

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 374/2009

M/s M.L.B.D. BOOKS INTERNATIONAL .. Appellant Through: Mr Rajiv Tyagi, Mr Chanchal Biswal, Mr Vikash Misra and Mr Ankit, Advocates

Versus

ASST. COMMISSIONER OF INCOME TAX .. Respondent Through: Mr R.D. Jolly, Sr. Standing Counsel.

CORAM
HON BLE MR JUSTICE VIKRAMAJIT SEN
HON BLE MR JUSTICE RAJIV SHAKDHER

O R D E R

31.03.2009

1. The assessee has preferred an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) against the judgment dated 11.09.2008 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal) in ITA No. 4193/Del/2006 pertaining to assessment year 2003-04.

2. The assessee is aggrieved primarily on account of the fact that a certain sum out of the payments made to a sister concern, that is, M/s Moti Lal Banarsidass Publisher (Pvt.) Ltd (in short MBPPL) have been disallowed on the

ground that the payments were excessive and unreasonable . In this respect

the Department has resorted to the provisions of Section 40A(2)(a) read with

Section 40A(2)(b) of the Act. The payments disallowed on this account which

have been treated as an excessive and unreasonable are in the sum of Rs 4,98,917/- (being 5% of the total purchase) out of the total payments made to

MBPPL being a sum of Rs 99,78,344/-. The other disallowance pertains to commission paid by the assessee to MBPPL amounting to Rs 3,48,233/- which the

assessee claimed was really in the nature of rent for space and other facilities

provided by MBPPL.

3. In order to adjudicate upon this appeal the following facts require to be noticed:-

3.1 The assessee is in the business of export and publication of books. The assessee filed a return of income for the relevant assessment year, that is,

assessment year 2003-04, declaring total income of Rs 19,89,210/-. The said

return was filed on 02.12.2003. On 02.12.2004 the return was processed under

Section 143(1) of the Act. However, the assessee s return was picked up for

scrutiny and a notice dated 18.10.2004 was issued under Section 143(2) of the

Act which was duly served on the assessee on 20.10.2004

3.2 During the course of inquiry it was revealed that the assessee had made a total purchase of books worth Rs 1,05,84,868/-, out of which books worth

Rs 99,78,344/- were purchased from its sister concern, that is, MBPPL. In the scrutiny the Assessing Officer discovered that in respect of books purchased by

the assessee and by other persons from MBPPL, the payments that the assessee

made were decidedly more than that which were paid by other persons who

purchased the books from MBPPL. In this regard, it would be beneficial to extract the comparative chart incorporated in the Assessing Officer s

order:

Name of the Book

Rate charged to others(in Rs) after discount of 40%

Rate charged to Assessee(in Rs) after discount of 40%

Sufi Message(Vol 1)

Inayat Khan Hazrat 87

147

Sufi Message(Vol 3)

Inayat Khan Hazrat

87

183/75

Sufi Message(Vol 7)

Inayat Khan Hazrat

87

87

3.3 Based on the difference in rates, as indicated in the box set out hereinabove, the Assessing Officer sought to disallow payments made by the

assessee to MBPPL on the ground that they were excessive and unreasonable by

taking recourse to the provisions of Section 40A(2)(a) of the Act. The assessee

attempted to explain the difference in rates by attributing the same to the fact

that, what the assessee had purchased from MBPPL were a hard bound edition of

the book, the rate for which was higher as compared to a paperback. The

Assessing Officer disbelieved the explanation given by the assessee. He came to

this conclusion by virtue of the fact that the invoice/bill made no reference to

the fact that books bought by the assessee were hard bound or paperback. He

also noted that despite the fact that several opportunities had been given to

the assessee to give requisite details of books purchased from MBPPL;

none was supplied. He also noted that the gross-profit rate of the assessee for the year, under consideration, had fallen from 32.27% to 27.4%. Based on these findings and the fact that the assessee had claimed that 5% of the total purchases from MBPPL related to hard bound books, the Assessing Officer disallowed, out of the total payment made to MBPPL, 5% of the said payment. Accordingly, a sum of Rs 4,98,917/- was disallowed (i.e. 5% of Rs 99,78,344/-).

3.4 As regards commission paid to MBPPL the same was also disallowed. The assessee had paid a sum of Rs 3,48,233/- as commission which, according to the assessee was really, as indicated above, rent for space and other facilities pegged at the rate of 1% of the turnover. The said sum was disallowed by again resorting to the provisions of Section 40A(2)(a). In coming to this conclusion the Assessing Officer took into account the fact that some of the directors of MBPPL and persons who were in control of the assessee were common. He was also of the view that the assessee had failed to establish the adequacy and need for payment of commission

4. Aggrieved the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)]. The CIT(A) by an order dated 08.09.2006 sustained the order of the Assessing Officer.

5. In a further appeal to the Tribunal, the Tribunal dismissed the appeal of the assessee.

6. The assessee, being aggrieved, has preferred the present appeal before us. In respect of the disallowance with regard to payments made to MBPPL the learned counsel for the assessee Mr Rajiv Tyagi has submitted that the

provisions of Section 40A(2)(a) of the Act are not applicable. He contends that the provisions can be triggered only if the payments made to a person, indicated in 40A(2)(b) of the Act, are unreasonable or excessive having regard to the fair market value of the goods, services or facilities. It is his contention that the fair market value, in the instant case, is the price printed on the book and having regard to this fact, it is obvious that the price charged by the assessee is less than the fair market value if regard is had of the fact that for the hard bound volume of Sufi Message (vol 1) the printed price is Rs 245 while the price paid by the Assessee is Rs 147. Similarly, in respect of Sufi Message (vol 3) and Sufi Message (vol 7) the printed price, according to him, is more than the price paid by the assessee to MBPPL. It is his submission that a comparison of the rates charged by MBPPL for books supplied to the assessee and those to persons other than the assessee would show that there was a uniform rate of discount of 40% and the difference in rate was only on account of the fact that the assessee had paid for hard bound editions whereas the rates picked up by the Assessing Officer in respect of the other persons were for paper backs.

7. We have considered the submissions of the learned counsel for the assessee and have also heard Mr R.D. Jolly, Sr. Standing Counsel appearing for the Revenue. Mr Jolly has basically relied upon the orders of the authority below.

7.1 As regards the submission of the learned counsel for the assessee that provisions of Section 40A(2)(a) of the Act are not applicable we are of the view that the submission is untenable. In the instant case as is evident from the orders of the authorities below the Assessing Officer had compared the

rates

paid by the assessee with the rates charged by MBPPL in respect of persons other

than the assessee. The assessee had explained the difference by stating that

the variance occurred on account of the fact that the rates pertained to hard

bound editions of the book. It is obvious that in so far as MBPPL was concerned

it was selling books to the assessee, who is an exporter of books, as also, to

others, in bulk, at a uniform rate of discount. Therefore, the fair market value in the instant case had to be discerned by keeping in mind a similarly

circumstanced person, that is, one who was a bulk purchaser of the books, in

issue. It is this which has prevailed with the authorities below. Therefore, in our view the submission of the learned counsel for the assessee that the

printed price ought to be taken as the fair market value is untenable and deserves to be rejected. It is pertinent to point out here that this stand is

not articulated by the assessee before any of the authorities below. The other

explanation given by the assessee, which was that the difference in rate arose

on account of the fact that the assessee's rates pertained to the hard bound

editions of the books was rightly rejected by the authorities below on the ground that there was no material whereby the explanation given by the

assessee

could be accepted. In these circumstances, we agree with the view of the

authorities below that in the absence of requisite details it was not possible

to accept the contention of the assessee that the rate paid by the assessee,

which undoubtedly is a higher rate, was for hard bound editions of the books.

8. With regard to the disallowance on account of commission, the learned counsel for the assessee had argued that the authorities below had incorrectly

disallowed the commission by making a value judgment that the commission at the

rate of 2.5% was excessive and unreasonable. It was contended that as long as

the assessee was able to show that the expenditure made by way of commission paid to MBPPL towards space and other facilities provided was incurred for the purposes of business, the same could not be disallowed by resorting to the provisions of Section 40A(2)(a).

8.1 On this aspect it is important to bring to fore the fact that the Tribunal, in the impugned judgment, noted the fact that in the case of the sister concern, that is, MBPPL, where MBPPL had paid commission to another sister concern, that is, Moti Lal Banarsi Dass, (the owner of the space and the facilities in issue) it had allowed to MBPPL by its order dated 03.08.2007 passed in ITA No. 4290Del/2003 in the case entitled ITO vs Moti Lal Banarsi Dass Pvt. Ltd., deduction by way of commission at the rate of 1% of the turnover in respect of very same premises. Therefore, keeping this circumstance in mind the Tribunal disallowed the assessee's claim for commission in excess of 1% on the basis that the facts of the case were identical to the aforementioned case.

8.2 The learned counsel for the assessee sought to argue before us that in the earlier case to which reference has been made by the Tribunal in the impugned judgment, the commission paid had been allowed on the ground that it was less than the normal warehousing charges. He contended that, therefore, as long as the commission paid was less than the normal warehousing charges and commission paid was commercially expedient, the same should have been allowed as a deduction.

8.3 We are not impressed with this submission, in view of the fact that, by virtue of the earlier order a bar had been set as to what was a reasonable sum payable for renting of the space and other facilities provided to a person similarly placed. It was not contended before the authorities below that

either

the space or the facilities were any different than that which was provided in

the aforementioned case. In that view of the matter in our opinion the Tribunal

rightly restricted the deduction of commission to the assessee to the extent of

1% of the turnover.

9. In view of our discussion above, we are of the opinion that no perversity can be found in findings returned in the impugned judgment.

No

question of law, much less, a substantial question of law, has arisen for our consideration. In the result the appeal is dismissed.

VIKRAMAJIT SEN, J

RAJIV SHAKDHER, J

March 31, 2009

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