

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA  
BEFORE SHRI S.S.VISWANETHRA RAVI, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.1325/KoI/2016

(निर्धारण वर्ष /Assessment Year:2011-2012)

Sri Kiran Bhagat, Prop. Bishal Enterprise, Dist- Uttar Dinajpur, PIN-733 202	Vs.	JCIT, Range-2, Jalpaiguri
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AJEPB 1680 N</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by : Shri Subhash Agarwal, Advocate

Revenue by : Shri G.Hukunga, JCIT

सुनवाई की तारीख / **Date of Hearing** : **26/10/2016**

घोषणा की तारीख/**Date of Pronouncement** **23/11/2016**

**आदेश / O R D E R**

**Per Dr. Arjun Lal Saini, AM:**

The captioned appeal filed by the assessee, pertaining to the assessment year 2011-2012, is directed against an order passed by Id. Commissioner of Income Tax (Appeals), Jalpaiguri in Appeal No.02/Jal/CIT(A)/Jal/2014-15, dated 28.04.2016, which in turn arises out of an order passed by the Assessing Officer (AO) Under Section143(3) of the Income Tax Act 1961, (in short the 'Act'), dated 17.02.2014.

2. Brief facts of the case qua the assessee are that the assessee filed the return of income on 30.02.2012 showing total income at Rs.3,60,240/- . The case was selected for scrutiny u/s.143(3) of the Act and the AO has completed the assessment after making addition of Rs.5,12,186/- on account of bogus expenditure ( discount allowed by the assessee was treated by the AO as bogus expenditure). During the course of hearing while verifying the claim of expenditure in the profit and loss account of

the assessee for the relevant period it is noticed that he had claimed an expenditure of Rs.14,22,455/- under the head "discount". The assessee gave discount to 23 dealers against the sale of Rs.7,64,63,660/-. The assessee filed detail and name and address of all 23 parties. Out of 23 parties only 11 parties complied to the above notice and confirmed the receipt of discount against purchase given by the assessee during the financial year 2010-11. The balance 12 parties to whom notice u/s.133(6) was issued, returned unserved. The assessee could not produce any of the 12 persons before the AO, therefore, the AO made the addition of Rs.5,12,186/-, observing that the assessee could not prove the genuineness of the expenditure.

3. Aggrieved from the order of Id. AO, the assessee filed an appeal before the Id. CIT(A), who has confirmed the additions made by the AO, by observing the followings :-

*"4. I have duly considered the submission of the assessee. The assessee is a distributor of Airtel GSM . He claimed to have had paid discount totalling to Rs.14,22 455/- to 23 numbers dealers. The AO sent notice U/s. 133(6) to all 23 sub-dealers, out of which 11 sub-dealers had confirmed receipts of discount and the other 12 notices were returned unserved by the postal authority as those persons were not found at the given addresses. The AO first asked the assessee to furnish confirmation from those 12 parties, which he failed. Thereafter, the AO asked the assessee to produce those 12 persons before him for examination and verification of genuineness of payments made to them totalling to Rs.5,12,186/-. The assessee again failed to produce those parties. The AO further observed from the books of account that the assessee followed a similar pattern of alleged payments of discount by cash only to those 12 parties. The AO, therefore, held that there was no actual sale made through those 12 parties and discounts were booked against those parties for the sole purpose of reduction of total income. He therefore disallowed Rs.5,12,186/- as bogus expenditure booked in accounts in the guise of payments of discounts against sale. Against these findings of the AO, Ld. AR*

*has made a general statement that the sub- dealers were very small soap owners; they changed their line of business or went elsewhere and it was not possible to get reply from all those sub-dealers. The AR also shown some copy of agreements with those sub-dealers, but could not explain why those documents were not produced before the AO.*

*5. In the light of above discussion, I am inclined to accept AO's findings that the assessee has not discharged even the primary onus by submitting confirmation of twelve alleged recipients of discounts on sale, especially when the notices issued U/s. 133(6) to them were returned unserved by the postal authority. It is well settled law in order to claim an expenditure falls U/s. 37(1), the burden of proving the necessary facts in that connection is on the assessee, as pointed out by AO in his order. These facts coupled with the findings of the AO that entire discounts to those twelve parties were paid only by cash, forced the AO to form a legitimate belief that the alleged payments of discounts totalling to Rs.5,12,186/- to those twelve parties were bogus. In view of such, I do not find any reason to disturb the assessment. The addition of Rs.5,12,186/- is therefore, confirmed.*

*6. In the result, the appeal is dismissed.”*

4. Before the Id. CIT(A), the assessee apart from the submissions made before the AO, submitted that the sub-dealers were generally very small shop owners, even a roadside cigarette shops, sells sim card. Many a time those people change their line of business or went elsewhere and it was not possible to get reply from them, that is , all those sub-dealers. The assessee also submitted that he had got copy of the agreement with all the parties as sub-agent. In addition to that, the ledger account of all the parties are, also available for these persons and, therefore, the discount allowed them is genuine. Ignoring all the submissions of the assessee, Id. CIT(A) had confirmed the action of the AO. Not being satisfied with the order of the Id. CIT(A), the assessee is in further appeal before us and has taken following grounds of appeal :-

*1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the disallowance of Rs.5,12,186/- made by the A.O. on account of discount against sale of SIM cards by wrongly the treating the same as bogus expenditure.*

*2. For that the Ld. CIT(A) ought to have accepted the fact that the sub - dealers were very small road side vendors, as such, it was not possible to get the confirmation of sales from all of them.*

*3. That the appellant craves leave to add, alter or delete all or any of the grounds of appeal.*

However, the assessee, in this appeal, has raised the multiple grounds of appeal but at the time of hearing the main grievance of the assessee has been confirmed to the issue as to whether the discount allowed by the assessee to various parties against the sale of sim cards is genuine or not.

4.1. The Id. AR for the assessee has vehemently submitted that before the Id. AO, 11 parties appeared and confirmed the receipt of discount. The parties, who have confirmed the receipt of discount were having PAN Card, Voter ID. The assessee has submitted a copy of agreement before the Id. CIT(A), in respect with all the parties, who have not confirmed the receipt of discount. As the assessee had submitted copy of the agreements with those sub-dealers to the Id. CIT(A) and in order to verify the genuineness, he could obtain a remand report from the AO. But the Id. CIT(A) neither sent the copy of the agreement to the AO for his verification, nor he himself verified. Ld. AR for the assessee, before us, submitted a statement of sales and discount and scheme allowed showing the sales figure and the discount figure along with name and

address of recipients. Apart from this, Id. AR has explained before us that even the discount under consideration should be allowed for the purpose of business of the assessee. Ld. AR also pointed out that since the commission payment was established by way of agreement, PAN Card, Voter ID, name and address of the recipients. These payments were made for the purpose of business. Ld. AR for the assessee has also relied on the following judgments :-

i) Kulwant Rai, 291 ITR 36 :

*“It is well-settled legal position in respect of income-tax assessment proceeding that although strict rules of Evidence Act do not apply to income-tax proceedings, assessments cannot be made on the basis of imagination and guess work. Reference in this respect may be made to the judgment of Hon’ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. vs. CIT (1954) 26 ITR 775 and a host of Supreme Court and High Court’s judgments thereafter on the subject. We, therefore, direct deletion of the sum of Rs. 17,00,892 assessed by the Assessing Officer by way of half share of the assessee in the alleged earnest money.”*

ii) Sigma Paints Ltd., 188 ITR 6 :

*“The Assessee was entitled to deduction under section 37(1) in respect of amount paid as secret commission”*

The sum and substance of these judgments are that where the assessee incurs any expenditure for the purpose of business, he is entitled to claim the deduction U/s.37(1) of the Act.

4.2. On the other hand, Id. DR for the revenue has pointed out that assessee under consideration has a turnover to the tune of Rs.115,538,442/- shows the net profit to the tune of Rs.3,50,160/-. The net profit declared by the assessee is not even 1% of the turnover/sales of

the assessee. Ld. DR also pointed out that the discount and scheme expenses are excessive, considering the nature of the business of the assessee and the turnover of the assessee. In addition to this, Id. DR for the revenue has also relied on the findings of the Id. AO, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

4.3. Having heard the rival submissions, perused the material available on record, we are of the view that there is merit in the submissions of the assessee, as the propositions canvassed by the Id. AR for the assessee are supported by the above cited judgments and the facts narrated by him. He has pointed out that the assessee had submitted copy of agreement, voter ID, PAN Card of those persons, to whom the discount were allowed. Ld. CIT(A) had neither sent the agreement to the AO for his verification, nor he has verified himself. Ld. AR also submitted before us that merely because some of the parties did not appear before the AO, does not mean that the assessee's transaction on account of discount allowed, is wrong. From the copy of the agreement, voter ID, name and address of the persons to whom the discount were given and their PAN Nos. were available. Neither the CIT(A) nor the AO could establish that the discount allowed by the assessee is not genuine. Therefore, considering the above cited factual position and the judgments relied on by the Id. AR, we are of the view that addition made by the Id. CIT(A) needs to be deleted. We accordingly delete the addition.

4.4. In the result, appeal filed by the assessee, ( on all the grounds), is allowed.

Order pronounced in the open court on this 23/11/2016.

**Sd/-**  
**(S.S.VISWANETHRA RAVI)**  
न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**  
**(DR. A.L.SAINI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

**कोलकाता /Kolkata; दिनांक Dated 23/11/2016**

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-Shri Kiran Bhagat
2. प्रत्यर्थी / The Respondent.-JCIT, Range-2, Jalpaiguri
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY  
ORDER,

उप/सहायक पंजीकार  
(Asstt. Registrar)  
आयकर अपीलीय अधिकरण, कोलकाता / ITAT, कोलकाता