IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'C', KOLKATA
(Before Shri S. S. Godara, J.M. & Dr.A.L.Saini, A.M.)

ITA No. 1326/Kol/2015 Asstt. Year : 2010-11

DCIT, Cir-2(1), Kolkata	Vs	M/s. Chloride Power Systems & Solutions Ltd. PAN: AABCC1825B
Deptt		(Respondent)

Deptt by : Shri Saurabh Kumar, Addl.CIT, ld.DR
Respondent by : Shri Anup Sinha, FCA, ld.AR

Date of Hearing : 16-01-2019		Date of Pronouncement: 10-04 -2019

ORDER

Per Dr. A.L.Saini, A.M.:

The captioned appeal filed by the Revenue, pertaining to assessment year 2010-11, is directed against the order passed by the ld.CIT (Appeals)-4, Kolkata, in ITA No. 478/CIT(A)-4/Circle-12/Kol/14-15, dated 06-08-2015, which in turn arises out of an assessment order passed by the Assessing Officer u/s.143(3) of the Income-Tax Act, 1961 (in short, the 'Act'), dated 21-03-2013.

2. The grievances raised by the Revenue are as follows:

> *"1.On the facts and circumstances of the case and in law, ld. CIT(A) has erred in deleting addition of Rs.39,69,958/- as a commission payment even though evidences regarding services rendered were not produced by the recipient of commission.*
>
> *2.On the facts and circumstances of the case and in law, ld. CIT(A) has erred in allowing the amount of Rs.28,85,681/- as written off which was standing as advance given for acquiring Capital Rights to M/s. Ifinity EV Motors (P) Ltd even though such payment was of Capital Nature.*
>
> *3.That the assessee craves leave to add, alter, amend or modify the grounds of appeal during the course of hearing proceedings of this case.*

3. Ground No. 1 relates to deletion of addition of Rs.39,69,958/- on account of commission payment.

4. The brief facts qua the issue are that the assessee filed its return of income (ROI) on 23-09-2010, declaring, total income to the tune of Rs.1,66,93,300/-. The said ROI was processed by the Department u/s. 143(1) on 15-07-2011 with total income of Rs.1,71,36,740/-. Later on, the assessee`s case was selected for scrutiny under section 143(2) of the Act. During the assessment proceedings, the assessee submitted the details of commission paid as follows:

Sl. No.	*Name of Party*	*Amount (Rs.)*
1	*M/s. Manifold Agency P.Ltd*	*7,72,100/-*
2.	*M/s. Venus Overseas Incorporation*	*83,500/-*
3.	*M/s. Nishamoni Associates*	*4,27,330/-*
4.	*M/s. Muskan Merchandise P.Ltd*	*26,87,028*
	TOTAL	*39,69,958/-*

In order to verify the genuineness of the commission paid, the AO issued notices under section 133(6) of the Act to these parties. However, notices returned back unserved. The assessee submitted before the AO that the payments were made for sale of battery to M/s CGPL. Notices was issued to M/s CGPL. However, M/s CGPL submitted, vide letter dated 06.12.2012 that they have no transaction with any other party except the assessee company. AO noticed that Assessee could not provide any explanation for the same, therefore he made addition of Rs.39,69,958/-.

5. Aggrieved by such order of the AO, passed u/s. 143(3) of the Act, the assessee filed an appeal before the ld. CIT(A), who deleted the impugned addition of Rs. 39,69,958/-. Aggrieved by the order of ld. CIT(A), the Revenue is in appeal before us.

6. Before us, the ld. DR for the Revenue submitted that assessing officer has passed a reasoned order therefore, the same should be sustained. On the other hand, the ld. Counsel for the assessee has defended the order of the ld. CIT(A).

7. We have heard both the parties and perused the material available on record. We note that the genuineness of the transaction of payment of commission amounting to Rs. 39,69,958/-, by the assessee, has not been questioned or doubted by the AO during the assessment proceedings. The payments were made by the assessee through account payee cheques and duly recorded in the books of account. In other words, there was actual outflow of Rs. 39,69,958/-, from the coffers of the assessee. Each party payment was subjected to TDS and tax deduction certificates were issued by the assessee. The bank statement reflected that the cheques were duly encashed. The agents duly filed their return of income and the income received were all subjected to taxation as per the provision. There is no further allegation of the AO that the said parties were benami or alias of the assessee or that the amount of commission charges paid to the said parties had flown back to the assessee. The fact that various agents had rendered some services in connection with obtaining orders or conducting various scope of work in catering to the domestic market of the assessee is without doubt, as would be evident from the detailed submission made vide letter dated 05/12/ 2012 and the relevant agreements also submitted in subsequent hearing. We note that the auditors report and the tax audit report had categorically stated that there was no personal expenditure incurred by the company. From the details enclosed it is clear that all the payments were made to parties against valid contracts. The AO did not hold a single instance that any part of the amount was specifically used for personal purpose. He has just made an adverse inference that the amount is not spent for business purpose. It may be noted that commission is based on percent of ex works price against valid contractual agreements and the same cannot be stated as personal payments for the company or its employees.

8. We note that there is no doubt that by involving the services of these agents, the company had received some business and thus added to its profitability. It also used their expertise and connections to recover the amounts, collect tax forms and other clearances, which other-wise would have required a full time employee of the assessee

company to devote its time. There would have been travel and stay expenses too. All these were dispensed with by the appointment of an agent who acts for and behalf of the company to carry out various activities. We note that the said expenditure incurred by the assessee on account of commission, is allowable under section 37(1) of the Act, having been laid out wholly and exclusively for the business of the assessee. The payment of such commission was driven by business expediency. It is now a settled principle of law that business or commercial expediency has to be judged from the perspective of the businessman and not of the Revenue, since it is the businessman who is being benefited from the services rendered and also it is he who knows to what extent the benefit ensures to him. This concept is popularly known as "director's arm chair principle" or "man on the platform omnibus".

The Hon'ble Supreme Court has held in the decision rendered in the case of CIT vs. Dhanrajgiri Raja Narasingirji, reported in 91 ITR 644 (SC) at page 550 of the said report that "it is not open to the department to prescribe what expenditure an assessee should incur and in what circumstances he should incur the expenditure. Every business man knows his interest best." The Hon'ble Supreme Court in the decision rendered in the case of Eastern Investments Limited vs. CIT reported in 20 ITR 1 (SC) has opined that the aspect of prudency of entering into a transaction and making an expenditure in connection therewith will have to be judged from the point of view of the businessman and not of the Department. The ratio of the said decision clearly emanates the view that one should not be concerned with the legality or propriety of a transaction or whether the result could have been achieved in another way. What one should be concerned with is whether the transaction was done in the ordinary course of business, however mistaken an assessee might have been. The Hon'ble Supreme Court has held in the decision rendered in the case of Sassoon J David & Co. P Ltd vs. CIT reported in 118 ITR 261 (SC) at page 275 of the said report that "It has to be observed here that the expression 'wholly and exclusively' used in section 10(2)(xv) of the Act [of the 1922 Act, corresponding to section 37(1) of the 1961 Act] does not mean

'necessarily'. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction under section 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure". The Hon`ble Calcutta High Court in the case of Diagnostics vs DClT, 334 ITR 311 had considered a similar issue where a purchase of material was done by the assessee by account payee cheque. However, upon issuance of summon, the supplier did not turn up and the amounts were disallowed that the parties were non-existent. The Calcutta High Court categorically held that once the payment is done by account payee cheque there is no reason to hold that the party did not exist. This principle was followed by the coordinate bench of Mumbai ITAT in the case of ACIT vs Avenue Real Estate Pvt Ltd ITA 8046/Mum/2011. In the said case the assessee made certain purchases and against which the AO issued summons u/s 131, which came back un-served. The assessee failed to produce the party even after several opportunities were given and finally the AO held such purchase as unexplained and disallowed the same. The Coordinate bench held as follows:

> *"Non-service of summons would not place the burden to produce the party squarely on the assessee, when it was being contented that the party had left the premises. That is, a disallowance would not automatically follow non-compliance of the summons by the third party, where there is nothing otherwise adverse on record. The purchases from the said party constituting less than 0.3% of the total project cost, and the payment against the purchases had been made per account payee cheques, so that there was nothing to show that the said money had been routed back to the assessee."*

We note that there are no findings by the AO that the amount paid is incorrect and that the agents are benami as the all have a genuine PAN and filed their return of income. The assessee could not have achieve the order or contract, payments etc unless the services of the commission agents were received. He has not shared the information on the non-service of above notice to the assessee (except Mushka) and merely

presumed that no services were rendered. His further enquiry to CGRL denying transactions with any party other than Caldyne was stretched to all other agents who were not at all involved with the transaction with CGPL. The non-service of notice to Muskan was due to shifting of office from 12 Mangoe Lane to 22 Brabourne Road, 2nd Floor, Kolkata 700 001. Even after submission of the above facts, the Assessing Officer denied to probe further enquiry. We note that a job of an agent is to act on behalf of the principal. The other party may acknowledge his presence but no written communication is ever directed to such agent. It is always the principal who directs his agent to take action on his behalf. Therefore, the communication from CGPL is totally misrepresented. Allegation of purchase of cheques is merely a presumption which is apparent from the order of the AO and the onus lies on the AO to prove the same. All the payments are made by cheque and are duly accounted for and shown in the bank statement. The PAN and other details of the parties were provided by the assessee and they have vouched that the amounts were subjected to TDS. There is a direct link that the assessee has got substantial orders through these parties and has effectively utilized them. Further there is no proof that the money has flown back to the assessee. Under the facts and circumstances as well as the legal position in the matter, we do not find the action of the AO in making the impugned disallowance of commission payments to be tenable and justifiable by any standards. That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid addition. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue is dismissed.

9. Ground No. 2 relates to allowance of Rs.34,82,452/- as written off, which was standing as advance. [the amount mentioned in this ground by Revenue, is wrong, it should be read as Rs.34,82,452/- instead of Rs.28,85,681/-]

10. The brief facts qua the issue are that assessee has written off doubtful advance, the details of which are given below:

Sl. No.	*Name of Party*	*Amount (Rs.)*
1	*M/s. Infinity EV Motors P.Ltd*	*2985681/-*
2.	*Terminal Excise Duty*	*405923/-*
3.	*EMD*	*90,843/-*
	TOTAL	*3482452/-*

During the assessment proceedings, the assessee was asked to explain whether the amount of Rs.34,82,452/- has been credited in the profit and loss account in the previous years. In response, the assessee submitted before AO about the nature of advance but the assessee could not produce any evidence that the same were credited in the profit and loss account in earlier years, hence the AO disallowed Rs.34,82,452/-.

11. Aggrieved by such order of the AO, the assesse carried the matter in appeal before the ld. CIT(A), who has deleted the addition of Rs.34,82,452/-. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us.

12. We have given a careful consideration to the rival submissions and perused the material available on record. The ld. DR has defended the order of the AO. On the other hand, the ld. Counsel for the assesse has defended the impugned order of the ld. CIT(A). We note that the assessee had written off doubtful advance to three parties as tabulated in the assessment order totaling Rs.34,82.452/-. The AO then required of the assessee to submit whether the same had been credited in the profit and loss account in previous years. Since no satisfactory reply was furnished, the same was disallowed by AO. The list of disallowance is given below for ready reference:

Sl. No.	Name of Party	Amount (Rs.)
1	M/s. Infinity EV Motors P.Ltd	228,85,681
2.	EMD	90,848
3.	Terminal Excise Duty	4,05,923
	TOTAL DISALLOWANCE	34,82,452

The assessee company is a leading company in India providing equipments and services with respect to power electronics equipments especially chargers.

However, it lacked knowledge and technical expertise with respect to SMPS power Plants, SMR's controllers and DSA which matched the specifications or requirements of Department of Telecommunication (DoT) and TEC. Thus, the assessee company could not participate or bid for the above projects. The management found a technology partner who had the above expertise and accordingly, Infinity EV Mote Pvt Limited (Infinity), a Company based at Nacharam Hyderabad, was found to have done Research and development on SMPS power plants, SMR Controllers, DSA and was manufacturing power electronic systems and equipments which confirmed to the specifications of DOT/TEC. The said company had the know-how, technical knowledge and expertise, which it had agreed to transfer to CPSSL. In this respect both the companies entered into a Memorandum of Understanding (MOU) on 31st May 2002 pages 106 -111 of paper book, for a period of three years, wherein Infinity agreed to share its technical information (e.g. processes, inventions, engineering and manufacturing skills and designs and drawings which are owned by Infinity, advice on various design and layout of future contracts at Caldyne premises/ sites, advice on raw materials, operational methodology, machinery and tools, documentations, etc., provide training and depute technical persons to help Caldyne to acquire and absorb the technology, against which assessee agreed to pay a total sum of Rs. 75 lakhs and Royalty on net sales achieved by assessee out of such technology. The transfer of the entire know-how was agreed to complete within October 2002, i.e. within the financial year 2002-03 itself. During the operative period of this agreement i.e. 3 years, neither parties have the right to disclose any information on the above to any third party without the written consent of the other [clause 8.1 page 109 of paper book] nor could either parties transfer the know-how, technologies or render assistance to any third party in India [Clause 8.2] page 110 of paper book].

13. It was submitted by ld counsel that though Infinity was the owner of the technology and expertise and agreed to transfer the said technology to Caldyne/ CPSSL, it had restrictive clauses in the MOU, which did not allow assessee to become the absolute owner of such technology. Accordingly, in real terms the technology was shared (a) for a limited period for some specific product line (b) with conditions and restrictions and therefore not an out-right transfer. We note that where there is a condition to a transfer over a right to technical knowledge, know-how or process, it cannot be held to be a capital asset. It is only where the recipient becomes an absolute owner of the rights; the same can come under the purview of capital asset. We note that as per section 32(1) (ii) of the Act, depreciation is allowed on intangible assets acquired on or after 1.4.1998. In this case the payment of lump sum fee or royalty for the technology did not allow assessee to own wholly or partly such right as Infinity retained the absolute right over the technology. Accordingly, any payment, with respect to the said MOU can only form a part of revenue expenditure. If one examines section 37(1) the said section allows expenditure which is laid out wholly and exclusively for the purpose of business should be allowed as a revenue expenditure, provided the same is not capital in nature. There could be no doubt that the MOU was entered wholly and exclusively for the purpose of business development of assessee and in the foregoing paragraphs we had stated that the same is not capital. Therefore, such expenditure is purely revenue in nature.

We note that said advance was given by the assessee during the ordinary course of business, accordingly, any payment in this respect should be treated as revenue expenditure and any loss should be treated as trading loss. For that we rely on the judgment of the Hon`ble Supreme Court in the case of Mysore Sugar Company Limited, 46 ITR 649 (SC). Hence, advance written off, even in respect of capital asset, which was not ultimately acquired would be allowed as business loss. For that, we further rely on the judgment of the Rajasthan High Court in the case of Anjani Kumar Co.Ltd 124 Taxman 429 (Raj). That being so, we decline

to interfere with the order of ld. C.I T.(A) in deleting the aforesaid addition. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue is dismissed.

14. In the result, the appeal of Revenue is dismissed

Order Pronounced in the Open Court on 10-04-2019

Sd/-	Sd/-
(S.S. Godara)	(Dr. A.L.Saini)
Judicial Member	Accountant Member

Dated: 10-04-2019

*PRADIP (Sr.PS)

Copy of the order forwarded to:

1. The Assessee/Department: DCIT, Cir-2(1) Aaykar Bhawan, P-7, Chowringhee Square, Kolkata-700 069
2 The Respondent/Assessee: M/s.Chloride Power Systems & Solutions Ltd, Plot-Y 21, Block-EP, Sector-V, Salt Lake Electronics Complex, Kolkata-91.
3. The CIT-, 4. The CIT(A)-,
5. DR, Kolkata Benches, Kolkata

True Copy, By order,

Asst. Registrar
ITAT, Kolkata Benches