

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.157/Ind/2017

Assessment Years 2010-11

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| Shri Mushtak Khan, 29 Kadav Ghat, Near PY Road, Indore | Vs. | ITO 2(3), Indore |
| (Assessee) | | (Respondent) |
| PAN No.ACTPK0068R | | |

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|-----------------------|-------------------------------|
| Revenue by | Shri K.G. Goel, Sr.DR |
| Assessee by | Shri Niranjana Purandare, C.A |
| Date of Hearing | 09.04.2019 |
| Date of Pronouncement | 16.04.2019 |

ORDER

PER MANISH BORAD.

The above captioned appeal is filed at the instance of the assessee pertaining to Assessment Year 2010-11 and is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-II (in short 'Ld.CIT(A)'), Indore dated 25.11.2016 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 31.10.2012 framed by ITO-4(1), Indore.

2. Assessee has raised following grounds of appeal;

1.The Id Respondent didn't give proper and reasonable opportunity to substantiate the expenditure of Rs 1010287/- being commission/discount paid to customers and/or through Advocates or registry consultants.

2.The remand report called from the AO is defective and speaks of inaction as it brings nothing new on record, but simply puts the entire blame on the appellant without any basis for frivolous reasons like bad/ illegible handwriting on stamp sale register . Moreover, the report appears to be a copy of the erstwhile AO's story, described in original order of assessment. The AO did not conduct independent inquiry from even a single customer as directed by Hon'ble CIT (A).Hence, directions flouted.

3.The additions are solely made on the assumption that assessee had to furnish the name and addresses of the customers which is contrary to the directions given by the CIT(A) to the AO calling remand report and as such the blame of inaction on the part of appellant fails.

4.That the Id respondent erred in not appreciating the independent third party confirmations, affidavits and orders of comparable cases etc, which were vital and cogent evidences to justify the expenses claimed. Moreover, Id. AO disbelieved the same without cross verifying it.

5. The Id respondent did not exercise its powers vested u/s 131 & 133(6) of the IT Act, for calling/summoning the customers and parties in spite of specific written request made by the appellant, therefore, the additions are vitiated and bad in law. Moreover, Id. AO failed to consider the business practice of this line of business.

6.The Id respondent failed to see the observation/admission of the Id AO who clearly admits at page no 03 of the Assessment order that according to his findings the fact of payment of portion of commission claimed as deduction

by the appellant , appears to be correct but beneficiaries of the same are the said advocates or the registry consultants and not the customers. This vital finding of the AO is also not disbelieved by the Id CIT (A) and on this ground alone, the expense claimed deserves to be allowed u/s 37 (1) of the IT Act.

7.The findings of Id. CIT(A) in holding the stamp sales registers mandatorily to be maintained by the appellant in own hand writing and deposited with the Govt. At the close of every year under the stamp Act r/w licensing rules as a self generated evidence having no evidencery value is contrary to law and incorrect findings.

3. Briefly stated facts as culled out from the records are that the assessee earns income from working as a licensed stamp vendor. E-return of income filed on 02.03.2011 declaring income of Rs.5,00,130/-. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. During the course of assessment proceedings while examining the financial statements Learned Assessing Officer (in short Ld. A.O) observed that the assessee has claimed expenditure for commission payment of Rs.10,10,287/- which was claimed by the assessee as a genuine expenditure paid to registry consultants and clients in order to increase the sale of stamp. After considering statements of the assessee Ld. A.O did not find any merit in the submissions as the alleged commission payments were not supported by any voucher

which can authenticate the payment of commission. He accordingly disallowed the commission expenditure of Rs.10,10,287/- and assessed the income at Rs.15,10,417/-.

4. Aggrieved assessee preferred appeal before Ld. CIT(A) but failed to succeed as Ld. CIT(A) after considering the additional evidence filed by the assessee and the remand report received from the Ld. A.O after admission of additional evidence confirmed the disallowance of commission of Rs.10,10,287/- claimed to have been paid to the customers buying the stamp papers observing as follows;

“4. All these grounds are primarily related to disallowance of commission paid to the customers buying stamps of Rs.10,10,287/-. I have gone through the assessment order (already reproduced above) especially the reasons cited by the AO for making the addition. I have also carefully considered the submissions made by the appellant in this regard. The same have already been reproduced above. Since, the major grievance of the appellant was of not providing opportunity to file customer's affidavits with regard to substantiating the claim of the appellant; it was decided to remand the matter to the AO with a direction to provide opportunity to the appellant to file the relevant evidences in its support. I would like to reproduce here the relevant para and the concluding remarks of the AO in the remand report:-

"During the course of appellate proceedings, Hon'ble Commissioner of Income Tax-II, Indore called for remand report from this office. Accordingly notices were issued to the assessee calling for evidences in support of his claim of commission payment. In response, the assessee filed stamp sale register for the relevant period which contains the details of the purchasers. The assessee was asked to identify the persons and to furnish the details like name & address of the purchasers so the further enquiry could be carried out. But the assessee himself shown his inability to identify the purchasers as the name & address appearing on the stamp sale register was illegible. The assessee was provided numerous opportunities to attend personally and provide the name and address of the customers whose names are appearing in the stamp sale register. Since the writing appearing in the register was illegible the assessee was asked to provide the name and address, but the assessee failed to do so. It is pertinent to mention here that assessee has himself admitted that the entry appearing in the stamp sale register is made by him and it is highly surprising that he himself failed to read the names and address written by him only. The assessee was also asked to furnish the commission payment account, ledgers, etc so that the claim of the assessee could be verified with the purchasers but he also failed to do so and gave evasive replies each time. Further the assessee had paid commission to his various customers and as per the provisions of section of 40(a)(ia) TDS was required to be deducted on payment of commission. Though the assessee has claimed to have made a payment of over Rs. 10 Lacs by way of commission but he failed to maintain individual ledger accounts of recipient of the commission. Further the assessee, has maintained no records

such as Bills/ vouchers, receipt memo, etc of commission payment. In the light of the facts discussed above, the claim of the assessee that he has paid commission is highly suspicious and unverifiable. Hence, you are requested to decide the case on the basis of evidences placed on record and merits of the case."

4.1 Based on the remand report, it is clear that despite providing the opportunity which was the major grievance of the appellant, he summarily failed to produce the evidences to substantiate his claim. The register so produced was also found to be illegible. Also the appellant was not able to furnish the name and addresses of the persons to whom the payment of commission has been made. He also admitted that all the entries were made by him only. This is self generated evidence which cannot be relied upon. In such a situation, I have no hesitation in confirming the additions so made by the AO.

These grounds of appeal are dismissed.

5. Aggrieved assessee is now in appeal before the Tribunal.
6. Ld. Counsel for the assessee took us through the paper book running from page 1 to 164 filed on 28.2.2019 and submitted that the assessee is into this business as stamp vendor for last many years. It is a normal practice to pass on the commission to the consultants as well as the stamp purchasers in order to increase the stamp sale. Regular entries in the books of accounts are made

on paying the commission on various dates. Details are also maintained in a register. He further submitted that the assessee has not paid any lump sum commission to claim the tax benefit rather it has been paid on daily basis whenever the stamps are sold and the entries of paying the commission is entered. Further referring to the paper book at page 48 to 64 he submitted that affidavits have been filed from various advocates/consultants stating that the commission/discounts is received from stamp vender which is mostly passed to the customers and have also confirmed that the payment have been received by the customers. Few of them have also provided the profit and loss account showing the income from commission received from the stamp vendor and further passing it on to the customers. He further referred to the following written submission filed before Ld. CIT(A) during the course of appellate proceedings.

"That the appeal was fixed for hearing on 16.12.2014 and was partly heard by the then Ld appellate authority and on next day a paper book comprising 82 pages were filed by the assessee in appeal office. On that date itself the then CIT(A) issued a direction to then ITO probably Mr Jha sahib to call the subject remand report.

That the assessee on 14.02.2015 submitted to the ITO office the sale register called from sub registrar office Indore for him to randomly select some of the customers and verify' on test check basis whether he customers were paid commission/ discount by the assessee?

The assessee submitted his written submissions before the Id AO's office vide its paper book compilation of 76 pages comprising affidavits/confirmations from 14 advocates & also copy of IT returns of some of the registry consultants for verification purposes. The AR also submitted customers confirmation/ documents gathered by him over a period of 2. 5 years from the customers totalling to roughly 26 details. The said paper book was received by the office of the ITO on 27.02.2015 and a photocopy of the said acknowledgment is being attached herewith in support of the contention.

It is correct to say that since February 2015, no much progress could be made in the case until 31.07.2016 spanning 15-16 months and AR has no hesitation share the lapse attributable to him due to his un availability on several times.

The new incumbent/respondent Shri DC Sharma probably joined this office in the month of July & fixed couple of dates since then calling the AR in connection with the remand proceedings. The AR did attend 01/02 dates which are part of the proceeding file with the AO and it was conveyed by the new incumbent that the =register do contain bad/ illegible hand writing and being old (pertaining to year 2009-10) the names and addresses of the customers are very difficult to read. But ultimately the AO called the assessee to the office for help in reading his own hand writing and it was later on known to the AR ON dhanteras i. e. 28. 10.2016 that more than 20-

25 names and complete address of the customers are identified by the AO and his office. In this back drop of happenings the AR was surprised to receive a copy of remand report from the appellate office on 02.11.2016 without calling any of the customers since 28.10.2016. It will be in fitness of justice and fair play that the assessee be given an opportunity to rebut any new adverse material available with him which might have gathered by him behind the back of the assessee.

On merits the only lapse or mistake committed by assessee or his AR is few non attendance but considering the 02 year delay and minimum 02 ITOs in the office the entire delay cannot be attributed on our head and on this ground alone this hon'ble authority is again requested to give some more time to the AO/assessee for making enquiry on the specific point mentioned in the direction dated 16.12.2014 bearing no F NO CIT(A)/ 1/ IND/ 2014-15. Now coming to the merits of the report it appears that the present respondent has simply copied some of the paras of assessment order and/ or assessee's submissions and he also has utterly failed like his predecessor ITO and the assessing authority all of whom have not bothered to call any customer/ advocate/ registry consultant who have deposed in favour of the fact that assessee did distribute or shared the discount in their favour. Moreover, in the assessment proceedings also the assessee had specifically requested the Id AA to call the parties and examine them on oath with a right to cross examine them (in case of adverse statement) (kindly refer page no 02 of our reply dated 06.09.2012 being part and parcel of our compilation at page 29). Despite such a clear request the AO/respondent have not thought it fit to verify any of the sworn statements referred to above available with their file since last 04 years.

It is equally pertinent to mention here that the AA rejecting the deduction of commission expenditure accepts in the same body of Assessment order at pg no 03 that "from the above it transpires that the beneficiaries of the portion of commission claimed as deduction by you are the said advocates or the registry consultants. As such it is in your interest that you produce the advocates who issued you the confirmation letters along with following documents:

- i) Details of IT returns filed by them*
- ii) A copy of their computation of Income.*
- iii) Amount of such commission/ discount declared by them in their income tax return for taxation.*

Please note that if the above compliance is not made, your claim of discount/ commission allowed will be rejected out rightly and subjected to tax accordingly. " Our Comments on above findings of the AQ: Kindly see the bent of mind and pre determined notion of the AO to reject the claim of the assessee totally. The AO on one hand admits that the subject expense has really gone out of the pocket of the assessee in favour of the advocates/ registry consultants but suddenly change its stand by holding that if those beneficiaries (alleged) produce their IT records and depose in favour of receiving the commission from the assessee then only the claim would be accepted. Unfortunately and with due respect to the chair of the AO I have to simply state that none of the registry advocates/ consultants said in their affidavits that they were themselves the recipient of the subject commission. The AO utterly failed in reading the sworn affidavits and created its own theory as per her conjectures and surmises suiting to her intention to any how disallow the claim."

7. Per contra Departmental Representative vehemently argued supporting the orders of both the lower authorities and submitted that the assessee failed to prove the genuineness of the alleged commission expenses and only purpose of incurring such expenses was to evade tax and therefore no relief should be granted and finding of Ld. CIT(A) should be confirmed.

8. We have heard rival contentions and perused the records placed before us. Though the assessee has raised multiple grounds running from Ground No. 1 to 7 but the sole grievance is against the finding of Ld. CIT(A) confirming the disallowance of commission expenditure of Rs. 10,10,287/- claimed by the assessee to have been paid to various customers/registry consultants purchasing the stamp papers.

9. We observe that the assessee is into this business as stamp vendor since last many years. For the year under appeal i.e. financial year 2009-10 the gross receipt from sale of non judicial stamp papers stood at Rs.12,76,87,770/- and gross revenue from sale of judicial stamps at Rs.46,05,000/-. Gross profit of Rs.20,20,574/- have been disclosed and after claiming various

indirect expenses including the impugned commission expenses of Rs.10,10,287/- the net profit of Rs.5,29,897/- has been disclosed and offered to tax. Ld. A.O has not pointed out any mistake/error in the figures of purchase, sales, stock, indirect income and other indirect expenses except the commission expenditure of Rs.10,10,287/-. Books of accounts are duly audited by a Chartered Accountant.

10. Now as far as the expenditure for commission of Rs.10,10,287/- is concerned assessee's claim is that the growth in this line of business solely depends on adopting commercial trade practice and to follow the system prevalent in this line of business of selling the stamp papers which requires that in order to retain and attract the customers, commission/discount to be passed on to customers and clients through registry consultants, since these professionals are the back bone limbs of this business. Ld. Counsel for the assessee also pleaded before us that the licencing rules does not prohibit the vendor to lower the stamps face value, however sale of stamps above the face is prohibited and complete records of stamp purchased and sold are maintained.

11. We also observe that the Ld. Counsel for the assessee while referring to the paper book mentioned about tax returns, computation of income of around 10 registry consultants showing such discount/ commission as their income in their returns which is further supported by few affidavits.

12. Now before us two facts are placed. On one hand the assessee has placed all financial statements, stamp sale registers showing the claim of commission expenditure along with financial statements, income tax returns, affidavits of various registry consultants and also showing the register entering date wise entry of commission paid as and when the stamps are sold. On the other hand the only allegation made by the Ld. A.O is that the claim of commission is not supported by any documentary evidence. It is true that each and every entry of commission payment the assessee has not provided the details and the same seems to be impractical because the entries of commission payment are multiple times in a day and it is not practically possible to take a receipt from each and every person who may be either a registry consultants or the customer actually using the stamp for himself. However one cannot

deny the fact that the person who is coming to purchase the stamp from a stamp vendor is conscious of the fact that the stamp vendors are earning some commission/income from sale of stamp paper. There being multiple stamp vendors, the customer has a liberty/option to purchase stamp paper from the stamp vendor who gives maximum commission or parts with maximum profits embedded in the stamp value. One of the well known business principle is that for increasing the gross revenue the profit margin needs to be reduced and same seems to be the situation of the assessee.

13. We therefore in the given facts and circumstances of the case and being fair to both the parties are of the considered view that out of the total disallowance of Rs.10,10,287/-, disallowance of commission to the extent of 25% i.e. at Rs.2,52,572/- shall be justified to cover the deficiency of not maintaining necessary vouchers and acknowledgement receipts at the end of the assessee for paying commission to the persons purchasing the stamp from him. We accordingly order so and set aside the finding of both the lower authorities and partly allow assessee's appeal by sustaining

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disallowance of commission expenditure at Rs.2,52,572/-.

15. In the result appeal of the assessee is partly allowed.

The order pronounced in the open Court on 16.04.2019.

Sd/-

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

**(MANISH BORAD)
ACCOUNTANT MEMBER**

दिनांक /Dated : 16 April, 2019

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore