

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

Before Hon'ble **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

I.T.A. No.954/Kol/2015 Assessment Year : 2009-10

Sri Rupak Mitra C/o Anand Advertising, 35, Chittaranjan Avenue, Kolkata-700012. PAN : AEPPM3993P	V/s.	A.C.I.T., Circle-39, 3, Govt.Place (West), Room No.13, 2 nd Floor, Kolkata-700001.
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Nilratan Dutta, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Rajat Kr.Kureel, JCIT
सुनवाई की तारीख/Date of Hearing	20.01.2017
घोषणा की तारीख/Date of Pronouncement	17.03.2017

आदेश /ORDER

Per Waseem Ahmed, AM

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-11, Kolkata dated 14.05.2015. Assessment was framed by A.C.I.T., Circle-39, Kolkata u/s 143(3) of the Income tax Act, 1961 (hereinafter referred to as 'the Act ') vide his order dated 21.12.2011 for assessment year 2009-10.

Shri Nilratan Dutta, Ld. Authorized Representative appeared on behalf of assessee and Shri Rajat Kumar Kureel, Ld. Departmental Representative represented on behalf of Revenue.

2. The first issue raised by the assessee in this appeal is that the Id. CIT(A) erred in confirming the order of AO by sustaining the disallowance of Rs.3,18,694/- on account of difference in the closing balance of the party i.e. M/s The Statesman Ltd.

3. The facts in brief are that the assessee in the present case is an individual and is engaged in the business of advertising agency in the name of M/s. Anand Advertising. The assessee, in its books of accounts has shown credit balance in the name of The Statesman Ltd. for Rs.4,89,147/- whereas the party in response to the notice u/s 133(6) of the Act has confirmed the balance of Rs.1,70,453/-. As a result, the AO observed the difference of Rs.3,18,694/- only. On clarification by the AO, the assessee submitted that the difference is arising on account of non-furnishing of credit notes by the creditors periodically. There is no difference in the amount of purchases shown by the assessee and the corresponding sales shown by the party. However the AO observed that no reconciliation statement was furnished by the assessee. Therefore, the AO disallowed the same which was added to the total income of the assessee.

4. Aggrieved, assessee preferred an appeal before Id. CIT(A). The assessee before Id. CIT(A) submitted that confirmation received from the party u/s 133(6) of the Act has no nexus with the accounts maintained by him. The assessee also submitted that the major difference in the closing balance of the party is mainly arising out of the difference in the opening balance. The assessee also submitted that once the purchase has been admitted by the AO at the time of assessment proceedings then the corresponding balance of sundry creditors cannot be disallowed. However, the Id. CIT(A) after considering the submissions of the assessee has confirmed the order of AO by observing as under :-

“The submission of the assessee are considered and they have no force. The addition of Rs.3,18,694/- has been made by the A.O. on the ground that the assessee has been overstating his liability to this extent. The assessee had been allowed credit notes by M/s. The Statesman from time to time which are not

accounted for by the assessee. When the creditor has waived its right to recover this sum, it should have automatically gone to reduce the cost of purchase or declared as cessation of liability and offered to tax. This has not been done by the assessee. It is mentioned here that the assessee has reconciled the "purchases" from The Statesman Ltd. during the previous year but has not reconciled the entire credit allowed by the creditor]. In view of the above, the addition of Rs.3,18,694/- is confirmed and the ground of appeal No.2 is dismissed."

Being aggrieved by the order of Id. CIT(A) the assessee is in second appeal before us on the following grounds of appeal :-

"1. For that authorities below is not justified in confirming the addition Rs.3,18,694/- as to the difference of Closing balance of M/s. The Statesman Ltd. and to the books of the appellant."

3. For that the discrepancies pointed out by the authorities below has no reasonable nexus with the books of the appellant and no opportunity was given to the appellant to cross examine the person from whom the information was obtained is clear violation of natural justice and order passed by the authorities below is behind the back of the appellant."

5. The Id. AR before us filed a paper book comprising of pages from 1 to 44 and submitted that the confirmation received u/s 133(6) of the Act was not cross examined with the assessee though the AO was empowered u/s 131 of the Act for calling the party for the attendance during income tax proceedings. The Id AR in this connection also relied in the order of Hon'ble ITAT of Lucknow in case of *Satnam Singh Chabra Vs. DCIT* reported in 74 TTJ 976 (Luk) wherein it was held as under:-

"By virtue of s. 131 the ITO has sufficient powers to summon any person and to enforce his attendance; AO could take resort to process as laid down in r. 14 of O. XVI of CPC for summoning the witness."

The Id AR also submitted that once the purchases has been accepted then the balance shown as outstanding of sundry creditors at the end of the year cannot be treated as bogus liability and consequently no addition can be made. In this regard, the Id AR placed his reliance in the case of *JCIT vs Mathura Das Ashok Kumar* reported in 101 TTJ 810 wherein it was held as under:

“As the purchases have been held to be genuine and accepted as such, the credits that remained outstanding in such account cannot be treated to have remained unexplained. The balance appearing in this account, which included the disputed addition also is the sum total of purchases that remained unpaid at the end of the year. As the genuineness of such purchases has not been disputed, rather the same has been accepted, the credits stand fully explained and no adverse inference is called for, either on facts or in law.”

The Id AR also submitted that the accounts maintained by the assessee were audited and no defect whatsoever was pointed out by the assessee. The information obtained by the AO behind the back of the assessee cannot be used against the assessee without the cross examination and if it is used then it will be against the principles of natural Justice. Reliance was placed in the judgment of Hon'ble jurisdictional High Court of Calcutta in the case of *CIT vs Eastern Commercial Enterprises* reported in 210 ITR 103 (Cal) wherein it was observed that Revenue making addition on the basis of a witness examined at the back of assessee is against the principles of natural justice.

The Id AR also submitted that the difference is arising mainly on account of difference in the opening balance, in the amount of purchases and payment made to the party. The Id AR in support of his claim has also submitted the copy of the ledger of the party in the books of the assessee which is placed on pages 16 to 24 of the paper book and the copy of the reconciliation statement which reads as under:-

	As per books	As per confirmation collected	Difference (Rs)
Opening balance	5,75,882/-	2,26,291/-	3,49,591/-
Closing balance	4,89,146/-	1,70,453/-	3,18,693/-
Net difference between opening & closing balance			30,898/-
Purchase	11,18,840/-	11,21,891/-	3,051/-
Payment	12,05,576/-	11,77,729/-	27,847/-
Net difference between purchase and payments			30,898/-

The Id. AR also reiterated the submissions as made before the Id. CIT(A). On the other hand the Id. DR vehemently supported orders of the authorities below.

6. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case. The issue in the instant case relates to the difference in the amount of credit balance shown by the assessee in the name of party namely, The Statesman limited and the balance shown by such party. The assessee has shown credit balance for Rs.4,89,147/- whereas the party has shown debit balance in its books of accounts for Rs.1,70,453/- Thus, the AO observed that the assessee has shown excess liabilities by Rs.3,18,694/- which was treated as income of the assessee. The view of the AO was confirmed by the learned CIT-A by observing that the assessee has been allowed credit notes and the same has not been accounted in the books. As such, the liability shown by the assessee has been waived by the party and deserves to be brought to tax as it has ceased to exist.

However the Id. AR in support of his claim submitted that certain differences are arising due to mismatch in the opening balance, value of purchase and amount of payment as shown by the assessee and the party which ultimately resulting in the closing balance in the books. The assessee in support of his claim has produced the copy of the ledger which is placed on pages 16 to 24 of the paper book. However, we find that the Id CIT(A) has observed that certain credit notes were given by the party which has not been accounted by the assessee. As such the liability shown by the assessee is bogus and therefore liable to be taxed. But on perusal of the order of Id CIT(A), we find that no details of the credit note has been given therein. Moreover, the findings given by the Id CIT(A) does not match with the details furnished by the assessee in the form of reconciliation statement for the impugned difference. We also find that there was no remand report available on this aspect from the AO. It was also observed that the confirmation received u/s 133(6) of the Act was not made available to the assessee for cross

examination. In view of above, we are inclined, in the interest of justice and fair play to restore this issue to the file of AO for fresh adjudication in accordance with the law. Hence this ground of appeal of the assessee is allowed for the statistical purposes.

