

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

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1344/Kol/2011
Assessment Year :2007-08

Manish Kumar Gupta Rainbow Building, Gandhi Market, Station Road, Barakar, Dist. Burdhaman Pin 7133 324 [PAN No.AFAPG 6357 H]	V/s.	Income Tax Officer, Ward-2(1), Parman Building, 54, G.T. Road, Apkar Garden, Asansol 713304
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri U. Dasgupta, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri S. Dasgupta, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	16-01-2018
घोषणा की तारीख/Date of Pronouncement	04-04-2018

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-Asansol dated 03.08.2011. Assessment was framed by ITO Ward-2(1), Asansol u/s 143(3)/144A of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 05.12.2008 for assessment year 2007-08.

Shri U. Dagupta, Ld. Advocate appeared on behalf of assessee and Shri S. Dasgupta, Ld. Departmental Representative appeared on behalf of Revenue.

2. At the outset Ld. counsel for the assessee submitted that grounds of appeal filed with the Memorandum of Appeal were not in concise Form and therefore these were violating the principle of Rule 8 of the Income Tax Appellate Tribunal Rule, 1963. Hence, these were revised. To this contrary,

Ld. DR raised no objection on the admission of revised grounds of appeal. Therefore, we admit the revised grounds of appeal, and accordingly proceed to hear and to dispose of the case. Hence, reproduced the revised grounds of appeal:-

“1) For that on the facts of the case the Ld CIT(A) was not justified in sustaining the addition of Net Profit based on comparative case, (when the AO has not made out a case for rejection of books) the book results of the appellant is to be accepted.

2) For that on the facts of the case the Ld. CIT(A) was not legally justified in sustaining the addition of Rs.77,08,718/- on A/c of Bulk Tickets (known as bulk agency bonus), when the entire amount issued by stockiest has been passed down the line to the retailers by way of adjustments and no profit element is embedded in such transactions, the addition made may please be deleted.

3) For that on the facts of the case the Ld. CIT(A) was not justified in sustaining the addition of Rs.4,31,155/- u/s. 40A(3) of the Act'61, and the same may please be deleted.

4) For that the appellant craves leave to add, alter amend any further grounds of appeal before or at the time of hearing.”

2. First issue raised by assessee in ground No.1 is that Ld. CIT(A) erred in sustaining the addition of net profit on the basis of comparative cases and ignoring the profit declared by it in its books of account.

3. Briefly stated facts are that assessee in the present case is an individual and engaged in the business of lottery tickets as stockiest of M/s Tiger Associates. The Assessing Officer during the year requires the assessee to furnish the purchased invoices, sale invoice and other documents for the purpose of verification. But the assessee failed to furnish the same despite several opportunities provided to him. As the assessee failed to furnish the required detail, the AO estimated the gross profit @ 2% of the total turnover which comes to ₹18,41,874/- only being 2% an amount of ₹9,20,93,707/- only. Thus, the AO treated the difference amount of ₹13,35,424/- (18,41,874.00 – the gross profit already declared Rs. 5,06,450.00) as low gross profit in the business of assessee and accordingly added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that profit shown by him in its books of

account were duly audited and audit report was duly submitted along with return of income. The AO held that gross profit declared by assessee is low without having any doubt on the purchase and sales as disclosed by him in his books of account. As such, the AO has not brought anything on record suggesting that profit declared by assessee was not correct. The assessee also submitted that profit has been estimated without rejecting the books of account. However, Ld. CIT(A) after considering the submission of the assessee allowed appeal partly by observing as under:-

“As per the assessment order, I do not find that the AO has rejected the books of account. It is also seen that though the AO has doubted the veracity of the books, ultimately he has not rejected them. But, it is seen from the assessment order that the appellant has not submitted purchase invoice and sales memos. So it may not be correct on the appellant’s part to maintain that the AO has accepted his purchase, sales and net profit. The appellant’s submission is also silent on this issue of non production of the documents. Further, as penalty the appellant’s submission before me he has prayed ‘Considering the facts of the case you are requested to please apply a fair rate and estimate the Net Profit...’. This in turn implies an admission that the GP disclosed by him is not correct. However, I do not find the Assessing Officer’s estimate of 2% also to be based on any particular rationale. Under the circumstances, the appellant’s disclosed rate of GP cannot be accepted but neither can the rate applied by the AO be confirmed as it is not seen to have any basis. In the facts of things in my opinion, it would be justifiable to look for comparable cases, ascertain the GP disclosed in them and apply an average rate to this case. While applying such rate, the AO is free to take into account Assessment Year distinguishing characteristics of the case, which, in his opinion, would lead to a variance. The appellant has submitted that the Hon’ble Settlement Commission had accepted a profit of 0.27% of the total turnover in one particular case. However, in my opinion, there can be variation between cases owing to their unique characteristics. In my opinion, therefore, acceptance of the rate of profit in one case need not necessarily mean that the same rate is valid for other cases as well. This ground of appeal is allowed subject to the direction given above.”

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

5. Ld. AR before us filed paper book which is running pages from 1 to 49 and stated that assessee is a stockiest of the main stockiest namely as Tiger Associates (TA for short) which has confirmed sales made to assessee during

the year in response to the notice issued u/s 133(6) of the Act. The Ld. AR in support of assessee's claim drew our attention on the copy of ledger maintained by TA in its books of account for the assessee which is placed on pages 4 to 22 of the paper book. The copy of the confirmation for the sale made to the assessee by TA is placed on page 1 and 2 of the paper book. Once the purchase made by the assessee from TA has been confirmed by TA then the amount of purchase shown by assessee cannot be rejected. There is only single party from whom the assessee purchased the lottery tickets. The audited financial statements were duly furnished during the course of assessment proceedings which are placed on pages 33 to 45 of the paper book. The assessee in his audited financial statement has declared the gross profit @ 0.53% and the same should be accepted for the year under consideration as the purchase from TA stand confirmed. Ld. AR further stated that Ld. CIT(A) has not considered the profit declared in the past which was also accepted by the Revenue. The assessee in the earlier years has declared the profit in the range of 0.27% to 0.53% only. Therefore the profit estimated by the Id. CIT-A on the basis of comparable cases is not justifiable. The AO during the course of assessment proceedings did not ask for the details of the party to whom the sale were made. Therefore, AO has wrongly assumed that the address of the debtors were not available. Ld. AR also submitted that the profit has been estimated without rejecting the books of account u/s 145(3) of the Act. In view of the above, Ld. AR submitted that the profit declared in his books of account should be accepted as correct profit for the purpose of taxation.

On the other hand, Ld. DR submitted that Ld. CIT(A) has given a direction to estimate the profit after considering the comparable cases after suitable verification. Therefore, the assessee is not at all aggrieved by the order of Ld. CIT(A). Ld. DR accordingly submitted that the appeal before Hon'ble ITAT does not lie. He vehemently supported the order of Authorities Below.

6. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, the AO found that the gross

profit declared by assessee is very low. Accordingly, AO required the assessee to furnish the details of purchase and sales to verify the gross profit declared by assessee but the assessee failed to furnish the same. Therefore, AO estimated the profit @ 2% of the total turnover and accordingly the difference of ₹13,75,424/- was added to the total income of assessee. However, on appeal the Ld. CIT(A) directed the assessee to estimate the profit on the basis of comparable cases and after making a suitable changes applicable to the instant facts of the case.

Now the grievance of the assessee before us is that Ld. CIT(A) erred in estimating the profit on comparative basis. As per the assessee once the books of account has not been rejected then the book profit declared by assessee in his books of account should be accepted. It is undisputed fact that assessee was given several opportunities during the course of assessment proceedings to produce his books and details of sales and purchases but assessee failed to do so. Thus, the AO resorted to estimate the profit.

