

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC-I' NEW DELHI**

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER

**I.T.A .No.-94/Del/2015
(ASSESSMENT YEAR-2008-09)**

DCIT, Central Circle-26, New Delhi. (APPELLANT)	vs	Parav Builders Pvt. Ltd., C-4, 1 st Floor, Malviya Nagar, New Delhi-110017. PAN-AAECP2997G (RESPONDENT)
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Appellant by	Sh. Raman Kant Garg, Sr.DR
Respondent by	Sh.Gaurav Goel, CA

Date of Hearing	11.09.2015
Date of Pronouncement	09 .11.2015

ORDER

The present appeal has been filed by the Revenue assailing the correctness of the order dated 08.10.2014 of CIT(A)-III, New Delhi pertaining to 2008-09 assessment year on the following grounds:-

1. *“On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the disallowance made towards brokerage charges of Rs.19,19,247/- paid to M/s. Ajanta Estate & Developers on purchase of land.*
2. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.*
3. *The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal.”*

2. However, at the time of hearing no one was present on behalf of the assessee. Accordingly, the appeal was passed over twice. In view of the fact that even in the third round, no one was present. Considering the material available on record it was considered appropriate to proceed with the present appeal ex-parte qua the assessee responded on merit after hearing the Ld. Sr.DR. However, the Ld. Sr.DR filed an adjournment petition stating that it needs to be argued by CIT DR. Considering the material available on record, the said request was rejected. The record shows that in the facts of the present case

pursuant to the search conducted on 19.10.2010 in IREO Group of cases wherein the assessee was also covered notice u/s 153A was issued to the assessee on 30.12.2011 requiring the assessee to furnish its return. In pursuance thereto the return as originally filed u/s 139 on 23.09.2008 declaring NIL income with loss in the year under consideration at Rs.1,46,225/- was again filed. In the course of the assessment proceedings, the assessee was required to substantiate the claim of brokerage charges paid to M/s Ajanta Estate & Developers on account of purchase of land from Sh. Virender K Khosla measuring 29 Bigha 04 Biswa at Vill.-Chhawla, Delhi. The assessee claimed that it has paid brokerage charges amount to Rs.66,63,987/- beside other expenses. The AO in order to verify the brokerage charges issued a letter u/s 133(6) of the Act. For ready-reference, the relevant extract is reproduced hereunder:-

5. *“However for verification of the details of brokerage charges a letter u/s 133(6) of the Income Tax Act was sent to the M/s Ajanta Estate & Development on 15.10.2012. The same returned unserved. Thereafter one more letter was sent vide letter no.524 dt 02.11.2012 and again no response of the same received. Vide order sheet entry dt 08.03.2013 the assessee company was required to show cause that why in absence of personal presence of Authorized Signatory of M/s Ajanta Estate the brokerage paid to him may not be restricted to 2% as per prevailing market practice.”*

3. In response to the show cause notice as per para 5.1 of the assessment order, the assessee is found to have filed letter dated 15.03.2013 referred to therein. A perusal of the same shows that on behalf of the assessee it was argued that the assessee reiterated on facts that the said broker had assisted the assessee for procurement of land approximately 0.83 acres situated at the specific village. Further it was also pleaded that in support of the said claim the address, PAN, copy of invoice, TDS certificate etc. of the said broker had been filed. Accordingly the claim was stated to be allowable. For ready-reference, the relevant extract is reproduced from the assessment order:-

*“Assessee company has already discharged its primary onus to substantiate the genuineness of the expenditure **by furnishing his address, PAN, copy of invoice, TDS certificate & the very fact that all the payments have been made vide account payee cheques through proper banking channel systems after making proper TDS at the applicable rates.** Your good office will appreciate the fact that the payment of brokerage is a quite common phenomenon in real estate industry and everybody accepts that*

involvement of brokers in the real estate deal is very common. There is no standard rate of brokerage for all kind of real estate deals, its wholly depends upon the facts & circumstances of the case like location, size of the land parcels, level of competition in the market, utility, need of the seller, name & goodwill of the parties etc.”

(emphasis provided)

3.1. However, not convinced with the claim of the assessee the AO rejected it holding that notice u/s 133(6) of the Act had been issued to the broker and he had not responded. Further, the claim was also rejected as the assessee had not produced the broker. Accordingly the brokerage was restricted to 2% instead of 2.8% as claimed by the assessee resulting in the addition by way of a disallowance amounting to Rs.19,19,247/-.

4. In appeal before the First Appellate Authority, the detailed submissions of the assessee are found reproduced at pages 3 to 8 of the order. A perusal of the same shows that apart from reiterating the facts as canvassed before the AO it was further pleaded that no evidence has been placed on record to justify the estimate at 2%. The adhoc disallowance in the absence of any evidence was assailed. The genuineness of the payment it was submitted has not been questioned and for restricting expenses no evidence has been placed on record. Reliance was placed upon CIT vs Walchand & Co. (P.) Ltd. [1967] 65 ITR 381 (SC); Jamna Auto Industries v CIT [2008] 167 Taxmann 192 (Punjab & Haryana High Court); cit v Chandulal Keshavlal & Co. p[1960] 38 ITR 601 (SC); and J.K. Commercial Corporation Ltd. v CIT [1969] 72 ITR 296 (Allahabad High Court) . The following evidences which remained unrebutted on record was relied upon:-

- (a) “Copy of Invoice raised by Ajanta Estate & Developers;*
- (b) Copy of Form 16A issued to Broker;*
- (c) Copy of PAN of broker;*
- (d) Copy of Bank Statement showing payment of brokerage from account of appellant company.”*

4.1. It is also seen that it had also been pleaded that the assessee had never dealt with the said broker in the future and infact had only one transaction with this broker. Thus in this background it was pleaded that the assessee was not in a position to put any pressure or influence on the broker as he was not related to the assessee and nor was he under his control. CIT vs Discovery Estates (P.) Ltd. [2013] 356 ITR 159 (Delhi High Court) was relied upon for the proposition that in the face of the evidences and documents on record suspicion cannot be replaced with the real evidences. Reliance was also placed

on the following decisions:- (i) Dhirajlal Girdharilal vs CIT 26 ITR 736 by Hon'ble Supreme Court; (ii) ITO v Hanuman Poddar [2005] 98 TTJ (Asr.) 705; (iii) Dhakeshwari Cotton Mills Ltd. vs CIT 26 ITR 775; (iv) CIT vs Enviro Control Associated (P.) Ltd. [2014] 43 taxmann.com; and (v) Hon'ble High Court of Delhi in the case of Siddho Mal & Sons v ITO [1980] 122 ITR 839.

4.2. On the basis of the same it was pleaded that genuineness of the payment had not been disputed as brokerage to the extent of 2% has been allowed thus simply because broker does not respond to the notice u/s 133(6) the AO cannot upset the evidence and apply brokerage as per his will. The extract of the further arguments advanced before the CIT(A) found extracted in the impugned order are reproduced for ready-reference:-

1.5.2. "Moreover during assessment proceedings Appellant submitted the copy of Sale Deeds, which clearly contains the name of Mr. Pawan Kumar proprietor of Ajanta Estate as one of the witness to the sale deed done before the Sub-registrar, New Delhi. Therefore, the identity and existence of Mr. Pawan Kumar, Proprietor of Ajanta Estate and Developer gets established by the fact that he is one of the witness to the sale deed registered with Registrar and even his Photograph was also clicked which forms part of the sale deed. The sale deed was a material available on record, hence his identity stands established and clearly establishes his nexus with the land purchase transaction. We are enclosing herewith the copy of sale deed as Annexure 3 which substantiates the identity of Broker.

It may further be clarified that even though the Ld.AO has alleged that the notice u/s 133(6) went unserved but still he was satisfied regarding the genuineness of brokerage as he has very well accepted the presence of broker in the land deal and has allowed brokerage to the extent of Rs.4744740/- paid to Ajanta Estate and Developer but arbitrarily on adhoc basis disallowed the brokerage of Rs.19,19,247/- by restricting the rate of brokerage paid from @ 2.80% to 2%. The appellant had produced more than sufficient evidences like PAN, Invoice, TDS returns to prove the genuineness of brokerage."

1.5.3. "The appellant had entered into a single transaction only with this broker and is not having any other relationship with him therefore appellant company is not in contact with him for the last 5 years so it was not possible for it to enforce his personal attendance. As it has no pressure or influence on the broker. But the office of Ld.AO is empowered by civil court powers to enforce the attendance of any person but it may be noted that in the instant case the Ld.AO has not issued notice u/s 131 of the Act to enforce the attendance of this person. Therefore, it is unlawful to allege that the appellant company has failed to produce the broker before Ld.AO as he was under no obligation to do so. Therefore appellant cannot be blamed or punished for non appearance of broker....."

4.3. In the said factual background, reliance was further placed upon the following decisions:- (i) CIT vs Modi Revlon (P.) Ltd. [2012] 26 taxmann.com 133 (Delhi High Court); (ii) Sunita Mine Chem Ind. V. ITO [2008] 23 SOT 39 (JODH.) (URO); and (iii) Midland International Ltd. v DCIT, Co. Circle 2(1), New Delhi by the ITAT Delhi Bench "E" [2007] 109 ITD 198 (Delhi) justifying the claim.

5. Considering these facts and arguments, the CIT(A) came to the following conclusion:-

4. *"I have gone through the above submission of the appellant and have considered the facts and evidences on record and the case law relied upon by the appellant.*

It is seen that the AO has not disputed the purchase of land from Mr.Virender K. Khosla amounting to Rs. 23,72,37,000. Further from the perusal of purchase deed, it is also seen that the witness to the transaction is one Mr. Pawan Kumar who is the proprietor of M/s Ajanta Estate & Developer and in the said transaction acted as a broker to whom the appellant paid Rs. 66,63,987 as the brokerage @ 2.80%. To prove the genuineness of the payment of brokerage expenses of Rs. 66,63,987, the appellant filed the income tax particulars, TDS certificates and copy of bank account from which it is seen that the payments have been made through an account payee cheque and on such brokerage payment, TDS has also been deducted. The AO has not doubted the payment of brokerage expenses but he has restricted the expenses to the extent of 2% instead of 2.80% paid by the appellant. This part disallowance is primarily made because notice under section 133(6) was not complied with by M/s. Ajanta Estate & Developer and also failure on the part of the appellant to produce the representative of M/s. Ajanta Estate.

*In my humble view, **the onus was duly discharged by the appellant by filing the requisite details with the AO and the AO had ample powers under the Act to enforce the attendance of M/s Ajanta Estate & Developer and I find that instead of using the powers available to the AO to enforce the attendance of M/s Ajanta Estate, the disallowance of the part of brokerage expenditure is not on sound footing but is purely based on conjecture and surmises. The AO admits that the payment of brokerage expenses to the extent of 2% is wholly and exclusively towards his business but an adhoc and part disallowance is not as per the cannon of natural justice. There was no concrete evidence and material available with the AO to hold that the brokerage expenses are excessive and it being the search case, no evidence was either found during the search regarding the bogus or disproportionate expenses.***

Hence, in view of the above discussion and also without any inquiry and any adverse material, an adhoc disallowance made by the AD towards the brokerage expenses deserves to be deleted."

(emphasis provided)

6. Aggrieved by which the Revenue is in appeal before the Tribunal. Ld. Sr. DR sought time. The findings in the entire order were read out alongwith the Sr. DR and he was required to address whether the Revenue would be in a position to rebut the evidences as in that eventuality time would be granted as otherwise adjournment would not be granted. On going through the entire order the Ld. Sr. DR still did not make any request seeking time to rebut the facts on record. Thus considering the peculiar facts and circumstances of the case as have been elaborated in the earlier part of this order and in the absence of any infirmity in the impugned order the request of the Sr. DR was rejected as no prayer for rebutting the facts on record was made. In the circumstances where on facts there is no dispute and no infirmity in the impugned order is brought out it was pronounced that the departmental appeal would be dismissed. However subsequently Mr. Goel appeared alongwith the Bench Clerk and stated that he was delayed accordingly his Power of Attorney may be taken. It was informed that the Departmental appeal anyway had been dismissed and the hearing stood concluded. On his insistence that presence may be recorded he was required to come alongwith the Ld. Sr.DR. Accordingly in the presence of the Sr. DR. the Bench clerk took the Power of Attorney on record. The parties were heard again wherein the Ld. AR placed reliance upon the impugned order and the Ld. SR.DR having gone through the facts on record still did not make any prayer seeking time for rebutting the facts and evidences on record. In the afore-mentioned peculiar facts and circumstances as per the pronouncement made in the Court at the time of hearing, the departmental appeal is dismissed. The reasons for the conclusion have already been brought out in the earlier part of this order as the facts would show that the genuineness of the transaction; the existence of the party etc. stood accepted by the AO himself as brokerage to the extract of 2% has been allowed. However the basis for arbitrarily restricting the same based on suspicions to the extent of 2% as opposed to the claim of 2.8% duly supported by unrebutted evidences and facts on record is absent on record. In the absence of any material justifying the restriction to 2% in the facts of the case and considering the legal position thereon, I am of the view that the finding arrived at by the First Appellate Authority deserves to be upheld. The said order was pronounced on the date of hearing itself in the open Court.

7. In the result, the appeal of the department is dismissed.

The order is pronounced in the open court on 09th of November, 2015.

Sd/-

**(DIVA SINGH)
JUDICIAL MEMBER**

Dated: 09/11/2015

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI