

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 8059/Mum/2011

(निर्धारण वर्ष / Assessment Year : 2008-09)

M/s. Advance Cardiologix E-202,2 nd Floor, Crystal Plaza, New Link Road, opp. Infinity Mall, Andheri(W), Mumbai-400 053	बनाम/ v.	Assistant Commissioner of Income Tax – Range 11(2) Aayakar Bhavan Mumbai.
स्थायी लेखा सं./PAN : AANFA7822F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Hari S Raheja
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख / **Date of Hearing** : 16-6-2016

घोषणा की तारीख / **Date of Pronouncement** : 12-09-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee firm, being ITA No. 8059/Mum/2011, is directed against the appellate order dated 28th September, 2011 passed by learned Commissioner of Income Tax (Appeals)- 3, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 21st December, 2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee firm in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

“1. The Learned CIT(A) erred in confirming disallowance in respect of commission payment amounting to Rs. 6,90,500/- to Shri. Chandra P. Pandey and Rs. 6,05,000/- to Shri Motilal Sharma and treating the same as unexplained expenditure u/s. 69C of the Income Tax Act,1961.

2. The learned CIT(A) erred in confirming the addition of Rs. 7,50,000/- being loan of Rs. 2,50,000/- from Shri. Pankaj Periwal and Rs.5,00,000/- from Shri. Raghulal Laxmi Narayan treating them as unexplained deposits u/s 68 of Income Tax Act,1961.

3. The learned CIT(A) erred in confirming disallowance of business expenses of Rs.23,035/- by treating the same as personal in nature.

4. The learned CIT(A) erred in confirming disallowance of business expenses of Rs. 40,132/- by treating the same as incurred for friends and relatives.”

3. At the outset learned counsel for the assessee submitted that the assessee did not wish to persue ground no. 3 and 4 and the same may be dismissed as 'not pressed'. The ld. DR did not objected to the dismissal of ground no. 3 and 4 raised by the assessee in the appeal filed with the Tribunal. After considering the arguments of both the parties, we hereby dismiss ground no. 3 and 4 raised by the assessee in memo of appeal filed with the Tribunal as not being pressed. We order accordingly.

4. The brief facts of the case are that the assessee is engaged in the business of dealing in cardio logical products, surgical and medical disposables.

5. The assessment was framed by the AO u/s 143(3) of the Act vide assessment orders dated 21-12-2010 where , inter-alia, additions were made by disallowing commissions payments made by the assessee of Rs. 6,90,500/- to Mr. Chandra P. Pandey and Rs. 6,05,000/- to Sh Motilal

Sharma by treating the same as unexplained expenditure u/s. 69C of the Act on the grounds that despite issue of summons u/s 131 of the Act which summons were returned with postal remarks 'Not Known' , these two parties failed to appear before the AO. The assessee was confronted with the return of summons u/s 131 of the Act but the assessee did not produced these two parties nor their new addresses were submitted by the assessee before the AO during course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act. The AO held that identity of these parties and the genuineness of the commission payment could not be proved by the assessee which led to disallowance of these commission expenses claimed as deduction by the assessee in return of income filed with the Revenue. The assessee did filed before the AO during assessment proceedings u/s 143(3) read with Section 143(2) of the Act , the details of commission paid and confirmations from these two parties. During appellate proceedings before the learned CIT(A) , the assessee submitted that these two parties namely Mr. Chandra P. Pandey and Sh Motilal Sharma could not appear before the AO as they were out of station and by the time they could comply with directions of the AO, the assessment order u/s 143(3) of the Act was already passed by the AO. Thus, the assessee requested the learned CIT(A) to admit additional evidences u/r 46A of Income Tax Rules, 1962 in order to establish the genuineness of the transactions and identity of these two parties. The learned CIT(A) forwarded the additional evidences to the AO for remand report. The AO objected to the admission of additional evidences u/r 46A of the Income Tax Rules, 1962 as it did not comply with requirements of Rule 46A of Income Tax Rules, 1962 and on merits the AO observed in his remand report that if the assessee could produce that these two parties were out of station at that time when the AO summoned them u/s. 131 of the Act for personal appearances before the AO, then additional evidences can be admitted. In rejoinder, the assessee submitted that the AO erred in concluding that the sufficient opportunity was given to the assessee during assessment proceedings u/s 143(3) read with

Section 143(2) of the Act. It was submitted that these two parties were at Kolkatta when the AO summoned them u/s 131 of the Act and they sent the documents desired by the AO but by the time documents reached the AO, the assessment order was already framed by the AO. The assessee pleaded that in the interest of justice and fair play, the additional evidences submitted at the appellate stage before the learned CIT(A) be admitted. It was submitted that both these parties are regular income tax payers and onus was sufficiently discharged as details and documents are duly submitted with respect to commission payments to both these parties. The assessee submitted that Section 69C of the Act cannot be invoked as source of payment is explained as payments were made by account payee cheque by the assessee from its bank account and tax was deducted at source before making payment to these parties and the said payees have duly included the said income in their return of income and paid due taxes to the Revenue.

The learned CIT(A) acknowledged that with respect to both the parties, the assessee has filed as an additional evidences before him u/r 46A of Income Tax Rules, 1962, the documents viz. copy of income tax return, confirmation letter, copy of services rendered, bill, debit note for commission payment, TDS certificate and bank statement but the same were not submitted before the AO during assessment proceedings and hence these additional evidences are not admissible at this appellate stage keeping in view Rule 46A of Income Tax Rules, 1962. The new address of these two parties are submitted at this appellate stage while summons sent by the AO returned unserved and new addresses were not submitted before the AO during assessment proceedings despite AO asking the same from the assessee. These two parties have reduced commission payments from these commission income received from the assessee. The bank statement of these two parties are not furnished and TDS certificates are also not submitted and hence the additions were confirmed by learned CIT(A) vide appellate order dated 28-09-2011.

6. Aggrieved by the appellate order dated 28-09-2011, the assessee filed second appeal before the Tribunal and the learned Counsel for the assessee contended that additional evidences were duly filed before the learned CIT(A) to prove that these commission payments are genuine and to establish the identity of these parties. The authorities below erred in not admitting additional evidences on technical grounds that the same were not produced before the AO during assessment proceedings. It was submitted that both these parties were out of station to Kolkatta when the AO summoned them and there is a new address of these parties which is duly submitted before the learned CIT(A). It was prayed that the issue may be set aside to the file of the AO and the assessee will duly submit all relevant evidences and explanation to prove the identity of parties and these commission payments are genuine. It was submitted that complete details of these parties along with services rendered, invoices, bank statements, TDS certificates, confirmations were submitted as additional evidences but the same were not admitted. The said additional evidences are placed in paper book filed with the Tribunal(page 10-21,43-57/pb). The learned DR relied on the orders of learned CIT(A).It was submitted that both the parties sent all details directly to the AO in response to summons u/s 131 of the Act by speed post which reached after the assessment was concluded by the AO and the same was not taken cognizance by the AO while framing assessment order u/s 143(3) of the Act.

7. We have considered the rival contentions and perused the material on record. The assessee is engaged in business of dealing in cardio logical products, surgical and medical disposable. The assessee is stated to have paid commission of Rs.6,90,500/- to Sh. Chandra P. Pandey and Rs. 6,05,000/- to Sh Motilal Sharma purportedly on sales of products dealt with by the assessee . The assessee has stated to have submitted invoices and ledger accounts of these parties along with bank statement before the AO

during the assessment proceedings (page 10-21/pb). The payments are stated to have been paid by cheque and tax was stated to be deducted at source on these commission payment. The AO issued summons to these two parties u/s 131 of the Act to appear before him to verify the identity of parties and genuineness of the transactions but the summons returned back unserved. The assessee was confronted by the AO but the assessee did not furnish their new address nor produced the parties during assessment proceedings u/s 143(3) read with Section 143(2) of the Act. It is the say of the assessee that both these parties were out of station when the AO summoned them for personal attendance and these parties sent documents by speed post on 20-12-2010 consisting of acknowledgment of their return of income , Copy of capital account, copy of proof of speed post as evidence of sending these documents by post to the AO, copy of TDS certificate, copy of their bank statement , which reached the AO after the assessment was framed u/s 143(3) of the Act on 21-12-2010 . It is the say of the assessee that these documents were not admitted when they were submitted before the learned CIT(A) on the technical grounds that the assessee failed to produce documents before the AO despite sufficient opportunity being granted to the assessee. In our considered view keeping in view factual matrix of the case and in the interest of substantial justice and fair play, these additional evidences need to be admitted and adjudicated on merits. Thus, in the interest of substantial justice, we are inclined to set aside and restore this issue to the file of the AO for de-novo determination of the matter on merits after considering and evaluating these additional evidences on merits. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. The AO shall admit all relevant evidences and explanations submitted by the assessee to support its contentions and the same shall be adjudicated by the AO on merit. This disposes of ground no. 1

raised by the assessee in memo of appeal filed with the Tribunal. We order accordingly.

