$~R-15, 26 & 35

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 10th January, 2018*

\+ ITA No.574/2005

COMMISSIONER OF INCOME TAX DEL ..... Appellant

Through: Mr. Asheesh Jain, Senior Standing Counsel with Mr. Shahrukh Ejaz, Advocates

versus

M/S HIND NIHON PROTEINS P. LTD. ..... Respondent

Through: Ms. Kavita Jha, Mr. Vaibhav Kulkarni & Mr. Udit Naresh, Advocates

WITH

ITA No.655/2005

COMMISSIONER OF INCOME TAX DEL ..... Appellant

Through: Mr. Asheesh Jain, Senior Standing Counsel with Mr. Shahrukh Ejaz, Advocates

versus

M/S HIND NIHON PROTEINS P. LTD. ..... Respondent

Through: Ms. Kavita Jha, Mr. Vaibhav Kulkarni & Mr. Udit Naresh, Advocates

WITH

ITA No.684/2005

COMMISSIONER OF INCOME TAX DEL ..... Appellant

Through: Mr. Asheesh Jain, Senior Standing Counsel with Mr. Shahrukh Ejaz, Advocates

versus

M/S HIND NIHON PROTEINS P. LTD. ..... Respondent

Through: Ms. Kavita Jha, Mr. Vaibhav Kulkarni & Mr. Udit Naresh, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. *(ORAL)*

1. This common order would dispose of the afore-stated appeals under Section 260 A of the Income Tax Act, 1961 ('Act' for short) by the Revenue which pertain to the assessment years ('AY' for short) 1994-1995, 1996-1997 and 1997-1998 in the case of M/s Hind Nihon Proteins P. Ltd.

2. The appeals have been admitted for hearing on the following substantial question of law:-

> "Whether the finding of the ITAT that the commission agents of the assessee had rendered services to the assessee so as to justify payment of commission to them is perverse being without any evidence?"

3. ITA No.574/2005, which relates to AY 1994-1995, is treated as lead case.

4. It is apparent from the substantial question of law framed, that the dispute is factual. Contention by the Revenue is that the finding recorded by the Income Tax Appellate Tribunal ('ITAT/Tribunal' for short), for deleting the addition on account of commission paid to two partnership firms M/s. Sikand Farm and M/s. R&A Exports, in which the parties related to the directors of the respondent assessee were partners, was not justified and should not have been allowed as business expenditure under Section 37 of the Act. The submission is that the findings recorded by the Tribunal are perverse and therefore, require interference in this appeal on substantial question under Section 260 A of the Act.

5. In order to appreciate the contention, we would like to reproduce the findings recorded by the ITAT in the order for the AY 1994-1995, which are as under:

> "14. The facts relating to ground No.3 as borne out from record are that the assessee claimed payment of commission to M/s. R&A Exports at Rs.19,73,396 and Rs.67,171 to M/s. Sikand Farm.
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> ……
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> 18. Having carefully examined the records available along with the orders of the lower authorities in the light of the rival submissions, we find that the agreement for payment of commission was duly executed between the assessee and the Commission Agent. Payment of commission was also made on the basis of sales, to the Commission Agents, and the receipt of the same was duly shown by the Agents in their Balance-sheet and Profit & Loss Accounts and paid the tax thereon which was accepted by the Revenue. It is also noticed from the comparative chart produced by the assessee that the assessee has been paying commission to the Agents regularly year after year and in some of the years it was not doubted by the Revenue and was accepted. In the asstt. year 1993-94 it was accepted by the Revenue u/s 143(1)(a) of the I.T. Act. Likewise, payment of commission at Rs.10.24 lakhs was also accepted by the Revenue in the asstt. year 1995-96 under regular assessment framed u/s 143(3) of the I.T. Act. In the asstt. year 1996-97 commission payment was initially disallowed by the assessing officer but the disallowance was deleted by the Commissioner (Appeals).
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> 19. The assessee has filed; the confirmations and the statements of accounts of the recipients besides the commission agreements to prove the genuineness of the payment of commission, the receipt of payment of commission was duly reflected in the books of account of the recipients and was offered to tax. The Revenue did not dispute the receipt of commission and accepted the income offered by the agents. Once the Revenue has accepted receipt of commission in the hands of recipient,

> it cannot raise a dispute with regard to such payments, as they are not allowed to blow hot and cold in the same breath. The assessee has clarified the nature of services rendered by the Commission Agents, and if the Revenue had doubts about the commission payments, the assessing officer could have very well summoned the parties to verify the correctness of the claim. By placing the relevant evidence, the assessee has discharged the onus which primarily lay upon it. We, therefore, do not find ourselves in agreement with the order of the Commissioner (Appeals) on this point. Accordingly, we set aside his order and delete the addition made on this account."

A reading of the aforesaid paragraphs would reveal that the assessee had entered into agreements with M/s Sikand Farm and M/s R&A Exports for payment of commission on the orders procured by them. Copies of these agreements have not been filed by the revenue with the appeal paperbook. The assessee had filed confirmation letters written by M/s Sikand Farm and M/s R&A Exports. In addition, income tax returns filed by M/s Sikand Farm and M/s R&A Exports were placed on record and relied upon. The firms were also paying taxes at maximum marginal rate. Allegation that commission was paid to avoid tax or divert income was therefore rejected as baseless and wrong. Moreover, the respondent assessee was entitled to deduction, both under Sections 80 HH and 80 I of the Act. In case the aforesaid expenditure had not been incurred, deduction under the two provisions would have increased. The last reasoning given by the ITAT was that the Assessing Officer ('AO' for short) had not disputed the payment of commission income to M/s Sikand Farm and M/s R&A Exports in the AYs 1993-1994, 1994-1995 and 1995-1996. Thus, there was contradiction.

6. The assessment order records that commission of Rs.6,55,772.78 had been paid to M/s North Star Marketing (P) Ltd. for the AYs 1994-1995. No

addition was made and the commission paid to M/s North Star Marketing (P) Ltd. was not disallowed. Thus, the respondent assessee was paying commission.

7. Learned counsel for the Revenue has relied on the assessment order for the AY 1994-95, which, in fact does not take into consideration the agreement between M/s Sikand Farm and M/s R&A Exports to pay commission. The AO has also not taken into consideration the confirmation letters, which were submitted by the respondent assessee, and referred to by the ITAT. The AO has recorded that vide order sheet entry 30.01.97, the respondent assessee was asked to justify the payment of commission and submit evidence on services rendered. It was also directed that the Managing Partner/proprietor of the concerns should appear before the AO. In response to the said directions, the assessee had filed a letter dated 12.02.1997, pointing out several facts justifying the expenditure and payment of commission, including returns filed by M/s Sikand Farm and M/s R&A Exports. These firms were assessed tax in different circles and their incomes included the commission earned.

8. We have also examined the order passed by the Commissioner of Income Tax (Appeals) ['CIT(A)' for short], who had affirmed the additions made by the AO by merely recording that exact nature of services rendered and the volume of orders procured etc. were not elucidated.

9. The reasoning given by the ITAT and the factual matrix being contrary to the reasoning given by the AO and the CIT(A), we do not think that the impugned order can be treated as perverse. While considering the question of perversity of a finding of fact, the test applicable is rather strict. The finding should be such which is arrived at without any material, or upon a view of the facts which could not reasonably be entertained or the

facts found are such that no person acting judicially and properly instructed as to the relevant law would have come to that determination. This test and benchmark is to be satisfied. It is not possible to hold so in the present case, and interfere. We are not required to reappraise the facts as an appellate court and decide whether we could have arrived at a different factual finding and conclusion.

10. In view of the aforesaid, we answer the question of law against the Revenue and in favour of the respondent assessee, holding that the decision of the ITAT is not perverse. Appeal is disposed of. No order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JANUARY 10, 2018
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