As discussed above, the profit is estimated at 5% of the receipt (i.e. expenditure during the year, as discussed above) of Rs. 4,81,93,425/-, which comes to Rs. 20,94,671/-. The same is added to the total income of the assessee. Penalty proceedings u/s.271(1)(c) are separately initiated by issuing notice u/s.274 of the I.T.Act, 1961.”

7. The assessee had submitted the following account in respect of receipt and expenditure incurred on behalf of the aforementioned party.

“M.K.P. DISTRIBUTORS PVT.LTD**Details of Expenses Charged to Agency promotion for the year
01/04/1999 to 31/03/2000. List -C****Agency Promotion**

Balance B/o.	9,923,868.00
Addition during the year	<u>28,604,581.00</u>
Total	38,528,449.00

LESS:

Advertising Expn.	11,579,622.00	
Business Promotion	3,759,572.00	
Salary	1,995,478.00	
Print & Stationery	108,556.00	
Postage & courier	51,178.00	
Newspaper & Period	33,045.00	
Travelling	886,370.00	
Society Charges	198,219.00	
Furniture for counters	1,502,698.00	
Wainkuth dham Ashram Trust	284,446.00	
Vishal Roopi Ashrafi Hira Trust	80,796.00	
Rent	64,000.00	<u>20,543,980.00</u>

Balance C/o.	17,984,469.00
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ADD:

Outstanding Advertising Expn.	<u>2,093,958.00</u>
Balance C/o. to Balance Sheet	<u>20,078,427.00</u>

20,078,427.00”

8. It has been the case of the assessee that it has been receiving amount from the aforementioned party for promoting the business of that party. The AO required the assessee to explain and assessee filed detailed submissions according to which the aforementioned amounts received by the assessee have specific purpose and it was spent accordingly. The said

amount was received in "Trust" on account of the remitter and assessee was not at liberty to utilize that fund according to its wish, hence, these were not free receipts. It was submitted that the assessee is in the business for last 12 years and the expenditure having not been debited to P&L Account and are not out of income, therefore, cannot be considered for disallowance. All the receipts are duly disclosed in the bank account. The payments made to charitable trust which are enjoying registration under section 12A of the Act as well as exemption under section 80G of the Act and these donations are made on behalf of the remitter and expenditure are made with their concurrence. Since they are not chargeable to P&L Account, the question of their disallowance does not arise. So far as it relates to the query of the AO regarding written agreement, the assessee submitted that there was no requirement of having any written agreement. It was submitted that the letter received from the said party dated 3/4/2003 has already been placed on record. There has been regular exchange of communication between the assessee and the said party, therefore, there was no requirement of any valid contract. To run the business is a prerogative of the assessee. The dealing of the assessee with its foreign suppliers is on principal to principal basis. The activities carried out from the funds received from foreign buyers was being conducted from separate premises with separate staff including technical and supervisory staff who look after the activity of agency promotion. Separate account is maintained thereon. Annual financial statement is submitted with the return of income and remitter has also duly informed through regular exchange of communication and remitter has not created any dispute regarding the same. Copy of such submission submitted to AO has filed at page 5 to 7 in the shape of letter dated 27/9/2007. It is in this manner the assessee objected for any adverse inference to be taken in this regard.

9. Ld. CIT(A) has upheld the action of the AO. It is common ground in all these years whereby the assessee has challenged the sustenance of addition of 5% of the expenditure incurred by the assessee from the remittances received from M/s. Miraj Pte. Ltd.

10. The assessee relied upon the submissions made by it before the AO and Ld. CIT(A) and as against Ld. D.R relied upon the findings recorded by AO and Ld. CIT(A). It was vehemently pleaded by Ld. D.R that assessee did not disclose the motive to do such a large activity without any profit on behalf of its foreign client. As against this argument of Ld. D.R, Ld. A.R of the assessee drew our attention towards the following letter written to the AO dated 9/10/2006, a copy of which is filed at page 57 of the paper book:

“G. L. PURSNANY
INCOME TAX CONSULTANT

13/343, Jasmine Society,
Near Rly Station,
New MIG Colony,
Bandra (East),
Mumbai — 400 051
Tel. 26478656

09-10-2006

M.K.P. Distributors Pvt. Ltd.
A.Y. 2004-05
Justification — Agency Promotion

A. Nature of Expenses:

Expenses are incurred on publicity through print and visual medias, Publicity materials, Launching of New products inviting the prospective dealers and other concerned persons in various Hotels,

Full details along with nature of expenses, Names and Addresses to whom the monies are paid are given in our letter of 29.06.06.

B. Indirect Benefit to the Assessee.

(1) Due to Awareness and promotion Drive Our Purchase/Import of products of the principals has increase from Rs.33,70,764/- from A.Y 2002-03 to Rs.10,013,992/- in A.Y 2004-05 thus consequential turn over increase and profit to assessee.

(2) Apart from the goods/Brands of principal viz. Mirage Pte Ltd. Dubai, the Assessee also deals in other brands of perfumes and cosmetics all over India. Thus the Assessee is know in perfumery and cosmetics Market all over India at no cost to them but at the cost of principals.

(3) Benefits of these kinds promotional expenses have a long time effect. We are and shall remain in this line whether we sell the products of our aforesaid principals or not. The Benefit shall continue to accrue in near future.

C. Business Prudence

Though there are no immediate monetary gains. Indirect Benefits mentioned above and continued & sustained benefits in time to come/accrue to the Assessee at No cost to them. This a policy of a Business Prudence.

Sd/-
(G. L. Pursnany)"

Thus it was submitted by Ld. A.R that assessee had obtained the benefit in the shape of increase in its business and, therefore, no income can be assessed simply on the basis of presumption as nothing has been brought on record by the department that assessee had earned any income out of the funds received by it from M/s. Miraj Pte. Ltd.

11. We have heard both the parties on this issue and their contentions have carefully been considered. We have also gone through the documents referred during the course of hearing. We found that the existence of the

foreign party and its genuineness has not been doubted by the AO as the assessee apart from receiving separate funds has also imported goods from the said party for its own trade. The assessee had filed evidence with the AO in the shape of letters received from the said party that the amounts sent to the assessee was for the business of that party. The assessee is keeping and maintaining separate account for the same, which was filed before AO, The AO has not doubted the receipt of the same also. The only ground on which addition is made is that assessee must have earned certain income out of those expenditure. However, there is no material placed on record by the revenue to establish the same. Right from the beginning it is the case of the assessee that the said amount was placed with it in "Trust" and assessee has been submitting the accounts of the same to the said party which did not have any objection upon such spending. In the account also no commission has been charged by the assessee. Therefore, the addition is made simply on the basis of presumption, which in our opinion is not sustainable. Therefore, we delete the addition and this ground of the assessee in respect of assessment years 2000-01 to 2002-03 is allowed.

12. So as it relates to disallowance pertaining to donation these have been stated to be out of the remittance received by the assessee in "Trust". Therefore, the addition with regard to donation is also deleted. One more addition related to the amount received by the assessee from above mentioned party i.e. disallowance of Rs. 50,000/- in respect of each of the year under appeal, which is disallowance on account of expenditure incurred in cash which are not claimed as deduction in P&L Account. This addition also relates to amount received by the assessee from aforementioned party and as it is not charged to P&L Account the addition with regard to same is deleted in respect of all the years.

13. It may be mentioned here that for assessment year 2005-06 no addition for 5% expenditure is made, therefore, that ground is not common so far as it relates to A.Y 2005-06.

14. Now we are left with only one disallowance which is with regard to expenses incurred by the assessee in its P&L Account which is out of cash on conveyance, telephone expenses etc.. We found that this issue is covered by the decision of ITAT in assessee's own case for A.Y 2004-05 in ITA No.157/Mum/2008 dated 30/04/2012 and copy of this decision was placed on our record. This issue is discussed in para 30 to 36 , which is reproduced below for the sake of convenience.

“30. In Ground of appeal No.2, the assessee has disputed the order of Ld. CIT(A) in confirming the disallowance of Rs.3,50,000/- being 20% in respect of expenses on telephone, postage, courier, sale promotions and conveyance aggregating a sum of Rs. 17,50,121/-.