8. In ground no. 2 raised by the assessee in the memo of appeal filed with the Tribunal, the assessee is aggrieved by the addition of Rs. 7,50,000/- with respect to loans raised by the assessee from two parties namely Sh Pankaj Periwal of Rs. 2,50,000/- and loan of Rs. 5,00,000/- from Sh. Raghulal Laxmi Narayan, vide assessment order dated 21-12-2010 passed u/s 143(3) of the Act on the grounds that the said two lenders have not submitted any response to notices u/s 133(6) of the Act issued by the AO during assessment proceedings u/s 143(3) read with Section 143(2) of the Act which led to AO to come to conclusion that their identity and creditworthiness of these lenders were not proved nor genuineness of the loan transactions were established and thus AO added the said sum as an unexplained deposits u/s 68 of the Act , which addition stood confirmed/upheld by learned CIT(A) in his appellate order dated 28-09-2011. The assessee submitted before the learned CIT(A) that these parties are from Kolkatta and they did send the compliance to notice issued by the AO u/s 133(6) of the Act directly to the AO but the AO has failed to take cognizance of the same. The assessee submitted the said compliance letter as additional evidence before the learned CIT(A) and prayed that the same may be admitted as additional evidence u/r 46A of Income Tax Rules, 1962 despite the fact that the same were sent directly by these parties to the AO in response to notice u/s 133(6) of the Act which AO failed to take cognizance while framing assessment order dated 21-12-2010 u/s 143(3) of the Act. The AO in his remand report stated that the assessee could not prove the identity and capacity of the creditors as well genuineness of the loan transactions could not be proved and no response was received w.r.t. notices u/s. 133(6) of the Act despite sufficient time given to produce the documents. The copies of confirmation letters, copy of income tax return of the creditors,, copy of bank account were submitted as additional evidences . The learned

CIT(A) rejected the contentions of the assessee and confirmed the additions vide appellate order dated 28-09-2011.

9. Aggrieved by the appellate order dated 28-09-2011, the assessee filed second appeal before the Tribunal and the learned Counsel for the assessee contended that additional evidences were duly filed before the learned CIT(A) to prove that these loans of Rs. 7,50,000/- received from these two parties were genuine and to establish the identity and creditworthiness of these two parties. The authorities below erred in not admitting additional evidences on technical grounds that the same were not produced before the AO during assessment proceedings. It was submitted that both these parties were from Kolkatta and when the AO called the information vide notices u/s 133(6) of the Act, these parties sent the information called for directly to the AO but the same was not taken cognizance by the AO while framing impugned assessment order dated 21-12-2010 u/s 143(3) of the Act. These evidences were filed before the learned CIT(A) as additional evidences u/r 46A of Income Tax Rules, 1962 but the same were not admitted. It was prayed that the issue may be set aside to the file of the AO and the assessee will duly submit all relevant evidences and explanation to prove the identity and creditworthiness of creditors and to prove that these loans are genuine. It was submitted that complete details of these parties such as confirmation of loans from these parties along with TDS certificate, ledger account and bank statements were submitted before the AO during assessment proceedings (pb/page 22-37) and as additional evidences copy of acknowledgement of return of these parties, bank accounts of these parties, TDS certificate were submitted before learned CIT(A) but the same were not admitted by AO/CIT(A). The said additional evidences are placed in paper book filed with the Tribunal (page 58-67/pb). The learned DR relied on the orders of learned CIT(A).

10. We have considered the rival contentions and perused the material on record. The assessee is engaged in business of dealing in cardio logical products, surgical and medical disposable. The assessee is stated to have raised loans of Rs.7,50,000/- from the two parties namely Mr Pankaj Periwal(Rs. 2,50,000/-) and Mr. Raghulal Laxmi Narayan(Rs. 5,00,000) during the previous year relevant to the impugned assessment year. The assessee submitted loan confirmation before the AO during assessment proceedings along with ledger account copy, assessee's bank statement, TDS certificate. The AO issued notice u/s 133(6) of the Act to verify the identity, creditworthiness of the loan creditors and to establish the genuineness of the loan transaction . The said parties are stated to be based in Kolkatta and submitted details such as loan confirmation, their copies of return of income, bank statement and TDS certificate directly to the AO which was stated to have not been taken cognizance by the AO while framing assessment order dated 21-12-2010 u/s 143(3) of the Act. These documents were produced by the assessee during appellate proceedings before the learned CIT(A) with a prayer to admit these additional evidences u/r 46A of the Income Tax Rules, 1962 which request of the assessee was not accepted by the CIT(A)/AO on the grounds that the sufficient opportunity was granted to the assessee during the course of assessment proceedings. In our considered view keeping in view factual matrix of the case and in the interest of substantial justice and fair play, these additional evidences need to be admitted and adjudicated on merits. Thus, in the interest of substantial justice, we are inclined to set aside and restore this issue also to the file of the AO for de-novo determination of the matter on merits after considering and evaluating these additional evidences on merits. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. The AO shall admit all relevant evidences and explanations submitted by the assessee to support its contentions and the same shall be adjudicated by the AO on merit. This

disposes of ground no. 2 raised by the assessee in memo of appeal filed with the Tribunal. We order accordingly.

11. In the result, appeal filed by the assessee in ITA No. 8059/Mum/2011 for the assessment year 2008-09 is partly allowed as indicated above.

Order pronounced in the open court on 12th September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 12-09-2016 को की गई ।

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 12-09-2016

I

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai