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

\+ **INCOME TAX APPEAL No. 395/2018**

Date of decision: 23rd July, 2018

ALPASSO INDUSTRIES PVT. LTD. ..... Appellant
Through Mr. Ved Jain & Mr. Pranjal Srivastava, Advocates.

versus

INCOME TAX OFFICER WARD-1(3) ..... Respondent
Through Mr. Zoheb Hossain, Sr. Standing Counsel & Mr. Deepak Anand, Advocate for the Revenue.

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

SANJIV KHANNA, J. (ORAL):

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) by M/s Alpasso Industries Private Limited relates to disallowance of purported expenditure of Rs.1 crore paid as commission to M/s AGR Steel Strips Private Limited. It arises from order dated 31st October, 2017 passed by the Income Tax Appellate Tribunal (Tribunal, for short) and relates to Assessment Year 2010-11.

2. Appellant submits that the decision of the Tribunal is perverse being contrary to the facts as M/s AGR Steel Strips Private Limited had accepted

and accounted for the payment, which was made through banking channel and in an earlier assessment year, the appellant had paid Rs.1.25 Crores as commission to M/s AGR Steels Private Limited, albeit no addition was made. Three other assessees had also paid commission to M/s AGR Steels Private Limited during the period relevant to the Assessment Years 2009-10 and 2011-12.

3. The appellant in the return for the Assessment Year 2010-11 had declared taxable income of Rs.13,79,62,090/-, which income had included commission @ 1% received as an agent from M/s Hyosung Corporation Power and Industrial Systems PG Korea, who had been awarded purchase orders worth US$ 16,73,76,986 (Rs.803 Crores as per conversion rate of Rs.48/- per US Dollar) for supply of transformers to M/s Power Grid Corporation of India Limited (PGCIL). The appellant-assessee was notified Indian agent of the aforesaid Korean company, a fact mentioned in the letters dated 29th December, 2008 and 5th March, 2009 written to PGCIL. Services to be performed by the appellant as the Indian agent included coordination and follow up.

4. Factum of payment of Rs.1 crore by the appellant to M/s AGR Steels Private Limited is undisputed. Question raised relates to genuineness of the

expenditure and whether the payment was incurred wholly and exclusively for business purpose or was a surreptitious and covet payment not for any service rendered but other purposes.

5. The Tribunal, in our opinion, has taken a reasonable view to affirm the factual finding arrived at by the Assessing Officer and to reverse the perfunctory finding the Commissioner of Income Tax (Appeals) primarily predicted on paper work. Tribunal after exhaustive examination of the material for several reasons cumulative in nature has held that assessee was unable to discharge the onus and establish genuineness. The reasoning given by the Tribunal reads as under:-

> "8. We have heard the rival submissions and perused the relevant material on record including the paper book filed by the Ld. counsel of the assessee. The Ld. counsel of the assessee has relied on the finding of the Ld. CIT-(A) on the issue in dispute and also emphasized on the rule of consistency. We find that the Ld. CIT-(A) has concluded that the assessee has discharged its onus to establish the fact of rendering services by the sub-agent. In our opinion, this conclusion of the Ld. CIT-(A) is not based on the proper appreciation of the facts on record, due to following reasons:
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> (i) The Id. CIT(A) has recorded that the sub-agent had directly filed reply to the Assessing Officer in response to notice under section 133 (6) of the Act, with required documents and confirmed

having rendered services to the assessee. This observation is factually incorrect. The Assessing Officer has clearly mentioned in assessment order that the sub-agent did not provide detail of type of services provided to the assessee alongwith supporting evidence. He also mentioned that the assessee did not file documentary evidence to prove that sub-agent was having expert technical staff and experience in the field of services rendered. The Assessing Officer concluded that details provided by the sub-agent could not justify genuineness/necessity of allowability of such heavy commission. The learned CIT-(A) has not referred any documents to controvert the finding of the Assessing Officer.

(ii) The learned CIT-(A) has observed that assessee has filed the documentary evidences like copies of agreements, copies of bills, duly confirmed copies of account, copy of Ledger accounts for entries for commission payable and paid to AGR, bank statements, copies of agreement between assessee and Hyosung, details of commission earned by the assessee, copies of bank statement of AGR, copies of service tax challan of AGR etc. In our opinion, the services would have been rendered subsequent to agreements entered between the parties and thus, merely agreements, cannot prove the fact of services rendered. Similarly, copies of bills or Ledger accounts are documents to record the transactions in the books of accounts for the services rendered but these, in itself, are not documents evidencing the services rendered. Similarly, payment through bank or service tax challan payment by the sub-agent in itself cannot prove that sub-agent actually rendered the services.

(iii) The Ld. CIT-(A) has further observed that no cash has been withdrawn from the bank account of the AGR i.e. sub-agent. In our opinion, for discharging the onus that the services were rendered by the sub-agent, it was not relevant to show that cash was not withdrawn from the bank account of the subagent. Assessee was required to produce direct evidences of services rendered.