7. The second issue raised by the assessee in this appeal is that the Id. CIT(A) has erred in confirming the order of AO by sustaining the addition of Rs.1,18,760/- on account of difference in the closing balance of the party. The AO during the assessment proceedings found that the assessee has shown credit balance of Rs.3,64,590/- in the name of ABP (Pvt) Ltd. whereas such party has shown balance of Rs.2,45,830/- in its books of accounts. Thus the AO observed excess of Rs.1,18,760/- in the name of such party. Accordingly the AO treated the liability as bogus and added to the total income of the assessee.

8. Aggrieved, assessee preferred an appeal before Id. CIT(A). The assessee before the Id. CIT(A) submitted that the difference observed by the AO has no reasonable nexus with the books of accounts maintained by it. The assessee further submitted that the major difference to the closing balance of the party is mainly arising out of the difference in the opening balance. However, the Id. CIT(A) has disregarded the contention of the assessee and confirmed the order of AO by observing as under: -

“ The fact of the case are carefully considered. The assessee has not produced the copy of the detailed ledger account of his concern in the books of M/s. ABP Pvt. Ltd. and has only elaborated upon the concise account details obtained by the A.O. Further the assessee has sought to calculate the difference in purchase & payment in the concise account statement given by M/s. ABP Pvt. Ltd. but has not been able to rebut the finding of the A.O. that the assessee has been overstating his liability. M/s. ABP Pvt. Ltd. has itself declared the assessee as its debtor by only Rs.2,45,830/- and this indicates that either the assessee has been allowed benefit of credit notes or-the assessee has made payment to the company which are not accounted by the assessee. As a result it has to be held that the excess liability of Rs.118760/- is fictitious and the sum deserves to be brought to tax as cessation of liability. As regards the claims of the assessee that since there is an opening

balance difference also with M/s. ABP Pvt. Ltd. and as a sum of Rs.73,768/- has already been added to his returned income for A.Y. 2007-08 a credit of that sum should be given to him, this claim cannot be accepted at face value. The assessee has not produced details of his ledger account for Financial Year 2006-07 & 2007-08 to prove that there are no other supervening incidents which could have altered the situation. Further the AR also could not confirm that there was no appeal filed by the assessee for A.Y. 2007-08 or what was its outcome. In view of the above facts the addition of Rs.1,18,760/- is confirmed and the assessee's ground of appeal No.3 is dismissed."

Being aggrieved by the order of Id. CIT(A) the assessee is in second appeal on the following grounds of appeal:-

" 2. For that the authorities below is not justified sustaining the addition Rs. 1,18,760/- as to the difference of closing balance of ABP (Pvt) Ltd and to the books of the appellant."

9. The Id. AR before us reiterated the submissions as made before the Id. CIT(A) whereas the Id. DR vehemently supported the orders of the authorities below.

10. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case. The issue in the instant case relates to the difference in the amount of credit balance shown by the assessee in the name of party namely, ABP Pvt. Ltd and the balance shown by such party. The assessee has shown credit balance for Rs.3,64,590/- whereas the party has shown debit balance in its books of accounts for Rs.2,45,830/-. Thus, the AO observed that the assessee has shown excess liabilities by Rs.1,18,760/- which was treated as income of the assessee. The view of the AO was confirmed by the Id CIT(A) by observing that the assessee has either been allowed credit notes or he has made the payment from unaccounted sources. As such the liability shown by the assessee is fictitious liability and deserves to be brought to tax as it has ceased to exist.

However, we find that the AO in the remand report has stated that in the aforesaid difference i.e. Rs.1,18,760/- a difference of Rs.80,312/- pertains to the

earlier years and therefore the benefit to the assessee should be given for such difference. But on perusal appellate order, we find that there is no whisper about the remand report given by the AO. Thus, it is clear that the Id CIT(A) has passed the order without referring to the remand report given by the AO. The copy of the remand report is placed on pages 29 and 30 of the paper book. The relevant extract of the remand report is reproduced below:-

“5. After adjusting the opening balance, there is still a difference of Rs.38,447/-. A query was raised that whether the assessee has received any credit note, discounts or others from M/s ABP (P) Ltd., The assessee stated that he has no knowledge of that. However, he agreed that the amount payable to M/s ABP (P) Ltd. as on 31.03.2009 is Rs.2,45,830/-. So it is clear that some discounts, credit notes or others of Rs.38,447/- has been allowed to the assessee by M/s ABP (P) Ltd in the FY 2008-09, which should be treated as income of the assessee during the FY 2008-09.”

Besides the above, the Id AR has alleged that the confirmation received by the AO u/s 133(6) of the Act was not made available to the assessee for cross examination though the AO has been invested with such power u/s 131 of the Act which is against the principal of natural justice. However, on making reference to the records, we find that no such request for cross examination was made by the assessee at the time of assessment stage. We also find that sufficient opportunities were given at the time of the remand stage but the assessee has not made such request for the cross examination. Therefore, we are of the view that the principles of natural Justice have not been violated.

However we are in agreement with the argument placed by Id AR before us that the Id CIT(A) has passed the order without referring to remand report. In such a situation we are inclined to limit the disallowances as suggested by the AO in the remand report. Thus, this ground of appeal of assessee is partly allowed.

11. The third issue raised by the assessee in ground no.4 is that the Id. CIT(A) erred in confirming the order of AO by sustaining the addition of Rs.96,679/- being bogus and non-existing.

12. The AO during the course of assessment proceedings observed that the assessee has shown credit balance of Rs.96,679/- in the name of Yugdharma whereas the said firm was closed long back as evident from the remark of the postal authorities as “**shut down**” . Therefore, the AO treated the same as bogus and added to the total income of the assessee. Therefore the AO treated the same as bogus and added the total income of the assessee.

13. Aggrieved, the assessee preferred an appeal before the Id.CIT(A). The assessee before the Id. CIT(A) submitted that the firm is very much in existence. The assessee in support of his claim also submitted the receipts of the payments made to the party dated March 2010 for Rs.2,900/- and 18.07.2011 for Rs.8,790/-. However, the Id. CIT(A) has disregarded the claim of the assessee and confirmed the order of AO by observing as under :-

“The contentions of the assessee are difficult to accept. The Sundry Creditor M/s. Yugadharma was closed down years ago and there is no evidence of the entity existing in any form. Further though the assessee claimed to have paid two small amounts in cash to this creditor in future years, there is still no evidence. The cash vouchers produced by the assessee are unilateral and there is no evidence of the actual recipient. In the appellate proceedings also the AR could not give the name or address of the person to whom the cash was supposedly paid. This indicates that the liability was bogus and non-existing. In view of the same the addition of Rs.96,679/- is confirmed and the assessee's ground of appeal No.5 & 6 are dismissed.”

Being aggrieved by the order of Id. CIT(A) the assessee is in second appeal on the following grounds of appeal :-

“4. For that the authorities below is not justified in confirming the addition Rs.96,679/- treating the liability of M/s. Yugadharma brought forward from earlier year was bogus and non-existing is merely a guess work and opposed to the principal of natural justice.”

14. The Id. AR before us reiterated the submissions as made before the Id. CIT(A) whereas the Id. DR vehemently supported the orders of the authorities below.

15. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case. The issue in the instant case relates to the amount of credit balance shown by the assessee in the name of party namely, M/s Yugadharm which has been closed. The assessee has shown credit balance for Rs. 96,679/- which is arising from the earlier years. Thus the AO observed that impugned liability has ceased to exist and therefore the same was treated as income of the assessee. The view of the AO was confirmed by the Id CIT(A) by rejecting the claim of the assessee that it has paid part of the liability in the year under consideration.

