

inspecting Assistant Vs. British Pharmaceutical

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : May-23-1991

Reported in : (1991)39ITD105(Mum.)

Judge : M Ajinkya, G Israni

Appellant : inspecting Assistant

Respondent : British Pharmaceutical

Judgement :

1. to 8. [These paras are not reproduced here as they involve minor issues.] 9. The next ground is a more substantial ground and raises several issues of fact and law. The brief facts relating to the disallowance of the claim for expenses on commission paid to the selling agents will first have to be stated. The assessee is a registered firm and its first assessment year for the assessment year 1982-83 was completed on 26-4-1985 under Section 143(3) on a total income of Rs. 15,51,048.

While completing such assessment, the IAC had made a disallowance of commission paid to three parties amounting in all to Rs. 11,91,114 for the reasons given by him in para 11 of his order. These reasons as appearing in the original order of the IAC are as follows: (i) Para (3) of the agreement with M/s. BIPCO Sales Corporation shows that 'the principals will hand over to the agents the articles manufactured and produced by them at their factory to the agents for sale and distribution by the agents for and on behalf of the said principals'. During the

course of discussion while the sales of the assessee were examined the assessee was asked to show sales vouchers, delivery challans of the delivery made to M/s. BIPCO Sales Corporation through whom sales have been effected. However it is stated by the assessee that such delivery challans have not been made. On enquiring about the actual practice being adopted by the assessee it was stated that deliveries are sent straight from the factory of the assessee to outside parties and the challans are made directly in the name of the sole selling agents BIPCO Sales Corporation. This is obviously a clear contravention of the clause mentioned above.

(ii) To verify the fact further a survey was conducted under Section 133A on the assessee's premises as well as the premises of M/s.

BIPCO Sales Corporation. It was found that both the offices are situated in the same room. Detailed statements were recorded of Shri Lalit Kumar C. Shah, Partner of M/s. B.P.L. and Shri Umakant Shah, Partner in the firm of M/s. BIPCO Sales Corporation. The following salient features emerged from these statements :
(a) Packing etc. of the cases is made at the factory premises only by the assessee firm and the delivery is made straight to all the countries and outside clients. Only challans being made in the name of M/s. BIPCO Sales Corporation.

(b) No actual delivery is being handed over by the assessee to the sole selling agents M/s. BIPCO. There is no separate godown for M/s.

BIPCO (c) There is no such fixed transported company to prove that the goods are actually been transported from the assessee to its sole selling agents.

(d) No regular books or vouchers were found in the records of BIPCO showing packaging etc. done for items to be sent to their clients.

(e) The same people were found working for both the firms which the assessee tries to get it that the employees help each other.

10. Against this order, the assessee went in appeal. The CIT(A) passed his order on 17-1-86. Before the CIT(A), it was argued that the procedure laid down in Clause 3 of the agreement, which was made in 1974, stating that the assessee

shall hand over to the agent the goods manufactured at their factory for sale and distribution by Bipco for and on behalf of the assessee, was modified as a matter of convenience, and according to the modified procedure, the assessee delivered the goods to Bipco from its office, which was acquired later than in 1974 and therefore it could not be said that there was contravention of Clause 3. It was also argued that in view of such modification in procedure of taking delivery of goods sold by the assessee, the delivery was taken by Bipco not from the assessee's factory premises but from the assessee's office and for this purpose some employees of Bipco had to be present at all times to take delivery of the goods sold by the assessee to sort out the same customer-wise. As Bipco took delivery from the assessee's premises and forwarded the goods to the customers, there was no question of Bipco being required to store the goods for a long time. Further, it was pointed out that since the packing was done at the assessee's factory premises, there was no question of Bipco's packaging the goods or keeping any books or records in respect thereof. It was next argued that Bipco secured orders from customers, undertook to sort out the goods customer-wise, undertook the responsibility of securing payment of dues by customers and to pay rent, taxes, insurance of goods in transit and other charges for storage and disposal of the goods. In the case of Bipco, the assessment order showed that the income by way of commission was assessed in its hands after making allowance for expenses incurred by it on rendering the abovementioned services. Next, it was argued that the fact that the wives of some of the partners of the assessee were also partners of Bipco did not alter or affect the fact that Bipco was a separate entity possessing a separate Food & Drugs. Authority licence, separate licence from Municipal Authorities had a separate registration under Labour Welfare Fund Act, received separate bills of electricity, rent, etc., and was separately registered with the Sales-tax authorities. It also did not make any difference to the fact that the commission expended by the assessee was actually paid to Bipco in view of the services rendered by Bipco. Further, there were other partners in Bipco who looked after substantial portion of the administrative, financial and other responsibilities.

11. All these submissions were accepted by the first CIT(A), who, in para-3 of his order, inter alia, observed as follows:- It has also to be borne in mind that the

material relevant to only Bipco Sales has been used in the case of the two other selling agents without any particular enquiry in their dealings with the appellant. This being the position and since the dispute relates to the major addition made to the total income during the year, I would set aside this assessment order and direct the I.A.C. that the appellant should be given the statements of the persons recorded by him which have been used in framing the present assessment. The I.A.C. should also give the appellant an opportunity of cross-examining the persons whose statements have been recorded.

Specific enquiries should be made about the services rendered by the other two agents.

12. The matter so set aside was re-done by the IAC on 31-3-1986 in which he made the assessment on the same income as per the original order, viz., Rs. 15,51,048. This second order is an attempt on the part of the IAC to justify and explain the first order passed by him. We are surprised to find that the IAC has gone to the length of making critical, if not uncharitable, comments on the CIT(A) who has set aside the order. Even when the CIT(A) has directed that an opportunity of cross examination should be given, the IAC in his wisdom observed that the question of giving an opportunity of cross examination arises only in an event where the statement of third party not connected with the assessee in any way is recorded. He even passed disparaging remarks on the logic and rationale of the CIT(A) 's direction. The major portion of the order of the IAC is an exercise in explaining why he did not think it necessary to provide further opportunity to the assessee of cross examination. Finally, he disagreed with the CIT(A) on the issue of giving the assessee an opportunity of cross examining Mr. Umakant Sheth whose statement was recorded on 23-4-1985 with the observation as follows: Even if an opportunity had been given at that time it is difficult to visualise what cross examination could have taken place, since at that stage, the assessing officer was under no obligation to reveal to the assessee, what stand he was likely to adopt.

Nevertheless, he gave an opportunity to the assessee to cross examine Mr. Umakant Sheth, partner in M/s. Bipco, in the light of the statement given by him on

23-4-85. In the course of such examination, it transpired that as regards the nature of services rendered it was stated by Mr. Sheth that they were procuring orders from local as well as upcountry customers by correspondence and travelling. It also transpired that the statement given by Mr. Umakant Sheth on 23-4-85 gave a true picture of the state of affairs and that there was no difference between the statement given by Mr. Sheth on 23-4-85 and 21-2-85. Here again, it came to light that M/s. British Pharmaceutical Laboratories, the assessee herein, are the owners of the premises; that the premises of Bipco and B.P.L. for storing the goods are the same and that part of the premises has been given to Bipco on leave & licence.

At this stage, it may be stated that there was a survey operation under Section 133A on 23-4-1985 when the Income-tax Inspector visited the office premises and found that the employees of B.P.L. and Bipco were utilised for writing each other's books, and although the delivery of goods was taken not from the factory but straight from the office, it was not a violation of the original agreement clause which specifically required that the delivery would be taken from the factory.

13. On these facts, the I AC came to the conclusion that nothing new had emerged out of cross examination carried out by Dilip Sheth on behalf of the assessee. Although an effort was made to establish the fact that Bipco is an independent business, the basic issue, namely the nature and extent of the services rendered by Bipco to the assessee so as to earn the commission, had remained unanswered. The IAC, therefore, came to the conclusion that even after an opportunity was provided to the assessee, the assessee has not been able to prove anything further in its favour; on the contrary, some facts have been given on record which would conclusively prove that no services were rendered by the so-called sole selling agent and that the agency commission paid was a device for diverting or siphoning away of profits to a sister concern floated only for that purpose. To buttress this finding, the IAC finally concluded that from S.Y. 2040 Bipco was no more commission agents but was now trading with B.P.L.

14. The matter went again in appeal. The CIT(A) recorded the arguments of the assessee in para-3 of his order. At this time, the defence of the assessee was that

the IAC showed a prejudiced and biased approach and that Mr. Umakant Sheth was a technical person who did not know good English and was not aware of the financial implications of the commission agency agreement. No mala fides had been established by the IAC in the payment of commission; that the commission agents were rendering very substantial service to the assessee by securing upcountry orders which the assessee could not do without having a proper infrastructure and that at the most the commission could have been disallowed by invoking the provisions of Section 40A(2) which the IAC had not done and that only 10 per cent was paid as commission which could not be treated as unreasonable.

15. The CIT(Appeals), while giving his finding, took note of the facts which had come to light in the course of the survey operations under Section 133A which, as stated earlier, were conducted on the assessee's premises in the course of the fresh proceedings. These operations brought out the fact that the partners of Bipco Sales Corpn. were mainly either the wives of the assessee's partners or close relatives; that their office was situated in the assessee's basement; that the goods of the assessee and Bipco Sales Corpn. were kept in the same godown and that the accounts of both the concerns were written by the same account. These substantial evidence, according to the CIT(A), suggested that no genuine commission agency existed. The CIT(A) observed that when huge commission was paid to a sister concern, whose books are written by the assessee's accountant, who stores their goods in the assessee's godown and who has common employees with the assessee and who cannot show, what service was rendered for earning this handsome commission, the IAC would be entitled to draw adverse inference. The CIT(A) relied on the principles laid down by the Supreme Court in CIT v. Durga Prasad More [1971] 82 ITR 540 and the observations of the Supreme Court in the case of Collector of Customs v. B. Bhoormal. The CIT(A) finally observed that the entire exercise of having a commission agency agreement suddenly stopped after the survey under Section 133A; all the so-called difficulties in getting upcountry orders seemed to have suddenly ceased and, in CIT(A)'s opinion, the sudden termination of the commission agency itself tended to support the IAC's conclusion that the claim for commission was not genuine. The CIT(A) did not go into the question of

reasonableness of the commission payment under Section 40A(2) because he gave a finding that the disallowance of commission by the IAC was on the facts and evidence on record correct. It is against this second order of the CIT(A) that the present appeal is filed.

16. Several grounds are raised in this appeal. The substantial question is whether the impugned expenditure on commission was incurred for services rendered. Shri Tandon, the learned counsel for the assessee, argued that the department had not raised any question of benami. He pointed out that Bipco had rendered services justifying payment of commission. Bipco booked the orders for the assessee which fact had not been denied. Bipco had also realised the sale proceeds and had corresponded with the dealers all over the country. It had sorted and assembled diverse products and had serviced the customers of the assessee. They were, in fact, the del credere agents of the assessee.

Bipco was a registered firm recognised as such and assessed to tax as an independent entity. It was and has been in existence since 1964 with the same composition. Shri Tandon further argued that during the survey no evidence was found that the assessee itself was booking the orders.

He relied on paragraphs 27 and 23 of the sole selling agency agreement.

He argued that insurance on stocks and goods in transit was invariably paid by Bipco. As long as evidence of services rendered was established, the fact that there was close connection between the two firms was irrelevant. For this purpose, he relied on a decision of the Gujarat High Court in Voltamp Transformers (P.) Ltd. v. CIT [1981] 129 ITR 105 and another of the Punjab & Haryana High Court in CIT v. Kumar Engineers [1989] 178 ITR 630 where two of the partners of the assessee firm were also partners of the firm carrying on sole selling business.

The payment for commission was out of consideration of commercial expediency for which he relied on a decision of the Supreme Court in Aluminium Corporation of India Ltd. v. CIT [1972] 86 ITR 11. He argued that this was not a collusive agreement and relied in this context on the decision of the Delhi High Court in CIT v. Orissa Cement Ltd. [1988] 171 ITR 72. He also argued that the agent was

responsible not only for securing the orders but also for meeting other expenses like insurance, etc. He relied in this context on the decision of the Calcutta High Court in *J.K. Steel & Industries Ltd. v. CIT* [1978] 112 ITR 285. He also relied on the Delhi High Court decision in the case of *Mahalaxmi Sugar Mills Co. Ltd. v. CIT* [1986] 157 ITR 683. Shri Tandon argued that as per the agency agreement the list of services to be rendered by the sole selling agent included procuring and soliciting orders from all over India through its 120 authorised stockists, sorting and packaging of goods received from B.P.L. and forwarding them to the stockists, undertaking insurance of goods in transit, collection of dues from stockists and servicing the customers. Shri Tandon took us through the sole selling agency agreement dated 16-2-1974 between B.P.L. and M/s. Bipco Sales Corporation. Clause 3 of the agreement provided that the principals shall hand over to the agents the articles manufactured and produced by them at their factory to the agents of sale and distribution by the agents for and on behalf of the said principals. Clause 13 provided that the principals agree with the agents that they shall spend on advertisements and canvassing as suggested by the agents for furthering the sale and distribution of their products. Clause 16 provided that the principals agree to allow agents commission at the rate of 10 per cent on the net sale value of all the principals' articles or manufacture or products taken delivery of by the agents from time to time for sale in India and at such rate as may from time to time be mutually agreed upon between the principals and agents in respect of such products for sale at any place outside India. The same clause was more or less repeated in Clause 21 which provided that the agents shall be entitled to commission at 10 per cent as per Clause 16 here of on the net sale value after deduction of discount from the gross value. Clause 22 provided that the agents shall be personally responsible for all contracts entered into by them and shall bind themselves responsible for the recovery of the price of the goods sold. Clause 23 provided that all rent, taxes and like charges payable on the storage, disposal or sale of the goods and shall indemnify the principals against any demand by any person, authority or Government in this behalf. A copy of the balance-sheet of Bipco Sales Corporation for S.Y. 2037 as well as the trading and profit & loss account for the same year have been filed in which on the credits side commission of Rs. 11,86,281 has been shown, against which expenses of Rs. 9,75,201 have

been debited. Details of such expenses have been independently given at page 11 of the compilation and these include expenses like post parcel expenditure, general postage expenses, packing mukadami, Central Sales-tax, Maharashtra Sales-tax and interest of Rs. 1,56,936. Copy of the balance-sheet and profit & loss account of the assessee for the year have also been filed, in which net profit of Rs. 4,38,767 has been disclosed by the assessee. The net profit disclosed by the sole selling agents, namely, Bipco Sales Corporation (page 10 of the compilation) is Rs. 5,39,020. Shri Tandon argued that the survey operation had not brought on record any fresh material that would support the case of the revenue.

17. Shri B.G. Agarwal, the learned Departmental Representative, first of all, objected to several papers being filed for the first time as they were not filed before the lower authorities and no reason was given why they were not filed earlier. He relied on a decision in *Keshav Mills Co. Ltd. v. CIT* [1965] 56 ITR 365 (SC) and a decision of the Bombay High Court in *Velji Deoraj & Co. v. CIT* [1968] 68 ITR 708.

