

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri P.M.Jagtap, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

ITA No.96-97/Kol/2011
Assessment Year:2003-04

DCIT, Circle-1, 7 th Floor, Aayakar Bhawan, Kolakta-69	बनाम/ V/s.	M/s Eldyne Electro Systems Pvt. Ltd., 21, Old Bilygunge Road, Kolkata-700 019 [PAN No.AAACE 7357 H]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri D.S. Damle, FCA
राजस्व की ओर से/By Revenue	Shri Sallong Yaden, Addl. CIT-SR-DR
सुनवाई की तारीख/Date of Hearing	04-05-2017
घोषणा की तारीख/Date of Pronouncement	24-05-2017

आदेश /O R D E R

PER P.M.Jagtap, Accountant Member:-

These two appeals filed by the Revenue are directed against two separate orders of CIT(Appeals)-I Kolkata both dated 20.09.2010 for the same assessment year i.e. A.Y. 2003-04, one arising from the order of Assessing Officer passed u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and other arising from the order of AO u/s 143(3)/263 of the Act and they have been heard together and are being disposed of by single consolidate order for the sake of convenience.

2. First we shall take up the appeal of Revenue being **ITA No.96/Kol/2011** which is directed against the order of CIT(A)-I dated 20.09.2010 arising from the order of the AO u/s 143(3).

3. In ground No.1, the Revenue had challenged the order of the Id. CIT(Appeals) in deleting the disallowance of ₹2,92,787/- & ₹15,72,174/- made by the Assessing Officer u/s 43B of the Act on account of sales tax & central sale tax respectively.

4. The assessee in the present case is a limited company which is engaged in the business of manufacturing of Relays as well as signaling equipment for Railways. The return of income for the year under consideration i.e. A.Y. 2003-04 was filed by it on 27.11.2003 declaring total income of ₹26,81,000/-. In the balance-sheet filed along with the said return, sales tax of ₹2,29,787/- and Central Sales Tax of ₹15,72,174/- was shown to be payable by the assessee. During the course of assessment proceedings, the details of payment of the said outstanding amounts were called for by the AO and on verification of the same, he found that the outstanding amount of sales tax and central sales tax was paid by the assessee only after 30.11.2003 i.e., the due date of filing of return for the year under consideration. He therefore invoked the provision of Sec. 43B and made a disallowance of ₹18,01,961/- on account of outstanding sales tax and central sales tax. He also observed that deduction for the same was allowable to the assessee in the year in which the payment of sales tax and central sales tax was made by the assessee.

5. The disallowance of ₹18,01,961/- made by the AO on account of outstanding sales tax and central sales tax by invoking Sec. of 43B of the Act was challenged by the assessee in the appeal before CIT(Appeals). During the course of appellate proceedings before CIT(Appeals), the assessee submitted that since the sales tax had been charged and collected on behalf of Railways, the same was not included in the sales credited in the profit and loss account and it was also not claimed as deduction. It was contended that the sales tax thus was never routed by the assessee through its profit and loss account and having claimed no deduction for the same, the disallowance made by the AO u/s 43B of the Act was not sustainable. In support of this contention, reliance was placed by the assessee on the decision of Hon'ble Gauhati High Court in the case of *CIT vs. India Carbon Ltd.* 200 ITR 759 (Gau). CIT(Appeals) found merit in this contention of the assessee and deleted the disallowance made by the AO u/s. 43B by relying on the decision of Hon'ble Gauhati

High Court in the case of *India Carbon Ltd.* (supra) after taking note of the fact that the SLP filed by the assessee against the said decision before Hon'ble Supreme Court was dismissed.

