

[ASN]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1384 OF 2008

The Commissioner of Income Tax-22. Vs. ..Appellant.

M/s. Warkem. ..Respondent.

Mr.R.Ashokan for the Appellant.

Mr.Deepak Tarshalwale with Mr. V.S. Hadade for the Respondent.

**CORAM : F.I. REBELLO &  
R.S. MOHITE, JJ.  
DATE : 30th March, 2009.**

PC :

1. Revenue is in appeal on the following question.

The substantial question of law arises in the present appeal is regarding the true scope and correct interpretation of Sec.40(A)(2)(b) of the Income Tax Act, 1961 and other provisions and whether on the facts and circumstances of the case and in law the Hon'ble Tribunal is right in upholding the Order of CIT(A) and deleting the disallowance of Rs.40,59,971/- being the sales commission allegedly paid to M/s. Biotech Consultants?

2. The learned Tribunal relied on its earlier order for the assessment year 2001-2002 in I.T.A.No.346/Mum./2003 dated 8.4.2005 whereby the appeal preferred by the assessee has been allowed.

Appeal preferred before the court against the said order was dismissed on the ground of limitation. Such a dismissal would not amount to an order being confirmed by this court and therefore, it is open to this court to consider the question as raised.

3. We have had an opportunity of going through the order of ITA No.346/Mum/2005. In that case, except the commission on sales made to M/s. Himedia Laboratory Ltd. rest of the commission was allowed. In the appeal preferred before the Tribunal, the Tribunal noted that the commission has been paid to the assessee since 1984 and there is an agreement with the said company. Even the commission which was disallowed was allowed.

4. On behalf of the revenue, the learned counsel submits that in the instant case, A.O. has found that the payments have been made to one M/s. Biotech Consultants for the sales effected to various parties and the notices were issued to the said parties to whom the commission was paid by the assessee. It was found that those parties had no knowledge in so far as assessee is concerned.

5. We have gone through the agreement entered into between the assessee and M/s. Biotech Consultants. The relevant clause of the agreement reads as under.

"The Principals shall have the right to appoint any other person or persons to promote the sale of its products outside the "said area". Any business secured by the Principals direct from parties in the said area shall be considered as part of the sales promoted by the agents".

The "said area" is defined in Clause II as "through out the Union of India". In other words, all sales taking place even though not procured through the assessee herein by virtue of Clause 3, the assessee is entitled for commission. Such a clause cannot be said to be illegal under the Contract Act or being against public policy.

6. In the light of above, in our opinion, there is no merit in the appeal and the same is accordingly dismissed.

( R.S. MOHITE, J.)

( F.I.REBELLO, J.)