We note that the purchase shown by assessee has been confirmed by TA being the main stockiest from which the lottery tickets were purchased by assessee but in our considered view, the confirmation from TA does not absolve the assessee from the non production of the books of account.

We also observed that assessee before Ld. CIT(A) accepted to apply the fair rate to estimate the net profit. This finding of Ld. CIT(A) has also not been controverted by the Ld. AR before us. Now, if we accept the profit declared by assessee in its books of account then this would result double benefit to assessee. **Firstly**, the assessee did not produce the necessary documents before the AO despite several opportunities provided to assessee. **Secondly**, the profit declared by assessee in its books of account would be accepted without verification / production of the books of account before the Authorities Below.

In our considered view, such situation is not admissible in the given facts and circumstances. Thus, we hold that the act of estimation of the profit is correct and reasonable.

Now, the issue arises what should be the basis for estimating the profit in the given facts and circumstances. We note that the AO has admitted profit @ 2% without any basis, whereas Ld. CIT(A) directed the AO to estimate the profit based on comparable cases and after making suitable changes. From the above finding of Ld. CIT(A) we note that Ld. CIT(A) has not directed to consider the financial history of the assessee in its own case, rather directed to take the average of comparable cases for determining the gross profit. In our considered view, the history of the assessee becomes very important once the profit has to be determined on estimated basis. Though there was no scrutiny proceeding u/s 143(3) of the Act in earlier years but for that the assessee cannot be held responsible as it is not under his control. Once the assessee furnished his return of income then assessee has no role in the selection of the same under scrutiny proceedings. Thus, coming to profit declared by the assessee in earlier year cannot be brushed aside for estimating the profit of the current year until and unless, there are changes in the facts and circumstances. It is undisputed fact that there is no change in the facts and circumstances in the current year of assessee's business in comparison to earlier years. In view of the above, we observe that justice would be served to assessee if the profit is estimated after taking into consideration the profit of earlier years declared by assessee as well as comparable cases after making the suitable/ necessary adjustments. Hence, this ground of assessee's appeal is allowed for statistical purpose. Accordingly, AO is directed to adjudicate the issue afresh as indicted above.

7. Next issue raised by assessee is that Ld. CIT(A) erred in sustaining addition of ₹77,08,718/- on account of bulk agency tickets.

8. The assessee purchased lottery tickets only from TA which was classified as creditor in the books of account. The assessee adjusted the credit balance of creditor namely, TA by adjusting with the prize winning ticket,

bulk agency bonus and by way of making the payment through cash or Demand Draft. However, the AO observed that the assessee has not shown any income under the head bulk agency bonus whereas the TA in its statement has adjusted the bulk agency bonus for ₹3,08,34,873/- against the assessee. On question by the AO the assessee submitted that the bulk agency bonus was distributed among the sellers handling the prize winning tickets. However, the assessee failed to substantiate the claim made by him on the basis of documentary evidence. The assessee also failed to justify the bulk agency bonus from the books of account that the bulk agency bonus received from TA own distributed among its distributors. Therefore AO disallowed bulk agency bonus for ₹77,08,718/- being ¼ of total agency bonus and added to the total income of assessee.

9. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who confirmed the action of AO by observing as under:-

“from the material on record it seen that an adjustment of the amount mentioned in the assessment order was indeed made by M/s Tiger Associate as bulk tickets from the cost of ticket supplied to the appellant. No payment or adjustment of bonus in the appellant's account has been done by M/s Tiger Associates as per their certificate. But, if prices of tickets have been adjusted then it would appear that the appellant has been supplied tickets at a lower rate which he is free to encash at market price and pocket the enhanced difference. As per further submission made before me, the appellant has claimed that ‘The stockiest adjust the amount of super tickets & special tickets from the purchase cost of tickets and in the same way sub-stockiest adjust this amount from the purchase value of tickets. So there is no any profit element includes in super tickets and special tickets.’ It would therefore appear that this adjustment is being carried forward along the chain of supply. However, this is precisely the question that AO has raised. In his words, ‘the sole creditor, Tiger Associates has adjusted the agency bonus fully in the books of the assessee only. But, it is not ascertainable that how much agency bonus had been distributed among his debtors. Because, the debtors had also not specifically confirmed that how much bulk agency bonus had been adjusted by the assessee with their payments.’ This is the issue which has not been clarified at the staged of assessment and remaining nebulous at the appellate stage also. Under the circumstances, I do not think it fit to interfere with the Assessing Officer's addition. This ground of appeal is dismissed.”

Being aggrieved by this order of Ld. CIT(A) assessee has come up an appeal before us.

10. Ld. AR before us filed the additional document in support of bulk agency bonus received by him and distributed among the sellers. These additional documents are explaining the transactions of bulk agency bonus and placed on pages 46 to 49 of the paper book. Ld. AR before us prayed by way of filing a separate application vide letter dated 16.01.2018 for the admission of additional evidence in terms of Rule 29 of ITAT, Rules, 1963.

On the other hand, Ld. DR supported the order of Authorities Below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. In this case, addition was made by AO on account of bulk agency bonus received from TA due to fact that same was not shown in the books of accounts. The view taken by the AO was subsequently confirmed by Ld. CIT(A). From the foregoing discussion, we find that assessee has clarified the bulk agency bonus received from TA before the Authorities Below as evident from the details placed on pages 23 to 26 of the paper book. We also observe that the additional documents filed by assessee are crucial for the purpose of adjudication of the instant issue. Moreover, we also note that the necessary details of bulk agency bonus have already placed on record on pages 23 to 26 of the paper book. Therefore, it can be inferred that the additional documents filed by the assessee are explaining the dispute which is already available on record. Therefore, we hold that the additional documents filed by assessee are necessary for disposal of dispute in hand. Therefore, we admit the same and restore the issue back to the file of AO for fresh adjudication in accordance with law and after considering the fresh evidence filed by assessee. Thus, the ground of assessee is allowed for statistical purpose in terms of above direction.

12. Last issue raised by assessee in ground No.3 is that Ld. CIT(A) erred in confirming the order of AO by sustaining the addition of ₹4,31,155/- u/s. 40A(3) of the Act.

13. During the course of assessment proceedings, AO observed that assessee has made the cash payment exceeding to ₹20,000/- to TA in contravention to the provision of Section 40A(3) of the Act. Accordingly, AO disallowed the same of ₹86,231/- being 20% of ₹3,31,155/- and added to the total income of assessee.

14. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who confirmed the order of AO by observing as under:-

“6. Ground No.4: In this ground the appellant is disputing the Assessing Officer's addition u/s. 40A(3). The Assessing Officer's case is that cash had been paid by the appellant directly to M/s Tiger Associates above the statutory limits. The appellant's case is that these amounts were directly collected by M/s Tiger Associate from the debtors of the appellant. However, I do not find Assessment Year evidence of such claim being submitted by the appellant. The addition made is, therefore, confirmed. This ground of appeal is dismissed.”

Being aggrieved by this order of Ld. CIT(A) assessee has come up an appeal before us.

15. Ld. AR for the assessee at the outset submitted that in similar facts and circumstances, the Co-ordinate Bench of this Tribunal in assessee's own case in ITA No.2477/Kol/2013 vide order dated 15.07.2016 has deleted the addition made by AO by observing as under:-

“6. We have heard rival parties and perused the materials available on record. From the foregoing discussion, we find that the AO has disallowed cash payment under the provisions of Section 40A(3) of the Act and the same was confirmed by the Id. CIT(A). At the outset, we find that genuineness of the payment has not been doubted by the lower authorities and various courts have held the same issue in favour of the assessee, where genuineness of the parties to whom payment in cash was not subject matter of the dispute. We find in the similar facts and circumstances where the genuineness has not been doubted, the Hon'ble jurisdictional High Court in the case of Girdharilal Goenka vs. Commissioner of Income Tax (1989) 80 CTR 0140 : (1989) 179 ITR 0122 has held as under :

"The ground of disallowance of the payments is that there was a time-lag between the date of the bill and the payment made. The object of the provision of s. 40A(3) is to check evasion of taxes so that the payment is made from the disclosed sources. Both the payer and the payee would be showing in the respective account the payments made and received. It presupposes that the transaction must be genuine transaction. In this case, genuineness of the transactions has not been disputed by the Revenue authorities. The only ground is the delay in making payment. It is not in dispute that it is the first year of the business of the assessee which was started in December, 1973, and the accounting year ended on 22nd October, 1974, and this was the first year of assessment. The payments were made almost before the close of the accounting year before Dewali. A certificate was produced from the seller, M, who stated in the certificate that they "asked the purchaser to make payment of different bills in cash as there was necessity of liquid funds for the expediency of the business". Dates of the bills and permanent account number were also mentioned in the certificate. Thus, the seller insisted upon the assessee's paying the bills in cash. The identity of the payee who was an income-tax assessee was established and the genuineness of the transactions was not doubted or disputed. The ITO has to take a pragmatic view of the matter. The ITO should take a practical approach to problems and strike a balance between the direction of law and hardship to the assessee. He should not enmesh himself in technicalities. After all, the object is not to deprive the assessee of the deduction which he is otherwise entitled to claim. Where the amount was paid in cash or received in cash, the Assessing Officer has to find out whether the transaction is genuine or not and if he finds that the transaction is genuine, he should allow the deduction. The CBDT circular No. 220 dt. 31st May, 1977 is not exhaustive; it is only illustrative and the Assessing Officer has to take into account the surrounding circumstances, considerations of business expediency and the facts of each particular case in exercising his discretion either in favour or against the assessee. There may be an oral agreement between the assessee and the seller for payment in cash. A seller may not be willing to accept cheques; cash payment may be made at the request of the payee who is also an assessee and a certificate to that effect filed; absence of banking facilities in places where cash payments are made. All such cases would come within the purview of exceptional or unavoidable circumstances. On the facts of this case, where the assessee has satisfied the Assessing Officer as to the genuineness of the payment and the identity of the payee, the circumstance that there was a delay in making payment of the bills by itself would not take the case out of the ambit of exceptional or unavoidable circumstances referred to in r. 6DD(j) and deduction of the expenditure which is otherwise allowable to him cannot be denied.

Where the assessee has satisfied the Assessing Officer as to the genuineness of the payment and the identity of the payee, and that payee insisted on cash payment the circumstance that there was a delay in making payment of the bills by itself would not take the case out of the ambit of exceptional or unavoidable circumstances referred to in r. 6DD(j)."

Further Ld. AR in support the claim of assessee that has submitted the confirmation from M/s Vira Enterprises stating that there was an agency between the assessee and Vira Enterprises which is placed on record. Respectfully following the aforesaid decisions, we are inclined to set

aside the orders of lower authorities. AO is directed accordingly, hence, this ground raised by assessee is allowed.”

On the other hand, Ld. DR fairly agreed that the issue involved is covered in favour of assessee.

16. Accordingly, respectfully following the precedent, as above, we hold that the impugned addition disallowed by the Co-ordinate Bench of this Tribunal in assessee's own case (*supra*). Accordingly, we delete the same. This ground of assessee's appeal is allowed.

16. In the result, assessee's appeal is allowed for statistical purpose as indicated above.

Order pronounced in the open court 04/04/2018

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 04/04/2018 कोलकाता ।

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

1. अपीलार्थी/Appellant-Manish Kr. Gupta, Rainbow Building, Gandhi Market, Station Road, Barakar, Dist. Burdhaman, Pin-713324
2. प्रत्यर्थी/Respondent-ITO Ward-2(1), Parmar Building, 54, G.T. Road, Apkar Garden, Asansol Pin 713304
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।