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# IN THE HIGH COURT OF ORISSA AT CUTTACK

## ITA No.41 of 2017

***M/s. Oripol Industries Ltd.,Balasore*** .... ***Appellant***
Mr. R. P. Kar, Advocate

*-versus-*

***Joint Commissioner of Income Tax, Balasore and others*** .... ***Respondents***
Mr. R. S. Chimanka, Senior Standing Counsel along with
Mr. A. Kedia, Junior Standing Counsel for the Department

**CORAM:**
**THE CHIEF JUSTICE**
**JUSTICE R. K. PATTANAIK**

**ORDER**
**12.05.2022**

| Order No. | ***Dr. S. Muralidhar, CJ.*** |
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| 04. | 1. This appeal by the Assessee is directed against an order dated 26th April, 2017 passed by the Income Tax Appellate Tribunal (ITAT), Cuttack Bench, Cuttack in ITA No.511/CTK/2014 for the Assessment Year (AY) 2010-11. |

2. While admitting this appeal on 11th March 2022, the following question was framed for consideration by this Court:

> "Whether the Assessing Officer (AO), CIT (A) and the ITAT were right in disallowing commission expenses and in applying Section 37 of the IT Act?"

3. The background facts are that the Appellant during the AY in question was engaged in the business of manufacturing and sale of P.P. woven sacks meant for packing of fertilizer and cement etc. It filed its return of income for the AY in question on 10th September, 2010 declaring a total income of Rs.1,47,09,311/-. The return was

picked up for scrutiny and the statutory notice was sent along with a questionnaire to the Appellant by the Assessing Officer (AO).

4. While examining the claims of the Appellant, the AO raised a query regarding payment of commission to the tune of Rs.53,49,790/- and asked the Appellant to justify it. The explanation offered by the Appellant was that it had obtained an export order for supply of Iron Ore Fines (IOF). The supply was time bound and had to be made within a short span of time. Since the materials could not be gathered by the Directors of the Company themselves, they engaged their relatives for procurement of quality IOF. For this, commission was paid to each of them. It was claimed that the commission was entirely paid through banking channels after deducting Tax at Source (TDS). Each of the commission agents had disclosed the said commission amount in their respective returns and paid tax thereon. It was accordingly claimed that no adverse inference should be drawn against the Appellant.

5. In the assessment order dated 8th March 2013, the AO partly allowed the commission expenses to the tune of Rs.23,41,245/- and disallowed Rs.30,08,545/- which was then added to the returned income of the Appellant.

6. The Appellant then went in appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 20th October 2014, the CIT (A) dismissed the appeal. It was observed that the persons to whom the commission was paid were Directors of the appellant or the relatives of such Directors. The letters of

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confirmation from them could easily be collected and therefore, was not accepted by the CIT (A).

7. Thereafter, the Appellant went before the ITAT, which perused in great detail the actual payments of commission made. It was noted that the gross turnover of the Assessee was Rs.5278.63 lakhs and, therefore, the commission paid worked out to 1.35% thereof. It is further noticed that before the CIT(A), the Appellant had admitted that of the 7 individuals to whom the commission had been paid, 3 were Directors of the Company and 4 were relatives of the Directors. The Appellant had failed to bring on record their expertise to render services and also what services had in fact been rendered to enhance the business of the Appellant. Merely because TDS had been deducted, would not justify allowing the entire amount as claimed towards commission. Accordingly, the appeal was dismissed.

8. This Court has heard the submissions of Mr. R.P. Kar, leaned counsel for the Appellant and Mr. R. S. Chimanka, learned Senior Standing Counsel for the Department-Respondents.

9. Mr. Kar relies on the decision of the Supreme Court in ***J.K. Woollen Manufacturing v. Commissioner of Income Tax (1969) 72 ITR 612 (SC)*** and submits that the commission paid could not be termed as excessive or unreasonable and had been duly accounted for. He insisted that with the TDS having been deducted at the time of paying such commission, and with the recipients of commission having disclosed it in their respective tax returns and having paid tax thereon, again subjecting such payment at the hands of the Appellant

would amount to double taxation, which was impermissible in law. Mr. Kar submits that full explanation had in fact been offered by the Appellant for the commission paid. Lastly, in the alternative, Mr. Kar submits that if any of the payments needed to be further verified, the matter could be remanded either to the ITAT or even to the AO for a fresh examination.

10. Mr. Chimanka, on the other hand, supports the concurrent orders of the AO, the CIT (A) and the ITAT and submits that they call for no interference.

11. The above submissions have been considered. At the outset, it requires to be noticed that the supply of IOF was not the line of business of the Appellant. It was no doubt required to make the supply, pursuant to an export order, in a short span of time. Nevertheless, claiming that each of the seven persons to whom commission was paid actually had the expertise to help the Appellant procuring the IOF from different sources appears to be stretching things a bit too far.

12. It is not a sheer coincidence that three of the seven persons to whom commission was paid happened to be Directors of the Appellant and the remaining four were relatives of such Directors. Particularly, with the Appellant not being able to demonstrate their special expertise in procuring IOF from the markets in India, the AO appears to be justified in disallowing the commission insofar as it was paid to the said seven persons. The AO has been objective on the issue. It is not as if the entire amount claimed by the Assessee as

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payment towards commission was disallowed. Of the sum of Rs.53,49,790/- claimed, the AO in fact allowed the payment of commission of Rs.23,41,245/- to two entities.

13. The decision in ***J.K. Woollen Manufacturing*** *(supra)* appears to have turned on its own facts. The question there was the test of commercial expediency. In other words, whether the payment made to the General Manager of the company as commission was an expenditure wholly and exclusively for the purpose of the business? It was concluded that the reasonableness of the expenditure had to be adjudged from the point of view of the businessman and not the Income Tax Department. In the circumstances, the entire amount paid to the General Manager as commission was allowed as expenditure.

14. In the present case, all the persons to whom commission was paid were either Directors of the Company or their relatives. None of them is shown to have any expertise in procuring IOF from the Indian markets for enabling the Appellant to meet the purchase order placed on it for IOF. The amounts paid as commission were also not insubstantial. In the facts of the case, it cannot be said that the AO's decision to disallow part of the payment towards commission was unreasonably arrived at. The test of commercial expediency was indeed applied. Even from the point of view of a businessman, it does appear to this Court that the commission amount which was disallowed by the AO cannot be said to be for the purpose of business of the Appellant.

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15. Consequently, the question framed by this Court is answered in the affirmative i.e. in favour of the Department and against the Assessee. The appeal is dismissed, but in the circumstances, with no order as to costs.

***(Dr. S. Muralidhar)***
***Chief Justice***

***(R. K. Pattanaik)***
***Judge***

*M. Panda*