



2,3,5 to 9.

% 19.11.2009

Present: Mr. Sanjeev Sabharwal, Advocate for the Appellant.
Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash
Kumar, Advocate for the Respondent.

+ ITA No. 1128/2009, 1141/2009, 1159/2009, 1162/2009,
1201/2009, 1202/2009, 1203/2009

(Common Order)

* All these appeals relate to different assessment years in respect of the same assessee raising identical question. The issue is qua the commission paid by the assessee to various agencies for dealing with the government institutions to whom the assessee, the manufacturer of pharmaceuticals formulations has been supplying drugs. The Assessing Officer had disallowed the said commission primarily on the ground that no such services were required to deal with the government institutions, as the government contracts can be procured through tenders alone. According to the Assessing Officer it was not believable that any services were rendered by these persons for dealing with the government institutions and, therefore, the expense was not business expenditure which would qualify for deduction under Section 37 of the Income Tax Act. At the same time the expense of commission shown by the assessee for dealing with private persons were allowed by the Assessing Officer. We may also note at this stage that the trigger point was the survey



conducted at the office premise of one Sh. Sanjay Rastogi, Chartered Accountant, A-115, Seelampur, Delhi and in that survey a statement of Sh. Sanjay Rastogi was recorded wherein he had stated that he was giving accommodation entries to various companies. One such concern named by Sanjay Rastogi was M/s. Hallmark Health Care Ltd. Incidentally, one of the agents to whom the commissions were paid by the assessee was M/s Hallmark Health Care Ltd. This led to issuance of notices to the respondent under Section 148 of the Act.

The order of the Assessing Officer thus records in detail the statement which was given by Mr. Sanjay Rastogi and appears to have been influenced by the said statement. That apart the Assessing Officer was also of the opinion that no satisfactory evidence was furnished by the assessee which would show that any services were in fact rendered by those agencies to whom the commission was paid.

The assessee challenged the orders passed by the Assessing Officer by filing appeal before the CIT (A). The CIT (A) went into entire gamut of controversy and found that the assessee had provided sufficient evidence to show that these persons/agencies to whom the commission had been paid had in fact rendered their services to the assessee. It was also found by the CIT(A) that on the basis of the purported statement of Sanjay



Rastogi naming M/s Hallmark Health Care Ltd., the assessment Respondent-Assessee for the assessment year 1997-98 was sought to be reopened by issuing notice under Section 148 of the Income Tax Act. Re-assessment was thereafter carried out in respect of the assessment year 1997-98 and thus the proceedings for that year were dropped. The inference which is drawn by the CIT(A) on that basis was that for the assessment year 1997-98 the commission which was paid by the assessee to M/s Hallmark Health Care Ltd. was accepted as genuine and thus there was no reason to doubt the dealings of the said party with the assessee i.e. rendering of service by M/s Hallmark Health Care Ltd. for subsequent years as well. It is also a matter of record that Sanjay Rastogi was not produced for cross-examination even when specific request was made by the assessee in this behalf.

Various reasons on the basis of which CIT(A) came to the conclusion that commission expenditure was in fact incurred by the assessee as business expenditure and, therefore, was allowable, are summarized by the ITAT in the following manner:

"....(i) that the assessing authority had for the assessment year 1997-98 reopened the assessment but had dropped the proceedings subsequently and



consequently, it was deemed that the assessing authority had for the A.Y. 1997-98 accepted the genuineness of the commission paid to the agents even in regard to the sale to government institutions, (ii) that the assessing authority had on similar evidence as available and found in the course of search allowed the commission expenditure on account of the sales made to domestic and export customers (iii) that the various persons who had received the commission had confirmed the receipt of the commission as also confirmed that services had been rendered to the assessee even in the 133(6) proceedings conducted by the AO and (iv) that in the course of search, no evidence had been found to show that the commission as paid to the agents were bogus. Aggrieved with the action of the learned CIT(A) in directing the AO to allow the claim of commission paid to the agents in respect of the transactions with government institutions, the Revenue has filed these appeals...."

The Income Tax Appellate Tribunal (ITAT) has confirmed the aforesaid finding of facts in appeal preferred by the Revenue against the decision of the CIT(A) allowing the expenditure claimed by the assessee. The order of the Income Tax Appellate Tribunal would also indicate that the Assessing Officer had mainly nurtured



the doubt about the payment of the commission for the services rendered by both the parties for government institutions which was questionable. This doubt of the Assessing Officer has been brushed aside by the ITAT in the following manner:

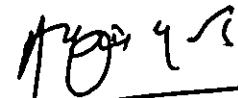
"12. Here, we find that the AO has in regard to the commission payment to the agents who had assisted the assessee to deal with the government agencies have been specifically earmarked and disallowed on the ground that there was no necessity of an agent while dealing with the government. Though, it is very much true that the government does not deal with middleman, it does not mean that there is no role for an agent to play when an assessee is dealing with the government. The transactions and the dealings with the government obviously cannot be done through an agent but the agent can assist an assessee in obtaining supply and facilitating of information which are required for the assessee. The explanation of the assessee that the agents assisted the assessee in the pre tender and the post tender activities is clearly borne out of the evidences which are part of the seized material. This being so, it cannot be said that no services have been rendered by the agents to the assessee. In the circumstances, we are of the view that the learned CIT(A) was right in deleting the disallowance of the



commission as made by the AO. His impugned orders on this issue for all the seven years under consideration are, therefore, upheld and these appeals of the Revenue are dismissed."

The ITAT has also discussed the proofs furnished by the assessee in the form of documentary evidence in respect of services rendered etc. for arriving at the aforesaid finding. All these are findings of fact and no question of law arises for determination in these appeals.

These appeals are accordingly dismissed.


A.K. SIKRI, J.


SIDDHARTH MRIDUL, J.

November 19, 2009
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