

आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL, MUMBAI "B" BENCH

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य, एवं राजेन्द्र, लेखा सदस्य

Before S/Sh. Joginder Singh, Judicial Member & Rajendra, Accountant Member

आयकर अपील सं./ITA No.1718/Mum/2012, निर्धारण वर्ष/Assessment Year-2008-09

ACIT- Central Circle-25(3) 308, C-11, Bandra Kurla Complex Bandra (E) Mumbai-400 051.	Vs	Shri Milan N. Shah Q-1202, Panchsheel Garden Mahavir Nagar, Kandivali(W) Mumbai-400 067. PAN: ANIPS 3933 R
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Nishit Gandhi

राजस्व की ओर से/ Revenue by : Shri Yogesh Kamat-Sr.AR

सुनवाई की तारीख/ Date of Hearing : 15-06-2015

घोषणा की तारीख / Date of Pronouncement : 15-06-2015

आयकर अधिनियम, 1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dt.16.12.2011 of CIT(A) – 35, the Assessing Officer(AO), has raised following Grounds of Appeal:

“1. On the facts and in the circumstances of the case, and in law, the ld. Commissioner of Income tax(Appeals) erred in deleting the addition of Rs.29,45,455/- made by the Assessing Officer on account of sub-consultancy charges paid.

2. The appellant prays that the order of the ld. Commissioner of Income tax(Appeals) on the above ground be set aside and that of the Assessing Officer be restored.

3. The appellant craves leave to amend or alter any ground or add a new ground.”

Assessee, an individual, engaged in the business of consultancy and advisory services in shares and securities, filed his return of income on 30.09.2009 admitting total income of Rs.38.92 lacs. The AO completed the assessment on 24.12.10, u/s. 143(3) of the Act determining the income of the assessee at Rs.68.37 lacs.

2. Effective ground of appeal is about disallowance of deduction of Rs.29,45,455/- claimed by the assessee towards consultancy charges. During the assessment proceedings the AO found that the assessee had debited consultancy charges in the names of Navin S. Shah (Father of the assessee) and Hemant K. Shah, CA (friend of the assessee). He examined the assessee on oath during the assessment proceeding and directed the assessee to file explanation about justification of payment of consultancy charges. After considering the submission of the assessee, he held that the assessee had not been able to establish the genuine need of the business viz. a viz. the expenses for consultancy fees, that sub consultancy charges had been paid to related parties, that one of the party was his father, that consultancy fee was outstanding for the year and the earlier years. The AO made an addition of Rs.29.45 lacs.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was contended that the assessee had filed explanation with regard to genuineness of payment of sub-consultancy fee, that the AO had wrongly held that jobbing activities did not warrant any expert opinion, that the jobbing business was highly volatile, that it required daily analysis of share market quotations and trends, that all these activities could not be performed by one person single handedly, that he took advice from persons who were experienced and expert in the line of activity, that the businessman was the best judge of the activity to be employed to carry on the business activity, that Hemant K. Shah was a professional, that he was in the field of share market for last so many years, that he had submitted the copy of his income tax return, that Hemant K. Shah had offered the income received from the assessee for the year under consideration for taxation, that Navin S. Shah had expert knowledge of share trading, that he was working with treasury bench of Central Bank of India, that he had also paid the tax on the receipt basis with regard to sub-consultancy fees. The FAA called for a remand report from the AO and invited comments of the assessee about the remand report.

After considering the available material, the FAA held that the assessee was regularly carrying on the business of consultancy and advisory services in the form of jobbing, that he had shown the income arising from both activities which was accepted as such by the department, that there had been phenomenal increase in the gross receipt from Rs.42.00 lacs to Rs.96.00 lacs for AY.2007-08 to 2008-09, that the accounts of the assessee were audited as per provisions of section 44AB of the Act, that he had filed exhaustive details during the assessment proceedings, that it included explanation regarding consultancy charges debited to the P&L A/c., that the AO had not invoked the provisions of s.145 or 144 of the Act, that all the payments were made by A/c. payee cheques and appropriate taxes were deducted at source, that both the recipients of sub-consultancy were income tax assesseees and had offered the corresponding incomes in their returns, that both of them had filed confirmation of payment, copies of income tax statement and bank statement before the AO, that both of them had appeared before AO in response to the summons issued u/s. 131, that in their statement, on oath, they had confirmed the services rendered as well as receipt of sub-consultancy charges, that the assessee was also examined by AO, that he had confirmed payment of sub-consultancy charges, that both of them had experience of share market and were capable of rendering the services, that the AO had not controverted or disputed the basic facts, that the assessee was following mercantile system of accounting, that Navin S. Shah was following cash system of accounting, that AO had not spelt out as to what further evidences were expected from the assessee, that in the stock market consultancy and advisory is given on real time basis and continuously, that in such a trade customary practice as well as circumstantial evidences had to be looked in, that both the payees had given description of the services rendered by them, that the AO had not given any clear or specific finding about justification for invoking the provision of sec. 40A(2)(b) of the Act, that the AO could not sit in the armchair of the businessman to decide commercial expediency, business need reasonableness of payment to be made, that the assessee had discharged his onus to claim deduction of Rs.29.45 lacs as consultancy, that the AO had failed to bring on record any cogent material to rebut assessee's explanation and evidences. Accordingly, the disallowance of Rs.29,45,445/- made by the AO was deleted.

4. Before us, the Departmental Representative (DR) relied upon the order of the AO and stated that justification for deleting the addition was missing in the order of the FAA, that services were

not rendered to the assessee. The Authorised Representative (AR) argued that Hemant K. Shah, Navin S. Shah were expert in the field of share marketing, that amount was paid for business need of the assessee, that both of them had offered income for taxation, that in earlier years also assessee was paying consultancy charges to those persons. He referred to Pg-No.153 to 158 of the Paper book.

5. We have heard the rival submissions and perused the material before us. We find that the disallowance was made by the AO, as he was of the opinion that there was no business need to make sub consultancy charges and then services were not rendered by the consultants, that FAA had called for remand report for AO, that both the parties i.e. service providers had filed the proof of filing of their returns of income, during the assessment proceedings, wherein the sub consultancy charges were offered for taxation. In our opinion it is the assessee and not the AO who has to decide the needs of the business and payment to be made. If the payment are to be made for carrying on of business same cannot be disallowed even if the AO is of the opinion that the payment is excessive. The only exception is provisions of section 40(A)(2)(b) of the Act. But the AO has not discharged the onus that the assessee had violated that section. From the affidavits filed by both the recipients of the sub-consultancy, it is clear that they had rendered services to the assessee. In these circumstances, we are of the opinion that order of FAA does not suffer from any legal infirmity. Therefore, confirming his order, we decide the effective ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.

फलतः निर्धारित अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है।

Order pronounced in the open court on 15th, June, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 15 जून, 2015 को की गई।

Sd/-

(जोगिन्दर सिंह /Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई/Mumbai, दिनांक/Date: 15.06.2015

व.नि.स./v.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.