

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D” KOLKATA

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

ITA No.2244/Kol/2016
Assessment Year:2009-10

South Eastern Carriers Pvt. Ltd. 10, Phears Lane, 2 nd Floor, Kolkata-12 [PAN No. AA ECS 9360 E]	बनाम / V/s.	DCIT, Circle-8(2), Ayakar Bhawan, Kolkata-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri V.N. Purohit, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Arindam Bhattacharjee, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	01-02-2018
घोषणा की तारीख/Date of Pronouncement	07-02-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-11, Kolkata dated 30.09.2016. Assessment was framed by JCIT(OSD), Circle-10, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 08.12.2011 for assessment year 2008-09.

The grounds raised by the assessee per its appeal are as under:-

- “1) That the Learned CIT(Appeal) has erred both in law and under the circumstances in sustaining the disallowance of Rs.16,55,829/- made by AO.
- 2) That the Appellant craves leave to add, to amend or withdraw all or any of the ground or grounds of appeal at the time or before the hearing of the appeal.”

Shri V.N.Purohit, Ld. Authorized Representative appeared on behalf of assessee and Shri Aarindam Bhattacharjee, Ld. Departmental Representative appeared on behalf of Revenue.

2. In this appeal two grounds have been raised out of which ground No.2 is of general in nature and does not require any adjudication.

3. Sole issue raised by assessee in this appeal is that the Ld. CIT(A) erred in sustaining the disallowance of Rs. 16,55,829/- made by the Assessing Officer.

4. Briefly stated facts of the issue are that the assessee is a Private Limited Company and engaged in business of transportation of goods services. During the year, the assessee has claimed the lorry hire charges of Rs.165,58,29425/- only. During the assessment proceedings, the AO found that most of the expenses of lorry hire charges are paid in cash which were supported on the basis of self-made vouchers. Therefore the AO concluded that assessee has not proved the genuineness and nexus of the expenditure with the business operation. Accordingly the AO disallowed 0.1% of the lorry hire charges amounting to Rs.16,55,829/- and added to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal before CIT(A) against the disallowance made by the AO. During the appeal proceedings, the assessee submitted that similar expenses were claimed in the earlier years i.e. AYs 2005-06 to 2008-09 but no disallowance was made except in the AY 2008-09 for Rs.2.50 lakh on *ad hoc* basis. However, the same addition of the expenditure made in the A.Y. 2008-09 of Rs. 2.50 lakh approx. 0.67% of the total expenditure by the A.O was deleted by the Id. CIT(A). However, the Ld. CIT(A) disregarded the contention of the assessee and upheld the disallowance made by the AO by observing as under:-

“4.3 The submission made by the assessee in the present proceedings need to be carefully analysed. The fact that the assessee during the year under consideration has shown 8.95% margin in freight received over the expenses made for transportation which is significantly lower than the same ratio in the previous year at 10.15% and also lower than the same ratio in year proceeding to that. The addition made by the Assessing Officer though on estimated figure is based upon uncontroverted fact of the declining ratio of freight received as compared to freight and other transportation charges paid by the assessee.

4.4 The addition made here, by the Assessing Officer, though I on the basis of certain estimates, it emanates from uncontroverted facts apparent from the submission of the assessee himself. Though the Assessing Officer has agreed that payment in cash is

business exigency, the averment on which the assessee as relied in his defence. The assessee does not have liberty to selectively ignore the other averment made by the Assessing Officer that in respect of such expenditure the assessee could not prove the genuineness and the nexus with its business operations. It is settled law that assessee cannot probate and reprobate at the same time.

4.5 The other argument taken by the assessee and cited at paragraph no 4.2.2 is general nature these arguments if they are applicable to business of the assessee in the present year has also not been established by the assessee. The theoretical arguments made by the assessee without substantiating the same with facts of the working of the present year is not being analysed here.

4.6 Careful appreciation of the submissions made by the assessee as cited in para 4.2 above clearly indicates that in order to explain the low operating margin in the present year the assessee has given his main argument in para 4.2.3 wherein the assessee has attributed the fall in the margin to the bad economic condition prevailing in 2009-2010. However a bad economic condition of falling manufacturing and falling export should first impact the turnover of the assessee. A perusal of chart prepared by the assessee and cite in para 4.2.1 above clearly indicates that the turnover of the assessee has rather gone up during the year. Similarly the bad economic condition if at all had impacted the business of the assessee it must have impacted both the business activities which results into receipts and the business activities which results into expenditure, particularly in the case of the assessee, where the procured business as well as expenditure are identical i.e. transportation.

4.7 In view of the arguments in para 4.3 to 4.6 I am of the opinion that the argument of the assessee are general, a flimsy, theoretical and unsubstantiated by the facts of the case. It is trite law that revenue authority cannot act on pure conjectures surmises and notions the converse of the same is also true that once the Assessing Officer has acted on the basis of certain ration and figures from the financial account of the assessee it cannot be controverted by pure surmise conjectures and theoretical arguments. Accordingly the arguments of the assessee as quoted in para 4.2.1 to 4.2.3 is rejected.

4.8 The only remaining argument cited in paragraph no 4.2.4 does not hold good, as it is trite law that the principle of res judicata is not applicable on the proceedings of Income Tax Act.”

Aggrieved by this, the assessee has come up in appeal before us.

6. The Id. AR before us reiterated the submission made before the Id. CIT(A) and also filed a chart showing the expenses claim in the earlier years and subsequent year.

The relevant extract of the chart is reproduced below:-

Financial year	Asst. year	Turnover	Freight	Lorry hire	% on lorry hire on freight	% on lorry hire on turnover
2004-05	2005-06	813609244	812803457	758482464	93.32%	93.22%
2005-06	2006-07	1008018433	1001401684	928821760	92.75%	92.14%
2006-07	2007-08	1270016538	1267798251	1147615983	90.52%	90.36%
2007-08	2008-09	1653149372	1650754966	1483135576	89.85%	89.72%

2008-09	2009-10	1828070661	1825218260	1661806133	91.05%	90.90%
2009-10	2010-11	2216026001	2214456883	2032930909	91.80%	91.74%
TOTAL		8788890249	8772433501	8012792825	91.34%	91.17%

The Id. AR also submitted that the expenses cannot be disallowed on estimated basis. He in support of assessee's claim relied on the order of the co-ordinate Bench of this Tribunal in the case of *Logisys India Ltd. Vs. DCIT* in **ITA No. 843/Kol/2006** order dated 11.1.2017.

On the other hand the Id. DR vehemently supported the order of lower authorities.

7. We have heard and perused the submissions made by the Ld.AR and Id. DR as well as the materials available on records. In the instant case, the assessee has claimed the expenses under the head "lorry hire charges" which were based on self made vouchers. The payments of these expenses were made in cash. Thus, the AO doubted on the genuineness of the expenses and held that the business nexuses cannot be established. The view of the AO was subsequently confirmed by the Id. CIT(A).

The undisputed fact is that the lorry hire charges was disallowed by the AO on estimated basis and without finding out any defect in the books of accounts of the assessee. All the supporting documents and books of accounts were produced before the AO during assessment proceedings. In our view the *ad hoc* disallowance of the expenses is not permitted under the provisions of law. The AO should have made the disallowance after making specific reference to the vouchers/documents which was not connected with the business of the assessee. In this connection, we also rely on the order of Co-ordinate Bench of ITAT Kolkata in the case of *Animesh Sadhu Vs. ACIT* in **ITA 11/Kol/2013** Dated 12.11.2014. The relevant extract is reproduced below :-

"8. We have considered the rival submissions. A perusal of the assessment order shows that the Assessing Officer has disallowed 20% of the expenses on estimate basis on the ground that no independent verification to be made to find out the authenticity of the expenses. Ld. CIT(Appeals) has reduced the same on the same ground. However, we are of the view that no estimated disallowance scan be made for inability to make independent verification. If any specific expenditure is unverifiable or is un-vouched, then such specific expenditure is disallowable. Here no such specific identification has been done. In these circumstances, we are of the view that the estimated disallowance as confirmed by the Id. CIT(Appeals) is unsustainable. Consequently the same stands deleted. In the result, Grounds No. 2 & 3 of the assessee's appeal stand allowed."

Similarly, we note that the Id. CIT(A) has observed that the margin of the assessee has been reduced in comparison to the earlier years. It is again uncontroverted fact and cannot be disputed but the same cannot be attributed due to the lorry hire charges. There can be multiple reasons for the reduction of the margin of the assessee such as increase in the fuel or reduction in the price charged by the assessee from the parties due to competition. But no such fact has been brought on the record by the Id. CIT(A). Thus, in our considered view the reasons cited by the Id. CIT(A) for confirming the addition is not tenable.

7.1 It is also important to note that the AO accepted in the assessment order that as per the nature of business cash expenses cannot be avoided in totality. The view expressed by the AO reflects the acceptance for the nature of expenses claimed by the assessee on self made vouchers. Respectfully, following the order of the Co-ordinate Bench (supra) and considering the other factors as discussed above, we delete the addition made by the lower authorities. Hence, this ground of appeal of the assessee is allowed.

8. In the result, assessee's appeal stands allowed.

Order pronounced in open court on 07/02/2018

Sd/-

(न्यायिक सदस्य)

(S.S.Viswanethra Ravi)

Judicial Member

*Dkp, Sr.P.S

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

Accountant Member

दिनांक:- 07/02/2018 कोलकाता / Kolkata

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

1. अपीलार्थी/Appellant-South Eastern CarriersPvt. Ltd., 10, Phears Lane, 2nd Fl, Kol-12
2. प्रत्यर्थी/Respondent-DCIT, Circle-8(2), Ayakar 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