6. We have heard argument of both the sides on this issue and also perused the relevant materials on record. It is observed that a similar view as taken by the Hon'ble Gauhati High Court on this issue in the case of *India Carbon Ltd.* (supra) has been taken by Hon'ble Calcutta jurisdictional High Court in the case of *A.W. Figgis And Co. vs. CIT 256 ITR 268 (Cal)* by holding that Sec. 43B can be applied only on tax or duty which has been claimed as expenditure, but the same remains unpaid on the due date. While arriving at this decision, Hon'ble jurisdictional High Court has taken into consideration certain case laws relevant to the point including the decision of Hon'ble Supreme Court in the case of *Chowringhee Sales Bureau (P) Ltd. Vs. CIT (1973) 87 ITR 542 (SC)*. The issue involved in ground No.1 in Revenue's appeal thus is squarely covered in favour of assessee by the decision of Hon'ble jurisdictional High Court in the case of *Indian Carbon India Ltd.* (supra) and respectfully following the same, we uphold the impugned order of CIT(Appeals) deleting the disallowance made by the AO u/s 43B of the Act. Ground No.1 of Revenue's appeal is accordingly dismissed.

7. In ground NO.2 of its appeal for A.Y. 2003-04, the Revenue has challenged the action of CIT(Appeals) in deleting the disallowance of ₹60,92,457/- made by the AO u/s40(a)(i) on account of payment of consultancy charges made without deducting tax at source.

8. During the year under consideration, the assessee had claimed deduction on account of consultancy charges of ₹60,92,457/- paid to M/s Alcatel ACL AG, Germany. In this regard, it was noticed by the AO that out of said amount, tax at source was deducted by assessee in respect of payment of ₹35,82,767/- only and no tax was deducted from the balance amount of ₹60,92,457/-. When this position was confronted by the AO to the assessee, the latter explained that payment of ₹60,92,457/- was made in relation to cost of software and hardware purchased by the assessee on which no tax at source was required to be deducted. This explanation of the assessee, however was not accepted by the AO on the ground that entire amount of

₹96,76,223/- paid to M/s Alcatel ACL AG, Germany was claimed by the assessee as consultancy charges. He, therefore, invoked the provision of Sec. 40(a)(i) and made for disallowance of ₹60,92,457/- on this issue.

9. The disallowance of ₹60,92,457/- made by the AO u/s 40(a)(i) was challenged by the assessee in appeal filed before CIT(Appeals). During the course of appellate proceedings before Ld. CIT(Appeals) it was submitted on behalf of assessee that there was a glaring mistake to claim the amount of ₹60,92,457/- as consultancy charges in the books of account. It was submitted that the said amount represented payment made by the assessee against purchase of software and hardware and the supporting evidence already filed before the AO in the form of copies of relevant bills was referred and relied upon by the assessee in support of its claims of purchase so made. In order to give an opportunity to the AO to offer his comment on this issue, the matter was remanded by CIT(Appeals) to him. In his remand report submitted to CIT(Appeals), the AO however did not offer any adverse comment and simply relied on his assessment order. Keeping in view the submission made by the assessee and the material available on record including the remand report submitted by the AO, CIT(Appeals) held that the claim of assessee of having paid the amount of ₹60,92,457/- to M/s Alcatel ACL AG, Germany towards the purchase of software and hardware was duly supported by the invoices issued by the said party and since the said amount was paid against supply of material, there was no requirement for deduction tax at source and no question of disallowance u/s 40(a)(i). He accordingly deleted the disallowance made by the AO on this issue.

10. We have heard argument of both the sides on this issue and also perused the relevant material on record. As rightly submitted by the Ld. counsel for the assessee, the claim of assessee for having paid amount of ₹60,92,457/- in question to M/s Alcatel ACL AG, Germany towards purchase of software and hardware was duly supported by the invoice issued by the said party and although this claim was never disputed by the AO either, during the course of assessment proceedings or even during the course of remand proceedings by bringing any adverse material on record, the disallowance was made by him u/s. 40(a)(i) of the Act merely on the basis that the said amount was claimed by the assessee in its books of account as the consultancy

charges. There was, however a mistake on the part of accountant of the assessee-company to show the said amount as consultancy charges and since the same was established by the assessee by bringing relevant and cogent evidence in the form of invoice issued by the supplier, we are of the view that the CIT(Appeals) was fully justified in accepting the claim of assessee on this issue and deleting the disallowance made by AO u/s 40(a)(i) by holding that tax at source was not required to be deducted by assessee from the payment of ₹60,92,457/- as the same was made towards supply of software and hardware. We, therefore find no infirmity in the impugned order of CIT(Appeals) giving relief to the assessee on this issue and upholding the same, we dismiss ground No.2 of the Revenue's appeal.

11. In ground No.3, the Revenue has challenged the action of the CIT(Appeals) in deleting the addition of ₹42,03,229/- made by the AO on account of consultancy charges.

12. The details of consultancy charges furnished by the assessee during the course of assessment proceedings revealed that a sum of ₹44,00,846/- was paid by the assessee to various persons/parties in India. The claim of the assessee for the said consultancy charges was examined by the AO and on such examination, he found that no tax at source was deducted by the assessee from the payment made on account of consultancy charges to various parties/persons in India. He also noted that no evidence regarding the specific work/services rendered by the said persons/ parties was filed by the assessee. He, therefore, disallowed the consultancy charges of ₹44,00,846/- claimed to be paid by the assessee to various parties/persons.

13. The disallowance of ₹44,00,846/- made by the AO on account of consultancy charges paid to various persons on India was challenged by the assessee in the appeal filed before CIT(Appeals). As regards it's failure to file the required documents in support of the claim for said consultancy charges, the assessee submitted before CIT(Appeals) that the same could not be furnished during the course of assessment proceedings before the AO since its accountant was unwell during the relevant period. The assessee therefore filed such details and documents before CIT(Appeals) and sought admission of the same as additional evidence. As per the said additional evidence filed by the assessee, consultancy charges of ₹44,00,846/- actually

comprised of two amounts, ₹1,97,617/- on account of payment of salary made to its employees and balance amount of ₹42,03,229/- paid against supply of material. The additional evidence filed by the assessee was forwarded by CIT(Appeals) to the AO for the latter's verification and comments. In the remand report submitted to the CIT(Appeals), the AO however did not make any adverse comments on merit and insisted mainly on the point that sufficient opportunity was already afforded to the assessee of being heard on this issue during the course of assessment proceedings. After considering the submission made by the assessee in the light of additional evidence filed in support and remand report submitted by the AO, CIT(Appeals) accepted the claim of assessee that the amount of ₹42,03,229/- claimed under the head of "consultancy charges" by mistake actually represented the payment made against supply of material. He accordingly allowed relief to the assessee to that extent and sustained the disallowance made by the AO on this issue to the extent of balance amount of ₹1,97,617/-.

14. We have heard argument of both the sides on this issue and also perused the relevant material on record. It is also observed that the claim of the assessee that the amount of ₹42,03,229/- paid to the persons/parties in India and booked under the head "consultancy charges" was actually paid on account of purchase/supply of material was duly supported by the documentary evidence filed by the assessee for the first time before the CIT(Appeals) and since the said evidence was not filed by the assessee before the Assessing Officer during the course of assessment proceedings for the reason explained by the assessee, the CIT(Appeals) forwarded the same to the assessee for his verification and comments. In the remand report submitted to the CIT(Appeals), the AO however did not make any adverse comment on the additional evidence filed by the assessee in support of its case and keeping in view the same as well as all the other facts of the case, we find no infirmity in the impugned order of CIT(Appeals) deleting the disallowance made by the AO on this issue to the extent of ₹42,03,229/-. Moreover, as rightly pointed out by the Ld. counsel for the assessee, the Revenue has challenged the relief given by the CIT(Appeals) on this issue in the ground raised with specific reference of 40(a)(i) of the Act for the failure of the assessee to deduct tax at source from the relevant payment whereas the provisions of

Sec. 40(a)(i) of the Act introduced with effect from assessment year 2004-05 are actually not applicable to the year of A.Y. 2003-04. We, therefore, find no merit in ground No.3 of Revenue's appeal and dismiss the same.