However we find that the AO in the remand report has stated that the assessee has produced the evidence of payment to the said party. The copy of the remand report is placed on pages 29 and 30 of the paper book. The relevant extract of the remand report is reproduced below:-

“6. Regarding the dues to M/s Yugadharm as on 31/03/2009, the assessee submitted evidence of payment after 31.03.2009 which shows, the assessee has made payment of Rs.3900/- on 30.03.2010 and Rs.8790/- on 18.07.2011 and stated that the amount is payable to M/s Yugadharm. The photocopies of two vouchers are enclosed in Annexure-E.”

In view of above, we are in agreement with the argument of Id AR that the Id CIT(A) has passed the order without referring to remand report. In such a situation, we are inclined to delete the addition as suggested by the AO in the remand report. Thus this ground of appeal of assessee is allowed.

16. The last issue raised by the assessee in this appeal is that the Id. CIT(A) erred in confirming the order of the AO by sustaining the disallowance of Rs.60364 on account of no connection with the business.

17. The assessee in the year under consideration has claimed development expenses of Rs.241456. On question by the AO about adding of expenses the assessee submitted that payment was made to the persons who used to collect

advertising business for the assessee. The assessee in support of his claim has also submitted self made vouchers and further stated that the payments were made through account payee cheque. However, the AO observed that the assessee failed to provide the basis for the aforesaid payment made to people for collection of advertisement business. Therefore the AO disallowed the same to the extent of 25% of the total expenses under the provision of section 40A(2)(a) of the Act and added to the total income of the assessee.

18. Aggrieved, assessee preferred an appeal to the Id. CIT(A). The assessee before the Id. CIT(A) submitted that the above said payments was made for collecting the advertisement business and the payment was made through cheque. However, the Id. CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under :

“However, the submissions of the assessee are silent on the actual services provided by the unnamed recipients and on the applicability of section 40A(2)(a) of the Act. As a result the ground of appeal is not accepted for want of proper clarifications and explanation about the services performed by the cheque recipients. The disallowance of Rs.60,364/- is sustained and the ground of appeal No.8 is dismissed.”

Being aggrieved by the order of CIT(A) the assessee is in second appeal before us by raising the following grounds of appeal :-

“5. For that facts and circumstances of the case the authorities below is not Justified sustaining the addition Rs.60,364/- on estimate paid to individual person by cheques for soliciting the business and earning revenue is allowable as deduction under section 37 of the I. T .Act' 1961.”

19. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We find that the disallowance under section 40A(2)(a) can be invoked when the A.O. is of the opinion that, inter alia, such expenditure is "excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the

assessee". Furthermore the payments should have been made to the persons as specified under section 40A(2)(b) of the Act. The relevant extract of the Act reads as under:-

'Sec.40 'A' of the Income Tax Act reads as follows.

Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".

(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him there from, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.'

In the present case, the disallowance has been made without complying the provisions of section 40A(2)(b) of the Act. The lower authorities have not brought any details of the specified person as required under the provisions of law. In view of above we reverse the order of lower authorities and thus the ground of appeal of the assessee is allowed.

20. In the result, assessee's appeal stands partly allowed for statistical purposes.

Order pronounced in the open court 17/03/2017

Sd/-
(न्यायिक सदस्य)
(S.S.Viswanethra Ravi)
(Judicial Member)

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
(Accountant Member)

RG.PS/Dkp Sr.ps.

दिनांक:- 17/03/2017 कोलकाता ।

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

1. अपीलार्थी/Appellant-Sri Rupak Mitra, C/o. Anand Advertising, 35, Chittaranjan Avenue, Kol-12
2. प्रत्यर्थी/Respondent- ACIT Circle-39, 3, Govt. Place (West), Room No. 13, 2nd Floor, Kol-001
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Kolkata / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।