

Sanmarg (P.) Ltd. Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Sep-09-1991

Reported in : (1992)40ITD242(Kol.)

Judge : D Meenakshisundaram, Vice, V Dongzathang

Appellant : Sanmarg (P.) Ltd.

Respondent : inspecting Assistant

Judgement :

1. This appeal is directed against the order of the CIT, West Bengal-III, Calcutta.
2. The assessee, as the name suggests, is deriving income from business of printing and publishing of daily newspaper by the name of "Sanmarg".

The original assessment was completed by the Assessing Officer under Section 143(3) of the Act on 28-1-1986. In the said assessment order the Assessing Officer allowed the commission paid to sales agents amounting to Rs. 52,38,614 and also the commission paid to advertising agents amounting to Rs. 2,49,067 being expenditure for the purpose of business. The Assessing Officer also allowed the claim of repairing and maintenance expenses claimed by the assessee at Rs. 7,01,273.

3. On examination of the assessment records of this assessment year 1985-86, it was noticed by the CIT that the Assessing Officer had not properly taken into account the above expenses which would otherwise be disallowable under the

provisions of Section 37(3A) of the Act.

Omission to do so on the part of the Assessing Officer resulted into the under-assessment of income by Rs. 10,97,536 with consequent short levy of tax and interest and, therefore, the CIT was of the view that the order was erroneous and prejudicial to the interest of the revenue in terms of Section 263 of the Act. He initiated proceedings under the said section. The learned CIT(A) also found that the assessee claimed Rs. 7,01,273 representing purchase of rotary and mono machine was debited to the P. & L. A/c. under the head "Repairs to plant and machinery" and was allowed by the Assessing Officer without verifying that it was purchase of machinery of a capital nature. He accordingly issued another notice in continuation of the earlier proceedings initiated by him vide letter dated 19-2-1988. Rejecting the explanation offered, the learned Commissioner passed the impugned order dated 7-3-1988 holding that the expenses in the form of commission to sales agents and Advertising agents are in the nature of sales promotion expenses includible for disallowance under Section 37(3 A) of the Act.

He also held that a sum of Rs. 7,01,273 claimed as repairs and maintenance charges was, in fact, purchase of capital assets in the form of rotary and mono machine disallowable as capital expenditure. He accordingly set aside the assessment order for the year 1985-86 partially on these two counts with a direction to the Assessing Officer to recompute the disallowance under Section 37(3 A) and disallowance pertaining to the purchase of rotary and mono machinery.

4. The assessee is aggrieved and has come up in appeal before the Tribunal. Sri R.N. Bajoria, learned counsel, appeared for the assessee.

According to him, there was no error or prejudice caused to the revenue by the order of the Assessing Officer. The assessee has been paying commission to selling agents in the normal course to advertising agencies, advertisers, local selling agents, outstation selling agents, Central/State Governments, Railways, Public Sector undertakings, etc.

and the bills have been raised after allowing commission/trade discount as per usual trade agreements with them. Advertisement and sales bills are raised and accounted for in the books of account on the basis of net amount and disclosure of the total amount of the commission/trade discount was made in the account only to meet the requirement under Section 211 of the Companies Act, 1956 and the Schedule VI thereto.

Such commission/trade discount to these agents are not peculiar to the assessee but usual practice in this line of business. Such amount of commission/ trade discount can never be termed as sales promotion within the meaning of Section 37(3A) of the Act. With regard to the commission to advertising agents and canvassers also it is stated that the commission had been paid to several representatives/canvassers/agents all over India who worked for the assessee to procure and secure advertisement business either purely on commission basis or partly on retainer basis. They are not employees of the assessee and they have been doing this work for other newspapers also on similar terms. Such commission to advertising agents and canvassers also cannot be termed as sales promotion in terms of Section 37(3A) of the Act. With regard to purchase of spare parts for repairs and maintenance, it is submitted that the learned CIT wrongly appreciated the purchases of these spare parts as purchases of machinery in the form of Rotary Printing Machine and Mono Key Board and Casters. Relying on the explanation submitted to the Commissioner at the first instance, copy of which is given at page 45 of the paper book, the learned counsel Sri R.N, Bajoria submitted that the same was in the nature of spare parts, Stores and Labour charges as per further details given at pages 47,49, 51 and 53 of the paper book. Elaborating further it is submitted that these spare parts were mostly imported items and duly supported by Bill of Lading and the Customers Clearance made by the assessee. In such a case it is submitted that these items could not be treated as in the nature of machinery of capital nature.

It is also pointed to us that the details were duly given in the Annual Report for the year ending 1984 at page 76 under the head "Other expenses" as repairs and maintenance for plant and machinery and further details have been incorporated at page 78 under the head "Notes on accounts". These items have not been

capitalized by the assessee as they are in the nature of spare parts not amounting to capital assets as evident from the details of the fixed assets given at page 73 of the Annual Report. It is, therefore, submitted that there was no error in the order of the Assessing Officer which is prejudicial to the interest of the revenue and, therefore, the learned Commissioner was not justified in invoking the provisions of Section 263 of the Act. On the other hand, the learned senior departmental representative, Sri R.N. Tripathi supported the order of the learned Commissioner. According to him, the Commissioner has fully examined the assessment records and on that basis he has given a finding after considering the explanation offered by the assessee. In such a case, there is no reasonable ground for interfering with the order of the learned Commissioner as the original order of the Assessing Officer was indeed erroneous and prejudicial to the interest of the revenue. It is, therefore, submitted that no interference is called for in this regard.

5. We have carefully considered the rival submissions in the light of the material on record. The assessee is a company doing business of printing and publication of a daily newspaper. The daily newspaper was sold almost entirely through selling agents outside the publishing centre of Calcutta and through hawkers, etc. in the city of Calcutta.

The commission/trade discount to these selling agents, etc. was given as per the usual trade arrangement with them and as per usual trade practice prevailing in the newspaper business. Similarly, the commission to advertising agents and canvassers were paid for the business secured by them. Such payment was either made purely on commission basis or partly on retaining basis. The genuineness of the payment and the services rendered have not been doubted. The only issue that falls for our consideration is whether these expenses will assume the character of 'sales promotion' as contemplated under Section 37(3A) of the Act. The term 'sales promotion' used in Section 37(3 A) came up before the Tribunal in the case of *Mopeds India Ltd. v. IAC* [1984] 7 ITD 324 (Hyd.) and in that it was held as follows : A selling agent's commission, in our opinion, can never be treated as an outlay on advertisement, publicity or sales promotion. This is part of selling cost. If it is allowed directly as a discount to the buyer, it is an abatement in the price. Even if the goods are routed through a distributor, or a selling agent, the

commission (and bonus) is an expenditure in the nature of sales commission which, in our opinion, is totally distinct from expenditure on advertisement, publicity or sales promotion. The expenditure contemplated under Sub-section (3A) of Section 37 is an expenditure on appeal to the potential customers at large and not a remuneration for service rendered to the assessee. In the advertisement outlay, there is no quid pro quo. A person who sees the advertisement may or may not buy the product advertised. Our interpretation is also buttressed by the fact that the various items which are exempted under Sub-section (3B) such as advertisement in a small newspaper, expenditure for maintaining an office for the purposes of advertisement, payment of salary to advertisement staff, expenditure on participation in press conference, sales conference, trade convention, trade fair or exhibition, expenditure on publication of pamphlets, etc., indicate the type of expenditure that is contemplated. Selling expenses by way of remuneration to agents and distributors, in our opinion, could have never been in contemplation of the disallowance which was introduced in the statute with a view to curbing ostentatious and excessive advertisement outlay at the expense of the exchequer.

6. Similar view has been taken by the Tribunal, Calcutta Bench in the case of Bata India Ltd. [IT Appeal Nos. 1392 and 1393 (Cal.) of 1988, dated 13-12-1989]. Identical issue came up before the Tribunal in the case of the well-known newspaper Statesman Ltd. [IT Appeal No. 917 (Cal.) of 1988]. In that case under similar circumstances the Commissioner invoked the provisions of Section 263 and directed the Assessing Officer to apply the provisions of Section 37(3A) of the Act on the above items. The Tribunal after elaborate discussion of the provisions of the Act and the relevant decisions on the point held as follows: 17. In view of above discussion and background, we are unable to hold that the commission paid to sales agents or advertisement agents can be disallowed under Section 37(3A) of the Act. It is not possible to pick up and isolate words 'sales promotion' out of expression 'advertisement, publicity and sales promotion' and give it literal meaning and disallow under Section 37(3 A) every expenditure aimed at promoting sales. The intended object that only socially wasteful expenditure falling within total expression 'advertisement, publicity and sales promotion' are to be disallowed has to be kept in view while applying Section 37(3A) of the Act. It is well known that newspapers are sold through hawkers and also agents. In fact,

sales agents and hawkers are integral part of distribution system of a newspaper. Likewise, importance of procuring advertisement for a newspaper need hardly be emphasized.

Thus, both selling agents and advertisement agents greatly contribute towards efficient running of a newspaper. These items can by stretch of no imagination be treated as extravagant or wasteful expenditure. No element of advertisement, publicity or sales promotion is involved in these expenses. We are, therefore, of the view that the provisions of Section 37(3 A) were not at all applicable to the expenditure in question. For all the above reasons, we vacate the order of the Commissioner of Income-tax passed under Section 263 of the Act.

7. The Hon'ble Calcutta High Court in the recent decision in the case of CIT v. Hindustan Motors Ltd. [IT Reference No. 134 of 1985, dated 23-2-1990] considered this issue elaborately and held that brokerage and commission paid for selling goods will not come within the mischief of the phrase "advertisement, publicity and sales promotion" under Section 37(3A) of the Act.

8. Respectfully following the above decisions we hold that the provisions of Section 37(3A) of the Act were not at all applicable to the expenses in question and, therefore, the order of the Assessing Officer cannot be said to be erroneous and prejudicial to the interest of the revenue. In that view of the matter, the learned Commissioner has not correctly assumed the jurisdiction and his order is liable to be vacated on this point.

9. With regard to the direction given by the Commissioner regarding purchase of machinery of a capital nature for a sum of Rs. 7,01,273 it is seen that the learned CIT has not brought on record any material to show that the items purchased are in the nature of a capital asset. On the other hand, the learned counsel Sri R.N. Bajoria before us produced various documents to prove that the purchases were in the nature of spare parts, stores and labour charges, etc. The invoice under which the items were imported clearly declared the items as permissible spare parts and matrices under OGL. Similarly, the clearance before the Customs authorities also fully evidenced that these items are in the nature of stores and spares parts. The bill of authorised clearing agents M/s. G.D. Traders also fully evidences the fact

that the items cleared were in the nature of spare parts and not a capital asset. The P. & L. A/c. and the Balance Sheet of the assessee and the Schedule attached thereto also classified these items as in the nature of stores and spare parts and they have not been added to the capital assets in the Schedule of fixed assets. In such a case, we have no alternative but to hold that the items purchased by the assessee are in the nature of spare parts, stores and labour charges as evidenced by the various documents submitted before us. There is, therefore, no error in the order of the Assessing Officer which will justify the Commissioner to invoke his power under Section 263. We hold accordingly and set aside the order of the learned Commissioner under Section 263.

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