Shri Agarwal further argued that the partners were inter-related and the transactions flowing out of the commission agreement were not at arm's length. Several statements were made consequent to the survey operation which falsify the claim of the assessee that independent services were rendered. Shri Agarwal relied on three decisions of the Supreme Court in *Durga Prasad More's case* (supra), *Lachminarayan Madan Lal v. CIT* [1972] 86 ITR 439, *Swadeshi Cotton Mills Co. Ltd. v. CIT* [1967] 63 ITR 57 and the decision of the Bombay High Court in *W.T.Suren & Co. (P.)Ltd. v. CIT* [1971] 80 ITR 602. He pointed out that most of the partners of Bipco were closely related to the partners of the assessee. They were either wives or brothers of the partners of the assessee firm and this was a device on the part of the assessee to divert the profits of this firm. The goods were received not in the factory but in the office. Shri Agarwal, in particular, relied on the statement of Mr. Umakant H. Sheth, partner of Bipco Sales Corporation, recorded in the course of action under Section 133A on 23-4-85 and his cross examination by Shri Dilip K. Sheth on behalf of the assessee before the IAC(Asst.), Range VIA, on 21-2-1986. He also brought to our notice voluntary statement of Lalitkumar C. Shah, partner of B.P.L., recorded during the course of action under Section 133A on 23-4-1985, in which, inter alia, it was stated by him that the sales are effected

directly by the firm, B.P.L., in the case of tender and Govt.

institutions and only the sales of G-Mycin injections are being effected through B.P.L. and sales in India and out of Bombay are effected by Bipco.

18. We have carefully considered the detailed submissions made on behalf of either side and have gone through and studied the voluminous material placed before us by both sides. There are certain basic facts in this connection which have to be stated before we reach our conclusion on the contentious issue. Bipco Sales Corpn. is a registered firm which has been assessed to tax as such for and from the assessment year 1972-73. Copies of its assessment orders since the assessment years 1972-73 to 1983-84 have been placed on record. In almost each of the assessment orders, the respective Assessing Officers have stated that firm is a stockist and/or sole selling agent of drugs and Pharmaceuticals manufactured by B.P.L. They have been assessed to tax on the income disclosed from commission earned by them as sole selling agents of the company for all these years. Therefore, so far as the department is concerned, the firm of M/s. Bipco Sales Corporation is an independent entity recognised as a registered firm and assessed to tax as such for more than 10 years including the assessment year 1982-83, which is the year under appeal before us. This, in our opinion, is the most important aspect of the matter. Secondly, we notice that neither the Assessing Officer nor the CIT(A) has taken the stand that Bipco is a benamidar of the assessee. Thirdly, the reasonableness or otherwise of the commission payments made to Bipco has not been the issue before the revenue authorities inasmuch as the Assessing Officer or officer CIT(Appeals) has not considered the question of payment of commission from the point of its reasonableness under Section 40A(2) of the Act.

Having made these preliminary observations, we have to first highlight the major issue that requires to be considered in the present appeal.

That issue, as we have stated in para. -16 of Our order hereinabove, is whether the impugned' expenditure on commission was incurred for services rendered or conversely whether there is evidence to establish that Bipco Sales Corp. had rendered any service to justify payment of commission to them. Such commission

was being paid in the past and its genuineness was never questioned during the last several years and we must note that Bipco Sales Corpn. was assessed to tax on such commission. It would appear that when the issue came before the first.

CIT(A), that CIT(A) was impressed by the various arguments that were advanced before him, a brief summary of which has been recorded by us in para-10 of our order above. The pith and substance of these arguments was that there was no contravention of Clause 3 of the agreement between the assessee and Bipco Sales Corpn. but only a slight modification that Bipco secured order from customers, undertook to sort the goods customerwise and undertook the responsibility of securing payment of dues by customers and to incur expenditure on rent, taxes, insurance of the goods in transit etc. The argument that such income was assessed to tax in the hands of Bipco in several years has been found to be correct as can be seen from the various copies of assessment orders filed before us. The main issue for consideration at this stage is whether any material has come to light in the course of survey operations under Section 133 A which were carried out on 23-4-1985 to justify the conclusion that Bipco Sales Corporation did not render any service and that the sole selling agreement dated 16-2-1974 was not actually acted upon. We have carefully considered both the statement of Umakant H. Sheth, partner of Bipco Sales Corpn., recorded in the course of action under Section 133A on 23-4-1985 and his cross-examination by Dilip K. Sheth on behalf of the assessee on 21-2-1986. In the first statement, the said Umakant H. Sheth stated that they are the sole selling agents of British Pharmaceutical Laboratories since 1968, that they 'have stockists all over India appointed by them, that they have received orders from them by post in case of upcountry and on telephone or in person in case of local stockists and that B.P.L. prepares invoices in their own name after deduction of 10% after which the goods are despatched along with the challan. He also stated in response to the question about expenses borne by the firm that packing charges, wooden boxes, grass, strapping and labour charges to Mukadam for carrying the consignment are made by them and they also pay freight, staff salary, bonus and interest on loan. He, of course, admitted that both BPL as well as Bipco have joint control over the premises which are used as godown; but he stated that they take delivery in separate trays order-wise from the basement godown of BPL and they do the

packing in the passage of the godown.

When questioned about bill book of BPL being written by their employees, he stated that the bill book of BPL is inclusive of sales-tax, register of form 14 of Bipco Sales Corporation. Hence in the same bill book of M/s. BPL they got printed one form of M/s. Bipco Sales Corpn., in order to save labour. In the course of cross-examination by Dilip K. Sheth, the said Umakant H. Sheth in reply to Question No. 34 pointed out that Bipco Sales Corpn. have separate drugs licence, sales-tax licence, profession tax licences, municipal shop establishment licence and labour welfare fund licence. When questioned about the nature of services rendered by Bipco Sales Corporation to BPL in their capacity as sole selling agents, the said Umakant Sheth stated as follows: We are procuring orders from local as well as upcountry by correspondence or travelling then we after consulting BPL for stock position BPL prepares invoices in our name after allowing 10% discount, then we prepare our challans of different parties and pack the goods for despatch then we get the L/R and we prepare invoices & despatch to different parties. We get the payment through bank or 30 days and for payments we have to correspond with the parties & after the payment is received the other formalities of accounts as well as C form is done by us.

We find that Bipco Sales Corpn. have an independent set of employees who do different jobs. They have their own accountant, packing supervisor, typist, person in charge of correspondence, filing and those doing packing and despatching work. There are 11 members of staff who are in no way connected with the assessee who has its own set of employees (24 in number). We also find that Bipco Sales Corpn. is an independent firm doing sole selling agency and has incurred a total expenditure of Rs. 9,75,201 which includes packing charges of Rs. 80,600, insurance of Rs. 13,753, Central Sales-tax of Rs. 3,81,476, Maharashtra Sales-tax of Rs. 32, 100 and advertisement expenses of Rs. 39,988. They pay as much as Rs. 4,56,936 on account of interest, pay salary of over Rs. 75,000 to its staff and pay rent of Rs. 12,000.

Their balance-sheet for the year shows sundry debtors of nearly Rs. 14 lakhs (Rs. 13,86,400) and they had taken sarafi loans of over Rs. 10 lakhs on which they pay

such substantial interest. Even the statement of Lalitkumar C. Shah, who is a partner of the assessee-firm, recorded in the course of the survey proceedings does not bring out anything which would contradict the stand of the assessee. He noted that there is no separate godown of Bipco. The goods taken out for sale are of Bipco and the basement premises belong to Bipco where packing is done by Bipco. He, of course, admitted that after S.Y. 2040 no commission is paid but they allow discount of 10% at the time of making invoices to Bipco Sales Corporation. On the appreciation of the evidence on record, we are satisfied that the conclusion of the revenue authorities that no services are rendered is not supported by any evidence on record even after the survey operations under Section 133 A were carried out. No doubt, there is some relationship between the partners of the assessee-firm and the partners of Bipco Sales Corpn. The wives of the partners of the assessee-firm are partners in Bipco with different profit sharing ratio. One of the partners is the brother of two partners in the assessee-firm. But then one partner in Bipco Sales Corpn., namely, Dhan Shankar Thakkar having 10% share has no connection with the partners of the assessee-firm. This individual is said to be with the firm for the last 20 years. Similarly, Umakant H. Sheth, has also been with the firm for a long time and is in no way related to the partners of the assessee-firm. These two individuals together account for 24% share in profits of that firm. Further, we find that the same constitution of Bipco existed for the earlier several years with the partners having equal profit sharing ratio. Therefore, the fact that there is inter-relationship between the partners of the assessee and the partners of Bipco does not by itself mean that no services were rendered by Bipco or that the payment of commission was a device for diverting the profits. Bipco for the year under consideration has shown more profits as per the books than the assessee and has been assessed as such on the income from commission. It is an independent taxable entity with a separate establishment which has been carrying on business of sole selling agency for the last more than 10 years. It has separate licences under the Sales-tax Act and Shop & Establishment Act In view of these facts, we are not at all convinced by the stand of the revenue authorities that no services were rendered and that the commission paid was only to divert the income to a sister concern. The first CIT(A), who set aside the order, was impressed by the arguments advanced and directed certain enquiries to be made.

The survey under Section 133A that was carried on and the statement recorded in the course of such survey have not, in our opinion, brought on record any material that would jeopardise the case of the assessee that it had paid commission to Bipco, the sole selling agents, for services rendered. The fact that such agency was terminated in S.Y. 2040 cannot be held against the assessee while determining this issue. The present issue cannot be decided on events which have occurred post facto. We have to see whether there is evidence for the year under appeal or services have been rendered by an independent firm. We are satisfied that such services were in fact rendered as they were rendered in the past.

19. In view of our finding on appreciation of evidence, it is really not necessary to deal at length with the plethora of cases cited in the course of arguments before us. We will, however, refer to a few decisions to buttress our findings particularly in the context of the close connection between the partners of the two firms. The Gujarat High Court in Voltamp Transformers (P.) Ltd. 's case (supra) was dealing with a similar case. In that case, the assessee was a private limited company engaged in the manufacture and sale of electric transformers. It appointed a firm as its sole selling agent. The partners of the firm were one of the directors and wives of other directors of the company. The Gujarat High Court held that the Tribunal had not taken into consideration the material placed on record to show that the commission was reasonable and the conclusion of the Tribunal that there was no commercial consideration on account of proximity between the sole selling agents and the directors was not correct.

Similarly, the Punjab & Haryana High Court in Kumar Engineer's case (supra) considered almost similar issue on similar facts where the assessee-firm claimed deduction of commission paid to its sole selling agents for procuring orders. The ITO disallowed the claim on the ground that two of the partners of the firm were partners of the firm carrying on sole selling agency. The Tribunal found that two of the partners of the sole selling agency had gone around the country and obtained huge orders for the products of the firm resulting in higher sales and, therefore, held that 4% of the commission out of 6% paid would be reasonable. This decision was confirmed by the Punjab & Haryana Court.

We have already said that there is no evidence to support that the agreement which was drawn up in 1974 and acted upon for the last 10 years or more was not a collusive agreement. This conclusion finds support in the decision of the Delhi High Court in the case of Orissa Cement Ltd. (supra). Reliance of the Departmental Representative on the decision in the case of Durga Prasad More (supra) is misplaced. We are satisfied that the agreement is not a facade to give an appearance of credibility to an otherwise bogus agreement. The Departmental Representative also relied on the decision of the Supreme Court in the case of Lachminarayan Madan Lal (supra) where the Supreme Court held that mere existence of an agreement and payment of commission does not make such payment genuine. However, in that case, the Tribunal found that on the day the selling agency agreement was executed, the selling agency firm had not even come into existence. In the present case, the selling agency has been functioning as such since 1968 and has been assessed to tax on the commission income received by it from the assessee since the assessment year 1972-73. Therefore, the ratio of the decision of the Supreme Court in this case would not be applicable to the facts of the present case. On an overall appreciation of the evidence on record and after carefully going through the various statements filed, we are satisfied that on this issue, namely, on the question of payment of commission to Bipco, the assessee is entitled to succeed. The order of the CIT(A) on this point is reversed.