

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE MRS. JUSTICE SHIRCY V.

THURSDAY, THE 3RD DAY OF AUGUST 2017/12TH SRAVANA, 1939

ITA.No. 1623 of 2009

AGAINST THE ORDER IN ITA 428/2002 of INCOME TAX APPELLATE

TRIBUNAL,COCHIN BENCH DATED 05-12-2008

APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX,
THIRUVANANTHAPURAM.
BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/APPELLANT:

M/S.OLAM EXPORTS (INDIA) LTD.,
KOLLAM.
R,R BY ADV. SRI.SAJI VARGHESE

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 03-08-2017 ALONG WITH ITA NO. 1633 OF 2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & SHIRCY V.,JJ.

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I.T.Appeal Nos. 1623 & 1633 of 2009
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Dated this the 3rd day of August, 2017

COMMON JUDGMENT

Antony Dominic, J.

These Income Tax appeals are filed by the Revenue aggrieved by the order passed by the Income Tax Appellate Tribunal, Cochin Bench allowing I.T.A. Nos. 428 & 429 of 2002 filed by the respondent/assessee concerning the assessment years 1997-98 and 1998-99. In the returns filed by the assessee, it was revealed that during the aforesaid years, the assessee had paid substantial amounts towards sales commission to M/s. Lovely Enterprises, Delhi for consignment sales. The Assessing Officer disallowed the claim, on the ground that the existence of such agent itself was in doubt. The first Appellate Authority conducted further enquiries into the matter. But, however confirmed the order of assessment. Further appeals were filed before the Tribunal. Before the Tribunal, the assessee had produced further documents. The Tribunal referred to the documents and found that the evidence indicated that the assessee had received only 95% of the invoice price and that the assessee could not have been taxed for an income which they have not received. For this purpose, the Tribunal placed reliance of the judgment of the Apex Court in **Godhra Electricity Co.Ltd. v. Commissioner of Income-Tax [225 (1997)ITR 746]**. On that basis, the Tribunal allowed the appeals of the assessee. It is this common order that is challenged by the Revenue and the questions of law framed are the following:

- “1. Whether on the facts and in the circumstances of the case the Tribunal is right in allowing the assessee's appeal when the payee was not traceable and there was no proof of payment of commission.
2. Whether on the facts and in the circumstances of the case, is the Tribunal right when the validity of the agreement itself has not been proved beyond doubt.
3. Whether on the facts and in the circumstances of the case the finding of the Assessing Officer being that “the existence of the party itself was doubtful (confirmed by the CIT(A) holding that the genuineness of the same has not been proved) the Tribunal is right in law in interfering with the order of the assessment without interfering with the findings of the Assessing Officer and the CIT(A)?
4. Whether on the facts and in the circumstances of the case is not the finding of “not doubted” and basing the order on “the agreement” absolutely perverse and unwarranted when the case of the Revenue is one of non existence of the party itself and lack of genuineness?
5. Whether on the facts and in the circumstances of the case:-

(i) did the assessee discharge the burden of proof

(ii) Are not the approach and order of the ITAT putting the burden of proof on the Revenue and hence vitiated?"

2. We heard the Standing Counsel for the Revenue and the counsel appearing for the assessee.

3. Having heard the rival submissions made at the Bar, though we are also inclined to agree with the Standing Counsel for the Revenue that there are circumstances which are capable of creating a reasonable suspicion about the existence of the Agency, M/s. Lovely Enterprises, fact remains such a concern had CST Registration. There were transactions between the assessee and the said concern and the invoices which were raised by the assessee in the name of the Agent also contained the gross sale price and the net amount payable, after recovery of 5% towards commission and other expenses due. Based on such transactions, the amounts were realised by the assessee through banking channels and F forms under the CST Act were also obtained by them from the Agent. These admitted facts, therefore, shows that the assessee had received only 95% of the gross price and the Revenue has no material before it that the assessee had received anything in excess thereof either directly or otherwise. The principles laid down by the Apex Court in Godhra Electricity's case (supra) clearly indicate that the assessee could be taxed only for the income that it has derived. If that be so, despite the contentions raised regarding the doubtful existence of the agent, the assessee having received only 95% of the gross value, could have been taxed, only for what it had actually received.

4. In that view of the matter, we are inclined to think that in the facts of this case, the Tribunal was justified in coming to the factual conclusion that the assessee could not have been taxed anything more than what it had received. In such circumstances, we do not find any questions of law arising in this appeal, to be considered by this Court.

These Appeals fail and they are dismissed.

Sd/-

ANTONY DOMINIC

JUDGE

Sd/-

SHIRCY V.

JUDGE

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**True copy
P.S. To Judge**