

**inspecting Assistant Vs. Mill Stores Syndicate**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Nov-07-1986

**Reported in :** (1987)20ITD41(Delhi)

**Judge :** G Krishnamurthy, S Vice, S Mehra, B Gupta

**Appellant :** inspecting Assistant

**Respondent :** Mill Stores Syndicate

**Judgement :**

1. These two appeals by the revenue raising identical grounds may be conveniently consolidated and disposed of by a common order.

2. In the assessment year 1981-82, the assessee-firm carrying on business of purchase and sale of mill stores and chemicals and distributorship of Fenner V. Belts in certain specified territories had paid brokerage and commission amounting to Rs. 24,814. Its turnover in that year amounted to Rs. 84,77,156. Similarly, in the assessment year 1982-83 brokerage and commission amounting to Rs. 16,318 had been paid when its turnover was of Rs. 93,29,606. According to the IAC (Assessment) the expenditure by way of brokerage and commission was not verifiable. Further, according to him, the assessee had failed to prove by evidence that the payment of brokerage and commission had been made for the purposes of business. He, therefore, disallowed estimated sums of Rs. 12,000 in each of the assessment years 1981-82 and 1982-83. When the matter went up in appeal before the Commissioner (Appeals), he found that brokerage and commission

similarly paid in the preceding assessment years had never been disallowed. He also examined some of the internal vouchers signed by the recipients of brokerage and commission and found that commission varying between 3 to 5 per cent of sales had been paid to them. The Commissioner (Appeals) also noted that on the reverse of each internal voucher details of sale bills, name of the purchaser, bill amount and brokerage paid had been duly entered.

After noticing these facts and having regard to the past history of the assessee the Commissioner (Appeals) held that there was no justification for disallowing part of the expenditure.

3. It is in the background of these facts, that the revenue is in appeal contending that the burden to prove that the payments had been made by way of commission and brokerage having not been discharged and the identity of the recipients having not been established by the assessee the Commissioner (Appeals) had no justification for vacating the disallowance made by the IAC (Assessment) in the assessment years 1981-82 and 1982-83. Mr. R.N. Bara, the learned senior departmental representative has contended that the evidence in support of the expenditure having not been furnished before the IAC (Assessment), the Commissioner (Appeals) had no justification in entertaining fresh evidence and in vacating the disallowances made by the IAC (Assessment). On the other hand, Shri Anurag Chopra, the learned authorised counsel of the assessee-res-pondent, has supported the orders passed by the Commissioner (Appeals).

4. We have considered the rival submissions. Having regard to the extent of turnover effected by the assessee and the past practice, we are satisfied that there was no scope for disallowing any part of the expenses on brokerage and commission claimed in the two assessment years. In the assessment year 1980-81, when commission and brokerage amounting to over Rs. 39,000 had been paid the same had been allowed by the assessing officer. In the two assessment years which are under appeal the turnover had increased considerably while the expenditure on brokerage and commission had inversely declined. It may be that having regard to the nature of expenditure incurred, the assessee was not able to produce the recipients but since the internal vouchers contained the necessary

details which were verified by the Commissioner (Appeals), we would agree with the latter that the expenditure as claimed in the two assessment years on brokerage and commission was wholly allowable.

5. There is no substance in the representation made by the learned departmental representative that the Commissioner (Appeals) had entertained some new evidence which was not produced before the assessing officer. In fact, all the books of account had been produced before the assessing officer and the disallowance had been made by him on the ground that the evidence produced was not convincing. According to us, the evidence which was available before the assessing officer and which had been once again produced before the Commissioner (Appeals) was adequate to establish that the expenses claimed by the assessee on brokerage and commission had in fact been incurred.

6. In conclusion, we hold that the expenditure as claimed by the assessee was allowable as business expenditure in the two assessment years. The appeals filed by the revenue fail.

1. I have the benefit of having gone through the detailed order prepared by my learned brother but regret my inability to agree with the conclusion arrived at. In this appeal we are concerned with the deletion of the addition of Rs. 12,000 made out of brokerage and commission said to have been paid by the assessee for augmenting its business. The learned ITO made the addition with the following observations: 4. While scrutinising the books of account of the assessee, it was found that during this year brokerage and commission of Rs. 24,814 was paid to various persons and commission received from the principal was Rs. 11,703. The assessee was asked to justify the claim of the brokerage made. The assessee admitted the position that there is no written agreement for the appointment of the persons to whom the brokerage has been paid nor could he produce before me convincing explanation regarding the nexus of the commission paid with the business and also the nature of services rendered by the persons to whom the commission was paid. The assessee only made submission that the commission is nearly paid at the rate of 10 per cent to the persons who procure some business for the firm. Assessee also admitted that it is not possible to produce all the parties

to whom the commission has been paid nor was able to provide full information regarding the whereabouts and the addresses of these persons. In view of these facts the claim of brokerage made does not appear to be fully justified nor the same appears to have been incurred wholly or inclusively for the purpose of business. It has been held in various decisions that two factors at least had first to be proved by the assessee and they are (i) that the amount had been expended by the assessee, and (ii) that the payments had been made for services rendered. After establishing both these factors, the assessee has still to satisfy the test that the expenditure had been incurred wholly or exclusively for the purpose of business. But if either the preliminary factors had not been proved and if no payment can be made at all or if payment was made which was not correlated to any services rendered to the assessee, the question of deciding whether commercial expediency would sanction the claim that the money had been expended wholly or inclusively for the business of the assessee could not arise at all for consideration--Madura Knitting Co. v. CIT [1956] 30 ITR 764, 797 (Mad.).

In view of the aforesaid discussion and also keeping in view the facts of the assessee's case where the assessee is not able to correlate the sales and the commission paid thereof to different parties for the services rendered and his inability to produce all the parties the assessee does not have justification for claiming the brokerage debited in his accounts. From over the onus of discharging the burden to prove is entirely on the assessee and is that has not been discharged the commission paid is not allowable in full. I, therefore, on an estimate basis disallow the claim of the assessee at Rs. 12,000.

2. The learned Commissioner (Appeals) deleted the addition observing that he could not find any justification for part disallowance of the amount. The revenue came before us against the said finding.

3. Submissions made on behalf of the parties have been heard. Some of the admitted facts in this case are: (a) that there was no agreement between the assessee and the so-called commission agents or brokers ; (b) there was no evidence that any service by the commission agents or brokers was rendered to the assessee in connection with its business ; (d) the assessee was not able to

disclose full particulars about the arrangement ; (e) the assessee was not in a position to disclose the details about the commission agents and brokers ; (f) the assessee also did not establish that similar commission/brokerage has also been paid by the other persons similarly placed ; (g) the assessee was also not in a position to produce the so-called commission agents and brokers before the learned ITO to establish the identity, service and the receipt ; and (h) the assessee also did not request the learned ITO to issue summons to the said parties.

4. The disallowance was made in those circumstances. The learned Commissioner (Appeals) deleted the disallowance without meeting even a part of the reasons employed by the learned ITO for making addition.

The learned Commissioner (Appeals)'s only reason for deleting the addition was that the learned ITO has not made the addition of the entire amount said to have been paid by the assessee by way of commission and brokerage. This is hardly any reason for interfering with the finding. The learned Commissioner (Appeals) in fact should have required the learned ITO to record the statements of the persons who are said to have received the commission or brokerage as before us and so also it is said to have been argued earlier that the names of the commission agents and brokers were mentioned in the receipts, copies existing with the assessee. The learned Commissioner (Appeals) in fact on the basis of those receipts should have directed the learned ITO to procure the presence of the parties and ascertain the correct state of affairs about the services rendered and the payments received.

This was the last which was supposed to have been done by the learned Commissioner (Appeals). He, in fact, without meeting the reasons of the learned ITO unjustifiably disturbed the finding. That does not appear to be justified.

5. Before us on behalf of the assessee it was vehemently and emphatically argued that the names of the parties to whom commission or brokerage was paid, appeared in the copies of the bills available with the assessee. On our specific query it was submitted on behalf of the assessee that on the basis of those receipts the persons should have been examined by the learned ITO. We further add that in case the learned ITO failed to do so at least the learned Commissioner

(Appeals) instead of deleting the addition should have in fact required the learned ITO to ascertain the correct position after recording the statements. That would have been, in our view, the proper thing to do.

We are, therefore, satisfied that deletion of the addition was not justified and the matters require to be set aside to the file of the learned ITO for recording the statements of the persons whose names are said to be appearing in the copies of the bills and who are stated to have received the payments by way of commission, etc. We, in these circumstances, set aside the impugned finding and restore the matter to the file of the learned ITO for doing the needful as mentioned herein-above.

Since we have differed in the present matter, the record is being placed before the President, Tribunal for proceeding further in the matter in accordance with law. The point of difference is as under: Whether, on the facts and in the circumstances of the case, the appeals should have been allowed or the matter should have been set aside to the file of the learned assessing officer for statements and decision 1. In these appeals heard by the Delhi Bench 'C' there was a difference of opinion between my learned brothers, which was referred to me by the President of the Tribunal for my opinion under Section 255(4) of the Income-tax Act, 1961. The point of difference is: Whether, on the facts and in the circumstances of the case, the appeals should have been allowed or the matters should have been set aside to the file of the learned assessing officer for statements and decision 2. The relevant facts are: The assessee is a firm carrying on business of purchase and sale of mill stores and chemicals. It also holds the distributorship of Fenner V Belts in certain specified territories. In the assessment year under appeal 1981-82 its turnover amounted to about Rs 84.77 lakhs. In the assessment year 1982-83 its turnover had gone up to Rs. 93.29 lakhs. The assessee-firm claimed that it was usual and normal to pay brokerage and commission in order to push up the sales and that a sum of Rs. 24,814 in the assessment year 1982-83 and Rs. 16,318 in the assessment year was paid as and by way of brokerage and commission. These amounts were claimed as deductions in computing the incomes of those two assessment years. The IAC (Assessment) observed that this expenditure was not verifiable. He was also of the opinion that the payment of brokerage and

commission did not appear to have been made for the purpose of business. However, he did not disallow the whole of the amount of commission but disallowed only Rs. 12,000 in each of the assessment years. When the matter came on appeal before the Commissioner (Appeals), he noticed that the brokerage and commission similarly paid in the preceding assessment years were always allowed and never disallowed. He also found that the assessee maintained some internal vouchers signed by the recipients of the brokerage and commission on the back of which vouchers details in regard to the sales in respect of this brokerage and commission was paid were entered. He also noticed that the rate of commission varied between 3-5 per cent of the sales. On these facts he held that there was no justification for the disallowance of any part of the expenditure. The revenue was dissatisfied with the conclusion reached by the Commissioner (Appeals) and in the further appeal filed by it before the Tribunal, it contended mainly that the burden to prove that the payments were made by way of brokerage and commission was on the assessee and that burden was not discharged. Not even the identity of the recipient was established. The Commissioner (Appeals) was, therefore, not justified in deleting the disallowances made by the IAC (Assessment). It was also contended that the evidence that was relied upon by the Commissioner (Appeals) was not produced before the IAC (Assessment) and that the Commissioner (Appeals) had no jurisdiction or justification in entertaining fresh evidence to vacate the disallowances.

After going through the evidence and considering the arguments, the Bench could not come to an agreed conclusion. The learned Accountant Member, who proposed the main order of the Bench, came to the conclusion that on the basis of the evidence considered by the Commissioner (Appeals) and the past history of the case, there was no justification for the disallowance of the brokerage and commission. He also noticed that the payment of commission in the years under appeal was comparatively less than the commission paid in the earlier years even though the turnovers in the years under appeal had enormously increased. Merely on the ground that the recipients were not produced, it is not open to the revenue to disbelieve the internal vouchers and hold against the assessee even though the internal vouchers furnished all the necessary details. The learned Accountant Member also dispelled the argument of the learned departmental representative

that the Commissioner (Appeals) had entertained new evidence which was not produced before the assessing officer. But the learned Judicial Member disagreed with the view expressed by the learned Accountant Member.

According to him the following are the admitted facts in this case: (a) that there was no agreement between the assessee and the so-called commission agents or brokers ; (b) there was no evidence that any service by the commission agents or brokers was rendered to the assessee in connection with its business; (d) the assessee was not able to disclose full particulars about the arrangement ; (e) the assessee was not in a position to disclose the details about the commission agents and brokers ; (f) the assessee also did not establish that similar commission/brokerage has also been paid by the other persons similarly placed ; (g) the assessee was also not in a position to produce the so-called commission agents and brokers before the learned ITO to establish the identity, service and the receipt; and (h) the assessee also did not request the learned ITO to issue summons to the said parties, According to him, the Commissioner (Appeals) deleted the disallowances without meeting even a part of the reasons furnished by the IAC (Assessment) for making the additions. He considered that the Commissioner (Appeals) should have required the assessee to produce the recipients before the IAC (Assessment) to enable him to record the statements and only then the question of allowance should have been considered. The Commissioner (Appeals) not having adopted this procedure, according to the learned Judicial Member, committed a mistake in deleting the additions in toto. According to him, the allowance of this commission either in the past or disallowance of the commission in part, did not make any difference.

3. Hence the difference of opinion between my learned brothers which was referred to me. I have heard the learned counsel for the assessee as well as the departmental representative, perused the records and I am of the view that on the facts of this case, the department did not make out a case for the disallowance of brokerage and commission. First and foremost the factum that payment of brokerage and commission was necessary for the purpose of the business was recognised by the department in the past by allowing the commission in full and in the years under appeal by making part allowance. When the IAC (Assessment)

pointed out that the assessee did not produce any evidence to show the nature of services rendered to entitle the commission to be allowed as a deduction, the entire commission should have been disallowed. That was not done in this case. Allowance of a part of the commission on an ad hoc basis would prove that the payment of brokerage and commission was necessary for the purpose of the business and services meriting the payment of brokerage and commission were rendered. There cannot, therefore, be any argument from the side of the revenue that there was no proof of any services having been rendered. Thus, it would only mean that the payment of commission though necessary for the purpose of the business was found to be excessive. Unless it was by implication held that the payment of commission was excessive, a part of the amount could not be disallowed. Part disallowance would, therefore, mean that the payment of commission was either excessive or to the extent disallowed, no proof of services was produced. Now in this state of record, what actually would be done by the IAC (Assessment) if the matter had been remitted by the Commissioner (Appeals) to him for fresh examination. Since disallowance was on estimate basis, the IAC (Assessment) has no means to know, which part of payment was held to be proved and which part of payment was held to be not proved. Whom would we examine There was no need to examine all of them because there was a part allowance. In this state of doubt, I see no useful purpose would we served by sending the case back to the IAC (Assessment) for examination. On the internal vouchers maintained by the assessee, not only the signatures of the recipients were obtained but full details, which are necessary to establish the genuineness of the payment of commission, was recorded. These details would serve as a proper voucher in support of the payment of brokerage and commission. Thus, when production of parties for examination is rendered impossible by making a part disallowance, when full details are available to hold that the payment of commission was genuine and when such payments are accepted as necessary for the purpose of the business not only in these years but also in the earlier years and when the payment of commission in these years was less than the payment of commission in the earlier years, I see no reason why the further exercise of sending the case back to the IAC (Assessment) for examination should be resorted to.

That exercise would have become necessary only if the entire commission was disallowed or commission with reference to certain payments was disallowed but not in a case where part disallowance was made on an estimate basis without reference to any specific payment.

4. I am, therefore, of the opinion that on the facts of this case, the assessee has proved beyond doubt the necessity for the payment of brokerage and commission, the factum of services, the mode and method of payment of commission and the vouchers in respect of the payments.

I, therefore, agree with the view expressed by the learned Accountant Member.

5. The matter will now go back to the regular Bench, which heard the appeals, for decision according to majority opinion.

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