15. Now we take up the appeal of Revenue being **ITA No. 97/Kol/2011** which is directed against the order of CIT(Appeals)-I Kolkata dated 20.09.2010 arising from the order of AO passed in order u/s 143(3)/263. In ground No.1 raised in this appeal, the Revenue has challenged the action of the CIT(Appeals) in deleting the disallowance of ₹2,25,458/- made by the AO u/s. 40A(3) of the Act to the extent of ₹1,87,458/-.

16. In the assessment completed u/s 143(3) by order dated 21.03.2006, the total income of assessee was determined by AO at ₹ 1,70,32,669/- after making various additions to the income of ₹36,81,010/- returned by the assessee. On examination of the records of the said assessment, the concerned CIT found that assessment order passed by AO u/s. 143(3) to be erroneous as well as prejudicial to the interest of the Revenue on certain specific points/issues. He, therefore, set aside the same on the said issues/points by an order passed u/s. 263 of the Act with a direction to the AO to make the assessment afresh on the said points/issues. During the course of fresh assessment proceedings initiated as per the direction of CIT, the AO found that certain expenditure aggregating to ₹11,27,290/- was incurred by the assessee in cash in the sums exceeding ₹ 20,000/-. The AO therefore invoked the provision of Section 40A(3) and made a disallowance of ₹2,25,458/- being 20% of the expense of ₹11,27,290/- incurred by the assessee on account of business promotion in cash.

17. The disallowance of ₹2,25,458/ made by the AO u/s. 40A(3) of the Act was disputed by assessee in the appeal filed before CIT(Appeals). It was submitted on behalf of assessee before CIT(Appeals) in support of its case on this issue that some of the expenses in question were incurred in cash for the purpose of urgent need for making payment at remote sites of railways where there were no banking facilities. It was contended that the said payments thus were made in the exceptions circumstances as prescribed in Rule 8DD and the disallowance made by the AO u/s 40A(3) of the Act to that extent was not sustainable. Keeping in view this submission made on behalf of assessee which was duly supported by relevant details and documents and

the remand report submitted by the AO thereon wherein no specific adverse comments were made, the CIT(Appeals) accepted the stand of the assessee and deleted the disallowance of ₹2,25,258/- made by the AO u/s. 40A(3) of the Act to the extent of ₹1,87,458/-.

18. We have heard argument of both the sides on this issue and also perused the relevant material on record. It is observed that the expenditure incurred by the assessee in cash was partly covered by the exceptional circumstances as prescribed in Rule 6DD inasmuch as the said expenditure was incurred by the assessee at different sites situated in remote places where banking facilities were not available. A finding of fact in this regard has been recorded by CIT(Appeals) in his impugned order after verifying the relevant details and documents furnished by the assessee and after obtaining remand report from the AO wherein no adverse comments were offered. At the time of hearing before us, the Ld. DR has not been able to rebut or controvert these finding recorded by CIT(Appeals). We therefore find no justifiable reason to interfere with the impugned order of CIT(Appeals) on this issue and upholding the same dismiss ground No.1 of Revenue's appeal.

19. In grounds No.2 to 6, the Revenue has challenged the relief given by the CIT(Appeals) to the assessee by restricting the disallowance made by the AO out of various expenses as under:-

Gr. No.	Head of expenses	Disallowance made by AO	Disallowance sustained by CIT(A)
2	Making charges	₹ 7,50 lakh	₹ 1,50 lakh
3	Laboaur charges	13,65,325	₹2,73,065/-
4	Service & maintenance charges	₹12.50 lakh	₹2.50 lakh
5	Business promotion	₹16,51,445	₹6,60,577/-
6	Installation and erection expenses	₹ 30 lakh	₹ 6 lakh

20. During the course of assessment proceedings u/s. 143(3)/263 of the Act, the AO found that the expenses claimed by the assessee under certain specific heads, were substantially higher than the expenditure incurred under the same heads in the immediately preceding year. He also noted that the said increase was disproportionate

to the increase in the turnover of the assessee during the year under consideration as against that of the immediately preceding year. Keeping in view this disproportionate increase which the assessee could not satisfactory explain and other adverse finding recorded by him, the AO made disallowance out of various expenses in the assessment completed u/s. 143(3)/263 as under:-