31. The Assessing Officer has stated that assessee has claimed the following expenses in it P&L account:

<i>i) Telephone expenses</i>	<i>: Rs. 7,24,165/-</i>
<i>ii) Postage & courier</i>	<i>: Rs. 7,10,624/-</i>
<i>iii) Sales promotion</i>	<i>: Rs. 1,42,430/-</i>
<i>iv) Conveyance</i>	<i>: <u>Rs. 1,72,902/-</u></i>
<i>Total</i>	<i>: Rs.17,50,121.</i>

32. The Assessing Officer has stated that assessee could not furnish supporting/ documentary evidences and has also not produced the cashbook to establish the genuineness and authenticity of these expenses. Hence, the AO disallowed 20% of Rs.17,50,121 which comes to Rs.3,50,024. In the first appeal, Ld CIT(A) has confirmed the action of Assessing Officer and the relevant para 5.15 which reads as under:

“5.15 I have gone through the contention of the appellant and do not find any merit in its case. The argument made by the appellant is general and without supporting the claim made by it in respect of such huge expenses. Further, it is also seen from the facts of the case that the appellant was also carrying out the activities for and on behalf of M/s. Miraj PTE Ltd. merely as facilitator and that it could not be denied that the expenses in the instant case could be incurred for the purpose of such agency promotion activities. Further in the instant case the

appellant has merely stated that expenses were incurred in cash were very less. However, it is not a question of incurring the expenses only in cash but to establish the purpose of such business which in my opinion the appellant has failed to do so. It is well settled that for the purpose of any expenses be allowed as deduction the same should be incurred for the purpose of the business which in this case is not established and therefore I do not find any infirmity in the AO's action in this regard and as such disallowance made by the AO is confirmed."

33. Hence, the assessee is in further appeal before the Tribunal.

34. Ld A.R. submitted that there is no justification to make disallowance on adhoc basis out of the expenses claimed by the assessee under the head "telephone, postage, courier, sales promotions and conveyance". He submitted that the assessee furnished supporting documentary evidences and cash book as required by Assessing Officer to establish that the expenses are genuine. He submitted that in telephone expenses, cash component was Rs.6464.50 and from postage and courier the cash component was Rs.9420. He further submitted that the cash component in sales promotion was only Rs.324. He further submitted that the conveyance expenses were reimbursed in cash for bus and taxi fare incurred by the employees which are more than 200. Therefore, the expenditure is reasonable and there is no justification for any disallowance.

35. Ld D.R. supported the order of Id CIT(A) and submitted that assessee could not establish that entire expenditure has been incurred for its business purposes. He submitted that the assessee had been undertaking the promotional activities for the products of M/s. Miraj PTE Ltd and the receipt as well expenditure have not been routed through P&L account. He submitted that Id CIT (A) has rightly stated that a part of expenditure could be incurred for the purpose of such promotional activities of the agency from which no income has been shown.

36. We have carefully considered the submissions of representatives of the parties and orders of authorities below. There is no dispute to the fact that the assessee has not been able to produce all documentary evidences to establish that the entire expenditure has been incurred by the assessee under the above heads for its business purposes. It is a fact that the assessee has also undertaken promotional activities to promote brand products of M/s. Miraj PTE Ltd in India and the receipt as well as expenditure have not been routed through P&L account of the assessee. We find substance in the observations of Id CIT(A) that a part of expenditure claimed by the assessee under the above heads could be for the purpose of promotional activities for the purposes of promotional activities. Hon'ble Andhra Pradesh High Court in the case of Commissioner of Income-tax v. Transport Corporation of India Ltd, 256 ITR 701(AP) has held that unsupported payment is not deductible. Hon'ble Supreme Court in the case of Commissioner of Income-tax v. Calcutta Agency

Ltd, 19 ITR 191(SC) has held that if the assessee fails to establish the fact of necessary documents to claim for deduction under section 37(1), the claim is not admissible. Considering the facts of the case and also case laws, we are of the considered view that the disallowance of 20% as confirmed by Id CIT(A) out of the expenses claimed by the assessee is reasonable. Hence, we uphold his order by rejecting the ground No.2 of appeal taken by the assessee.

15. In this view of the situation and after hearing both the parties, respectfully following the aforementioned order we decline to interference in the disallowance uphold by Ld. CIT(A) as the facts are not stated to be different. Accordingly this ground of the assessee for all the years is dismissed.

16. In the result, all the appeals are partly allowed in the manner aforesaid.

Order pronounced in the open court on the 10th day of August,
2012

Sd/-
(R.S.SYAL)
ACCOUNTANT MEMBER
Mumbai, Dated 10th August, 2012.

Sd/-
(I.P.BANSAL)
JUDICIAL MEMBER

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R”L” Bench.

(True copy)

By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.