(1998) 01 CAL CK 0002

In the Calcutta High Court

Case No : IT Reference No. 147 of 1992

Commissioner of Income Tax APPELLANT

Vs

Hindusthan Development Corpn. Ltd. RESPONDENT

Date of Decision : 13-01-1998

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 256(2)

Citation : (1998) 101 TAXMAN 146

Hon'ble Judges : Y.R. Meena, J;B. Bhattacharya, J

Bench : Division Bench

Judgement

Y.R. Meena, J.—In compliance with our direction u/s 256(2) of the income tax Act, 1961 (''the Act), the Tribunal has sent the statement of the case and referred the following questions :

"1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that Industrial Service Centre rendered services justifying the payment of commission of Rs. 22,36,555 was based on any relevant materials or perverse ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the disallowances on the sales commission of Rs. 22,36,555 was unjustified ?"

The assessee, Hindusthan Development Corpn. Ltd., is a public limited company and, inter alia, it carried on business of manufacture of Calcines Petroleum Coke (CPC). In the year under consideration the assessee has made the payment of commission of Rs. 22,36,555 to Industrial Services Centre (ISC). This commission has been paid on account of sales of the assessee''s product. The sales had taken place at the instance of ISC. From records it appears that the firm ISC consists of two partners, Smt. Uma Jaipuria and Sri Ramakant Sureka. Both partners were summoned to find out whether any service for sale of the assessee''s product has been rendered by the firm ISC. The statements of Sri

Ramakant Sureka are recorded as well as of S.K. Jaipuria, who is the husband of Smt. Uma Jaipuria. In his statement Sri Jaipuria accepts that the major sale of the assessee''s products was through ISC. There was an agreement between the assessee and ISC for sale of the assessee''s products and in pursuance of that agreement the firm ISC has rendered the services and commission has been paid by cheque and Sri Jaipuria was looking after the business of the firm as husband of Smt. Uma Jaipuria.

After taking into account the statement of Sri Ramakant Sureka and Sri S.K. Jaipuria and also the materials placed before him, the ITO was of the view that no service has been rendered and the payment of Rs. 22,36,585 paid to ISC was not for the purpose of the assessee''s business. Therefore, he disallowed the said amount of commission and added it in the income of the assessee.

2. In appeal before the Commissioner (Appeals), the assessee has submitted the details of service and commission paid to ISC, by the assessee and also brought to the notice of the Commissioner (Appeals) that the ITO has not even supplied copy of the statement of Sri Ramakant Sureka and Sri S.K. Jaipuria, which was recorded at the back of the assessee. Even no opportunity had been granted to the assessee to cross-examine Sri Sureka and Sri S.K. Jaipuria.

On the request of the assessee, the copies of the statements of Sri Sureka and Sri Jaipuria were supplied. The details of service rendered by ISC to increase the sale of product of the assessee and details of monthwise payment made by the assessee were furnished.

Considering those details the claim of the assessee was allowed. The matter was then taken before the Tribunal and the Tribunal has also affirmed the view taken by the Commissioner (Appeals). The Tribunal found that the agreement was genuine, service has been rendered by ISC and even the sale has been increased after the agreement. The sale, in fact, increased from 12560 (M/T) to 20989 (M/T).

3. Thereafter, the department filed an application u/s 256(1) for a reference of the question proposed and that application has been rejected by the Tribunal on the ground that the question proposed is a question based on a finding of fact.

In compliance with our direction in application u/s 256(2), the statement of the case has been sent and aforesaid questions referred for our opinion.

4. Heard the learned counsels for the parties.

Genuineness of the agreement has not been disputed that the assessee and ISC agreed that the sales will be through ISC and the commission on sales on a particular rate will be paid by the assessee. All payments are made by the account-payee cheque. Statements of partners of ISC were recorded at the back of the assessee. No opportunity was given to the assessee to cross-examine them, not even copies of those statements were supplied to the assessee at the time of assessment and those statements were used against the assessee. Not only that, even in the statements which were recorded at the back of the assessee. Sri Sureka being a partner of the firm, of ISC and Sri Jaipuria being the husband of another partner of the firm, had admitted that there was an agreement between the assessee and ISC for sale of the products of the assessee on commission basis. The commission has been paid as per the agreement through account-payee cheque. When the ITO had not allowed to submit copies of the evidences which were relevant to find out whether ISC has rendered any service, those very evidences, thereafter, were submitted in appeal before the Commissioner (Appeals). Those were considered and it was found as a matter of fact that services were rendered and commission has been paid for the services rendered by ISC.

Whether any service has been rendered by ISC-basically it is a question of fact. A query was put by the Bench to the learned counsel for the department as to what type of evidence in such cases is required. No satisfactory answer has been given. In cases of sale promotion even sales can be procured on telephone if the purchaser is persuaded by the Agent. Not only that, there is a concurrent finding of the Commissioner (Appeals) as well as of the Tribunal, that service has been rendered by ISC and commission has been paid for that service. Merely, if some satisfactory answer has not been given by either of the partners of ISC to the ITO, that does not mean that no services are rendered or to disbelieve the genuineness of the agreement for services or sales, as well as of the payment. Even payment has not been denied. Therefore, in such cases, it cannot be said that the finding of fact is perverse. When the finding of fact regarding rendering of service is not perverse, then how the payment of commission can be disallowed; thus, no interference is called for in the order of the Tribunal.

In the result, question No. 1 referred to us, we answer in the affirmative, i.e., that finding is based on material on record and so far as whether the finding is perverse, we answer the same in the negative, i.e., the first part in favour of the assessee and against the revenue and the second part in favour of the assessee and against the revenue. Question No. 2 is a consequential question and we answer that in the light of answer to question No. 1.

B. Bhattacharya, J. - I agree.