- i) Making charges ₹47.50 lakh out of ₹15,75,716/- (50%)
- ii) Labour charges ₹13,65,325 out of ₹ 27,48,290/- (50%)
- iii) Service and maintenance ₹ 12.50 lakh out of ₹25,33,350/- (50%)
- iv) Business promotion expenses ₹16,51,445/- out of ₹66,05,779/- (25%)
- v) Interest expense of ₹ 30 lakh out of ₹ 60 lakh (50%)

21. The aforesaid disallowances made by the AO out of various expenses were challenged by the assessee in the appeal filed before CIT(Appeals). During the course of appellate proceedings, the relevant figures of turnover for the years A.Ys 2003-04 and 2004-05 were furnished by the assessee along with the corresponding expenses incurred under the relevant heads to point out that there is no direct correlation between the quantum of the said expenses and the quantum of turnover. It was also brought to the notice of CIT(Appeals) by the assessee that there was no adverse finding recorded by the AO in his assessment order as regards genuineness of the relevant expenditure as well as their business purpose. It was contended that the disallowances out of various expenses were made by the AO on the basis of surmise and conjecture and mathematical correlation in percentile increase which was not justified. When these submissions made by the assessee were forwarded by CIT(Appeals) to the AO for his comments, the AO did not specifically offer any adverse comments except reiterating the stand taken by him in the assessment order. Keeping in view the submissions made by the assessee as well as the material available on record including the remand report submitted by the AO, the CIT(Appeals) held that the *ad hoc* disallowance made by the AO out of various expenditure on arbitrary basis was excessive and unreasonable and accordingly he restricted the same to the extent as indicated above.

22. We have heard the arguments of both the sides on the issues involved in ground No. 2 to 6 of the Revenue's appeal relating to the disallowance made by the AO out of various expenses. As rightly submitted on behalf of assessee before the CIT(Appeals) and further reiterated before us, the disallowance out of various expenses was made by the AO on the basis of surmise and conjecture and on the basis of presumption regarding mathematical correlation in percentile increase in expenditure proportionate to the turnover. As specifically established on behalf of assessee before CIT(Appeals) on the basis of comparative figures of AYs 2003-04 & 2004-05, there was no such direct correlation between increase in the relevant expenditure and the increase in the turnover of the assessee. Moreover, no specific or material defects were pointed out by the AO to dispute or doubt the genuineness of the said expenditure incurred by the assessee or its business expediency. Keeping in view all these facts and circumstances, we are of the view that *ad hoc* disallowance made by the AO out of various expenses arbitrarily was excessive and unreasonable and CIT(Appeals) is fully justified to restrict the same to the reasonable extent. When the Ld. DR has sought to contend that the CIT(Appeals) has also not given any basis for the disallowance sustained by him out of various expenses, the Ld. counsel for the assessee has pointed out that the CIT(Appeals) has finally sustained disallowance to the extent 10% of the expenses claimed by the assessee under various heads and keeping in view that the net profit rate declared by assessee for the year under consideration was higher than that of the immediately preceding year, we find that the disallowance so sustained by CIT(Appeals) is quite tame and reasonable. We therefore uphold the impugned order of CIT(Appeals) on these issues and dismiss grounds No. 2 to 6 of the Revenue's appeal.

23. **In the result, both the appeals of Revenue are dismissed.**

Order pronounced in open court on 24/05/2017

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member
Kolkata,
*Dkp/Sr.PS

Sd/-
(P.M.Jagtap)
Accountant Member

दिनांक:- 24/05/2017

कोलकाता

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Eldyne Electro Systems Pvt. Ltd., P-21,Old Ballygunge Road, Kolkata-700 019
2. राजस्व/Revenue-DCIT, Circle-1, 7th Floor, Aayakar Bhawan, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary,
Head of Office/DDO

आयकर अपीलीय अधिकरण, कोलकाता