(iv) Further, the learned CIT-(A) has observed that in the preceding year also the fact of services rendered has been accepted by the Assessing Officer. In our opinion, the fact of services rendered needs to be examined in each year and by accepting the services rendered in one year, it cannot be established that the assessee might have rendered services in another year also and thus the rule of consistency, cannot be applied in the facts of the case.

9. In our opinion, the learned CIT-(A) has committed error in appreciating the facts of the case. One of the important requirement to examine, whether the expenses were incurred wholly and exclusively for the purpose of business, it was required for the assessee to furnish necessary documentary evidence in support of services rendered by the sub-agent. The Assessing Officer has specifically held that assessee failed in submitting:

(a) the details of services rendered by the sub-agent;
(b) the details of expenses incurred in relation to rendering such services;
(c) the persons contacted in the process of rendering services; and

> (d) the report submitted by the subagent in the process of rendering services etc.
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> 9.1 But neither the assessee nor the sub-agent submitted these crucial evidences in support of their claim of services rendered by the sub-agent before the lower authorities. Before us, also, the learned counsel of the assessee, failed to submit any evidence in support of services rendered except the claim that services were rendered telephonically. The documents submitted by the assessee are merely in the nature of paperwork. No documentary evidence supporting the expertise of the sub-agent in bidding process was filed either before the lower authorities or before us. No detail of the person(s), who on behalf of the sub-agent company interacted with M/s PCGIL, was given either before the lower authorities or before us. The assessee has not furnished any confirmation either from the principal company M/s Hyosung Corporation, Korea or from M/s PCGIL that the sub-agent provided the services of coordination and follow-up in the process of bidding of tenders for contracts. The assessee has merely submitted that coordination and follow-up services only required use of telephone or email or personal interaction, but it has not provided any documentary evidence before us, which could establish that the sub-agent followed with M/s `PCGIL'. The assessee has submitted that due to services of the sub-agent, the supplier got contract for supply of transformer, but the assessee has not given any detail what kind of services actually helped the supplier in getting the contract. In our opinion, the Ld. CIT-(A) is not correct in concluding that the assessee established the fact of rendering services by the subagent."

6. Reasoning reveals that M/s AGR Steel Strips Private Limited in response to summons under Section 133(6) had failed to describe and

elucidate on the nature and manner in which the services were rendered. Vague and indefinite general assertion that M/s SGR Steel Strips Private Limited had provided requisite service to procure purchase order and had incurred expenses on travel, conveyance, telephone, etc., recorded in their books of accounts, was rejected. Agreements with M/s AGR Steel Strips Private Limited dated 14th April, 2008 and 8th September, 2008 relied upon by the appellant had referred to lump sum commission payment of Rs.50 lacs and Rs.25 lacs. However, contracts were awarded to the Korean company on 29th December, 2008 and 5th March, 2009. Thus, the agreements with M/s AGR Steel Strips Private Limited were earlier in point of time. Observations of the Commissioner of Income Tax (Appeals) with reference to documentation, bank statement, etc., it was observed were on paper and would not prove and were not evidence to establish that services were rendered. The Tribunal has highlighted that crucial evidence in relation to four aspects; details of service rendered by the sub-agent, details of expenses incurred by the sub-agent for rendering services, persons whom the sub-agent had contacted in the process of rendering services and letters, report or document submitted by the sub-agent in the process of rendering services were missing and had not been placed on record. There was no

evidence to show that the sub-agent had the experts, who had helped in the bidding process or had interacted with the Indian company. No letter or communication from the Korean company or the Indian company to the sub-agent was filed.

7. Contention of the appellant that payment of Rs.1.25 crores was made by the appellant-assessee to the respondent in Assessment Year 2009-10, which amount was not disallowed, would not, in our opinion, reflect or show that the decision of the Tribunal was perverse. As rightly observed by the Tribunal, rule of consistency could not be extended to presume that the sub-agent must have rendered services in the year in question.

8. A decision of question of fact depends upon appreciation of evidence and material placed before the authorities, i.e. the Tribunal. The Tribunal, as a final fact finding authority, has to determine and decide question of fact in dispute by examination of evidence and material produced. Inference and conclusion based upon appreciation of fact does not give rise to a question of law. In this context that the appellant claims and asserts that the decision of the Tribunal was perverse, and therefore substantial question of law arises from the impugned order. A finding of a Tribunal on fact does not become perverse merely because another finding or conclusion was possible. Test

and benchmark of perversity is far stringent and strict. Factual findings can be only interfered with when they are patently unreasonable, not supported by any evidence or are based upon extraneous and irrelevant material. Interference may be justified when the conclusions are based upon mere conjectures and surmises or where no person acting judicially and properly instructed under the relevant law could have come to the same decision and conclusion. In the current factual matrix, having noted the evidence and material before the Tribunal, the final conclusion arrived at, it cannot be said, that Tribunal's conclusion was based upon no evidence to support or was rationally not possible or entirely unreasonable. The conclusion is also not contradictory.

9. For the aforesaid reasons, we do not think any substantial question of law arises in the present appeal and the same is dismissed, without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JULY 23, 2018
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