

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

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER

**I.T.A .No.-4642/Del/2015
(ASSESSMENT YEAR-2010-11)**

Anil Kumar Sharma, C-207, Prashant Vihar, Delhi-110085. PAN-AATPS8462R (APPELLANT)	vs	ITO, Ward-38(3), New Delhi. (RESPONDENT)
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Appellant by	Sh.Manish Uppal, CA
Respondent by	Ms. Anima Baranwal, Sr.DR

Date of Hearing	02.08.2016
Date of Pronouncement	29.09.2016

ORDER

The present appeal has been filed by the assessee assailing the correctness of the order dated 27.05.2015 of CIT(A)-13, New Delhi pertaining to 2010-11 assessment year on the following grounds:-

- 1. "That the impugned order is bad in law, illegal, unjustified, unreasonable, arbitrary and against the principal of natural justice and contrary to the facts and circumstances of the case and is liable to be set aside and quashed and thus to pass an order judiciously.*
- 2. That the Ld. CIT (A) erred in holding the validity of the assessment order, wherein the Ld. AO issued order u/s 143(3), whereas made the assessment by taking provisions of Section 144.*
- 3. That in the facts and circumstances of the Case, the Ld. CIT(A) erred in upholding the net addition of Rs. 14,50,440/- towards disallowance of expenditures incurred by the Ld. AO on the basis of surmises, whims and without any explanation and findings of facts.*
- 4. That the Ld. CIT(A) erred in not reducing the net additions of Rs. 14,50,440/- to Rs. 13,43,579/- on account of calculation error made by Ld.AO.*
- 5. That The Ld. CIT(A) erred, in the facts and circumstances of the case, in upholding the disallowance of deductions of Rs. 1,07,151/- u/s 80C.*

The Appellant craves leave to add, amend, alter vary and 7 or withdraw any or all the above grounds of Appeal and all the above grounds are without prejudice to each other."

2. The relevant facts of the case are that the assessee's return was selected for scrutiny through CASS and after issuance of notice u/s 143(2) etc., various opportunities were provided to the assessee. On one occasion, Sh. Sanjay Kalra, appeared however without a Power of Attorney. Accordingly the AO required him to furnish the same alongwith the statement of income and expenditure, P&L A/c, books of accounts alongwith the original appeals and vouchers etc. However, since despite opportunity, no one appeared on the next date and even failed to appear in response to notices issued u/s 271(1)(b), the AO proceeded to assess the income u/s 144. The AO considering the fact that the assessee had received a commission of Rs.22.64,810/- and showed the net profit of Rs.27,64,563/- in the absence of production of books of accounts, allowed 1/3 of expenses and further proceeded to make a disallowance claimed under Chapter VIA.

3. The assessee carried the issue in appeal before the First Appellate Authority who confirmed the order in regard to disallowance of one third expenses holding as under:-

"The appellant cannot claim that since the return income is accepted in the earlier year, it should not be subject to scrutiny in the subsequent year. It is also notable that the claim of expenses to the tune of Rs.22,64,810/- against gross receipt of commission income Rs.27,64,563/- which is almost 82% is unreasonable and excessive. Particularly, in the nature of business where the appellant receives only commission for selling insurance policies, as LIC agent, such high expenditure is not a normal situation. Hence, the principle of res-judicata as well as the principle of consistency is not applicable appellant's case. In view of this, disallowance of 1/3rd expenses claimed by the appellant is very reasonable. More importantly, the appellant has not specifically contested the nature of addition made by AO and it is not a part of the grounds of appeal. In view of this, the impugned order is found to be justifiable and hence the ground of appeal is dismissed."

3.1. The arguments of the assessee on addition by way of disallowance of deduction claimed u/s 80CCCC and 80U was also dismissed holding as under:-

6.3. "The reason given by AO, the submission of the appellant are considered. The appellant submitted photocopy of certificate given by LIC for premium paid during F.Y. 2009-10 that includes premium paid against policies in the name of the appellant and Aarushi Sharma. The certificate is dated 19.05.2015 and not the original receipts of premium paid. It is also not clear what are the compelling facts and circumstances under which the documents could not be submitted before the AO during assessment proceedings. Hence, such evidence cannot be accepted at appellate stage. The appellant is an LIC agent hence it should not have been difficult to provide original receipts for premium paid. The letter head and the signature in the certificate given from LIC is not dependable evidence. Moreover, the deduction claimed for Rs. 1,07,151/- and certificate given is for Rs.55,1537- only. Since nothing prevented appellant to submit these evidences before AO, the same are not accepted at appellate stage and accordingly, the addition made is confirmed and the ground of appeal is dismissed."

4. Aggrieved by this, the assessee is in appeal before the ITAT.
5. The Ld.AR addressing the addition by way of disallowance of 1/3 on estimates submitted that no justification has been given by the AO even if the assessee does not appear, the AO has bound to make a comparison with the earlier years.
6. Referring to the arguments advanced before the CIT(A) in para 6.2, it was his submission that the assessee had handed over his documents to his counsel and the assessee has been kept in the dark of the fact that he failed to appear before the AO resulting in the assessment having been made ex-parte.
7. Ld.Sr.DR submitted that she relied upon the orders below.
8. Having heard the rival submissions and perused the material available on record, it is seen that though the assessee raised an argument before the CIT(A) that all necessary documents were handed over to the Ld.AR and who kept the assessee in the dark, it is seen that as per the facts recorded in the assessment order, the Ld.AR, Sh. Sanjay Kalra appeared without any Power of Attorney. Thus the assessee in the facts of the present case, it is seen has been very lax in his responsibility and duties in appearing before the AO. However, considering the overall factual matrix, it is seen that while disallowing part

expenses no rationale basis has been brought out in the orders to justify one third disallowance. Judicially the issue is well-settled that while making a disallowance the factors of comparability in similar line of business with similar situated parties is the basis which can be considered. Moreover, the assessee's past record itself can be the best acceptable rationale. Even in an estimate it is the duty and responsibility of the AO to make a comparison in assessee's own case. In case the earlier assessment have been done u/s 143(3) or with comparable case in similarly situated entities. There is no justification to apply an Arbitrary Thumb Rule estimate of a disallowance of 1/3 of expenses. Accordingly, the impugned order is set aside and the issue is restored back to the file of the AO. Since the other addition by way of a disallowance of deduction claimed also for want of supporting evidence has been made and sustained which issue is challenged before the ITAT. The assessee is provided an opportunity to file supporting evidence in regard to its claim.

9. The AO accordingly is directed to pass a speaking order after giving the assessee a reasonable opportunity of being heard. While so directing it is made clear that the opportunity so provided should not be abused by the assessee and be utilized in good faith as failing which the AO would be at liberty to pass a speaking order on the basis of material available on record. The said order was pronounced on the date of hearing itself in the presence of the parties in the open Court.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

The order is pronounced in the open court on 29th September, 2016.

Sd/-

**(DIVA SINGH)
JUDICIAL MEMBER**

Amit Kumar

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI