

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

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1793 &2219/Kol/2016
Assessment Year :2012-13

ACIT, Circle-10(2) P-7 Chowringhee Square, 3 rd Floor, Kolkata-69	V/s.	M/s Saraswaty Press Ltd., 11, B.T. Road, Belgharia, Kolkata-700 056 [PAN No.AAECS 6328 J]
M/s Saraswaty Press Ltd, 11, B.T. Road, Belgharia, Kolkata-700056	V/s.	DCIT, Circle-10 P-7, Chowringhee Road, 3 rd Floor, Aayakar Bhawan, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.2220/Kol/2016
Assessment Year: 2011-12

M/s Saraswaty Press Ltd.,11, B.T. Road, Belgharia, Kolkata-700 056 [PAN No.AAECS 6328 J]	V/s.	DCIT, Circle-10(2) P-7 Chowringhee Square, 3 rd Floor, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक/ की ओर से/By Appellant	Shri Rip Das, FCA
राजस्व की ओर से/By Respondent	Shri S. Bhattacharjee, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	10-07-2018
घोषणा की तारीख/Date of Pronouncement	20-07-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These three cases pertain to assessment years 2011-12 and 2012-13.
Former assessment year 2011-12 comprises of assessee's appeal ITA

No.2220/Kol/2016 arising against Commissioner of Income Tax (Appeals)-4, Kolkata's order dated 11.07.2016 passed in case No.1176/CIT(A)-4/Circle-10/Kol/14-15 involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'. Latter assessment year 2012-13 involves Revenue's and assessee's cross appeals ITA No.1793 and 2219/Kol/2016 from the very CIT(A)'s order of even date passed in case No.1873/CIT(A)-4/Circle-10(2)/Kol/14-15 in 'scrutiny' assessment proceedings.

2. We proceed assessment year-wise for the sake of convenience and brevity.

Assessment Year: 2011-12

(Assessee's appeal ITA No.2220/Kol/2016)

3. The assessee's first substantive ground pleads that both the lower authorities have erred in law as well as on facts in rejecting its Value Added Tax (VAT for short) amounting to ₹2,12,100/- written off as no longer recoverable claimed as a deduction. Both the Learned representatives take us to CIT(A)'s corresponding findings in para 3.1 of the order reading as under:-

"3.1 I have considered the submission of the AR of the appellant in the matter in the backdrop of the assessment order. I find that the AO has disallowed the sum of ₹2,12,100/- u/s.36(2)(i) of the Act. The AR in his submissions has not disputed the finding of fact by the AO that the sum of VAT was not forming part of income in the profit and loss account in any of the previous assessment ears. In fact, the appellant has submitted that it is maintaining a separate account for VAT, wherein the input and output is entered and the yearend balance is reflected in the Balance Sheet of the appellant every year. I find that nothing is routed through profit & loss account. It was also submitted that this item is a revenue neutral item and has no impact on either profits or losses of the year. The appellant has also relied upon case laws as cited in the foregoing. On a holistic consideration of the issue at hand, I am of the opinion that allowability of claim u/s. 36(2) depends on only two criteria i.e. (a) the amount off write off must have formed part of income of the assessee in any of the previous assessment years and (b) the amount must be actually written off in the books of account. I find that the appellant has indeed satisfied the second criterion (b) but as far as first criterion (a) is concerned, the appellant has not fulfilled the same. Therefore the claim of appellant cannot be allowed u/s. 36(2) of the Act. This ground is dismissed accordingly."

4. We have given our thoughtful consideration to rival contentions. The Revenue reiterates the above twin reasoning of the CIT(A) that assessee has neither routed the impugned write off through its profit and loss account nor does it satisfy the basic tenet of bad debt write off claim u/s. 36(2) of the Act

(supra). We find no reason to concur with the same. Hon'ble jurisdictional high court's judgment in (1969) 71 ITR 131 (Cal) CIT vs. Chowringhee Sales Bureau has already held that such sales tax items are revenue in nature. There is further no issue between the parties about the fact that assessee has actually written off the sum in question of ₹2,12,100/-. Coming to CIT(A) former reason that the assessee had not routed the said sum for its profit and loss account, it is not in dispute that the instant taxpayer has followed the relevant accounting treatment to be given to the VAT item(s). We thus no substance in CIT(A)'s former reason as assessee has to mandatorily comply with the relevant accounting principle regarding VAT in question. Coming to the latter issue of having not included said VAT amount as income, we are of the view that assessee's impugned write off is very much incidental to carrying out of its business activity. We thus follow hon'ble apex court's decision in (1965) 55 ITR 707 CIT vs. Nanital Bank Ltd. to conclude that assessee's impugned claim is rather allowable as a business loss u/s 28 r.w.s 37 of the Act. We accordingly delete the impugned disallowance.

5. Next issue in assessee's instant appeal is that of disallowance of earnest money deposit of ₹7,55,500/- as no longer recoverable. The CIT(A)'s findings under challenge *qua* this issue read as under:-

"4.1 I have considered the submission of the A of the appellant in the matte. I find that the appellant has claimed a deduction of ₹7,55,500/- in respect of advance (earnest money) written off. Impugned order find from the assessment order that the disallowance is made u/s 36(2) of the Act. The AR before me has claimed the said write off as allowable u/s.28 of the Act, relying upon the case as cited supra. The AR has submitted before me that in the course of normal business activity, the appellant had to participate in various tender processes with different Government organizations for which they had to pay Earnest Money. Some of the sided earnest monies could not be recovered for different reasons and after lapse of reasonable time, the same were written off since chances of recovery of the same became remote. Since those Earnest monies were paid for regular business purpose and for securing business income, writing off of the sale were to be treated as normal business expenses. Although, the appellant's AR has submitted that the earnest money was paid for regular business purpose, I find that neither before the AO nor before me, the appellant has filed any perceptible evidence in this regard. It is not understood as to whether the earnest money was given on revenue account or on capital account. Thus, I am unable to accept the ape's contentions in the matter in the absence of any cogent supporting material documents in this regard. In view of this, this ground of appeal is dismissed."

6. We have given our thoughtful consideration to rival contentions. Learned Departmental Representative fails to dispute the basic fact that the assessee has actually written off the impugned in question in respect of its deposits for participating tenders processes in different organizations recoverable. The CIT(A) has also found "**perceptible evidence**" in assessee's favour. His only view that it is not clear as to whether the said amount is in capital or revenue account. We find no merit in such reasoning. The fact remains that the assessee has made the impugned deposits so as to carry out its routine business activity of taking part in tender process. We therefore conclude the same to be revenue expenditure allowable in the nature of business loss u/s 28 r.w.s 37 of the Act since incidental to its core business activity of tenders. The assessee succeeds in its second substantive ground as well.

7. This leaves us the assessee's third and last substantive grievance challenging correctness both the lower authorities action disallowing its material supply claims of ₹28,71,827/- as discussed in CIT(A)'s order as follows:-

"6. Ground No.4

This ground is directed against the action of the AO in making a disallowance of ₹.28,71,827/- u/s 40(a)(ia) .w. section 194C of the Act. The matter is discussed at para 5 of the assessment order. At the appellate stage, the AR of the appellant submitted as follows:-

'Learned assessing Authority disallowed Rs.28,71,827/- as per provision of sec 40(i)(a) of the It Act, 1961 for non-deduction of TDS **u/s 194C** of the Act. in this connection your assessee beg to submit that learned assessing authority disallowed the above sum on account of following four parties, although details of his findings and calculations in respect of those figures were not available:

- 1) Marble Kind & Tile Co Rs. 7,63,350/-
- 2) B Con Group Rs.10,66,312/-
- 3) Sanjay Agarwal Rs. 2,06,074/-
- 4) Avidip Enterprise Rs. 8,36,091/-

Orders were placed before them for supply as well as for execution of works. In some cases of execution of contract, any requirements of materials are being procured by them from outside independent parties and not supplied by your assessee and they raised invoices separately for supply of materials and for labour when such labour charges are required. As a result in case of supply of materials, stated herein above, taxes have not been deducted at source since these are not cases coming under expression "**carrying out any work**". In other cases taxes were duly deducted. In the Memorandum

explaining the provision of Finance Bill, 2009, definition of work in sec 194C has been clarified to the effect that “*work shall not include manufacturing or supplying of materials according to requirement or specification of customer by using raw materials purchased from a person other than customer.*”

Moreover Marble Kind & Tiles Co is a regular dealer of tiles and other building materials who are used to sale those materials in their day to day business and as a result purchase of materials from them in the normal course of business do not call for any Tax Deduction at Source. However, sometimes apart from selling goods in the normal course of business, they are also doing some labour oriented jobs/fixing jobs and taxes were deducted at source on those job, when arise.

Ledger copies of above parties along with the list of bills of those parties on which taxes were deducted at source are attached. Even accepting but not admitting that taxes are required to be deducted in all the bills, then also it will be evident from those papers that learned assessing authority, in cases nos 1 to 3 above, disallowed more than what was required. He failed to consider those bills on which your assessee already deducted TDS.

However, in view of the matter stated above, your assessee begs to submit that said disallowance of Rs.28,71,827/- should be deleted.’

6.1 I have considered the submission of the AR of the appellant in the backdrop of the assessment order. Impugned order find from the facts and submissions of the AR of the appellant that admittedly TDS was not effected on such payments. The appellant's AR has submitted that the expenses paid did not form part of work as defined u/s. 194C of the Act. In support of such contentions, the AR has not submitted any evidence in this regard. It has been contended by the AR that in respect of few parties, TDS has indeed been deducted. Thus considering the entire facts and circumstances of the case, I hold that provision of section 194C are very much applicable in the appellant's case. Thus, the appellant should have made TDS on such payments. Therefore, out of the total sum of ₹28,71,827/-, I direct the AO to disallow the expenses only on such sums of monies paid/payable by the appellant on which no TDS has been effected by it, if warranted as per the relevant provision of the Act. In respect of expenses where TDS has been effected and deposited before filing the return of income u/s. 139(1), the same should be allowed. This ground is disposed off accordingly.”

8. Suffice to say, both the lower authorities are of the view that the assessee ought to have deducted TDS as the impugned expenditure pertaining to supply of materials. We quote section 194C Explanation (iv)(e) of the Act in this backdrop to conclude that there is no specific finding in lower authorities' orders under challenge that the assessee had, in fact, supplied the necessary material to its payees for manufacture or supply purposes. We therefore conclude that the CIT(A) has erred in law as well as on facts in confirming the impugned disallowance of outright material purchase. The assessee succeeds in third and final substantive ground as well as the main appeal ITA No.2220/Kol/2016.

9. We now come to latter assessment year 2012-13. The Revenue's appeal ITA No. 1793/Kol/2016 raises its former substantive ground challenging correctness of the CIT(A)'s action treating assessee's repair expenditure claim on building amounting to ₹1,07,03,835/- as revenue expenditure as follows:-

"3. Ground No.1

This ground is directed against the action of the AO in disallowing an amount of ₹1,07,03,835/- on account of repairing expenses of building treating it as capital in nature. The matter is discussed at para 3 to 3.3 of the assessment order. In course of assessments proceedings, the assessee provided the breakup of the expenses incurred as follows:

<i>Expenses incurred for repair at the site office of the company at 32 & 32/1, APC Road, Kolkata-700009</i>	<i>Rs.15,56,093/-</i>
<i>Expenses incurred for repair at the registered office as well as unit-I&II of the company</i>	<i>Rs.91,47,742/-</i>
<i>Total</i>	<i>Rs.1,07,03,835/-</i>

The AO required of the assessee to explain the nature of repairs work carried out in response to which a detailed explanation was furnished vide letter dated 03.02.2015 to the effect that the expenses were revenue in nature. However, the AO rejected the above explanation of the assessee on the ground that the repairs were of the nature of capital expenditure bringing enduring benefit to the assessee. Moreover, the AO noted that the expenditure incurred at unit-II of the company at 5/5, B.T. Road, Belghoria, Kolkata 700056 could not be allowed otherwise also, since the said premises was not owned by the assessee but owned by M/s West Bengal Ceramic Development Corporation Ltd. In this regard, the assessee had not on record any agreement between it and the owner for carrying out of repair works.

3.1 At the appellate stage, the AR of the appellant advanced his argument on the matter and filed written submission as follows:

'Learned assessing authority disallow entire expenditure of Rs.1,07,03,835/- incurred for Repairing of Buildings on the plea that none of the expenditure are of "Routine Repairs" but entirely are of Capital nature and also that no repairing expenses are allowable on rented property.

In this connection, your assessee submits that the company possesses three units namely:

- 1) Factory & Registered Office : 11, B.T. Road, Kolkata-56-Unit I*
- 2) 2nd Production Unit : 5/5 B.T.Road, Kolkata-56-Unit II*
- 3) City & Sales Office : 32&32A, A.P.C. Road, Kolkata-9*

Out of the above, 1st & 3rd property owned by the company and 2nd property was taken on rent.

Firstly, the Learned assessing authority erred in concluding that no repairing expenses are allowable on rented property since as per provision of Sec 30(a) of the Act cost of repair on rented property was also an allowable expenditure along with payment of rent of the property.

Secondly, your assessee during the course of hearing of the assessment, vide its letter dt. 03.02.2015, has fully described the nature of activities carried on from each of the property and also the reason and circumstances for which said repairing work was carried on. Learned assessing officer, without going through the merit of the letter and without fully going through the details

of expenditure, disallowed the entire expenses with a simple comment that entire expenses are of capital nature. Copy of the above letter as well as details of such expenses are attached.

All the expenses incurred are of day to day normal repairing and maintenance nature and some of them were made to ensure safety, security and benefit of the workers and staff since the properties are very old specially the city office which was built up near independence. No new structures are built up and expenses are all for maintenance of the existing structures to keep them in working condition. No new asset was created and the company did not receive any benefit of enduring nature. Hon'ble Supreme Court in the case of *Ballimal Naval Kishore vs. CIT* have clearly described the term "repairs" as follows:

'The simple test that must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure or repairs what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset into existence, nor is its object the obtaining of a new or fresh advantage. This can be the only definition repairs because it is only by reason of this definition of repairs that the expenditure is a revenue expenditure. If the amount spent was for the purpose of bringing into existence a new asset or obtaining a new advantage, then obviously such an expenditure would not be an expenditure of a revenue nature but it would be a capital expenditure, and it is clear that the deduction which, the Legislature has permitted under section 10(2)(v) is a deduction where the expenditure is a revenue expenditure and not a capital expenditure.'

In view of the matter stated above, your assessee beg to submit that the said amount of Rs.1,07,03,835/- should be allowed as regular business expenditure.'

3.2 I have considered the arguments put forth by the AR of the appellant in the backdrop of the assessment order. I have also gone through the reply furnished by the assessee in the matter to the AO during the assessment proceedings vide letter dated 03.02.2015 as well as the details furnished by with regard to the impugned expenditure. The judicial citation as submitted is also taken into account in deciding the issue. I find that the grounds on which the said expenditure was disallowed by the AO lay in two folds i.e. (a) that the expenses were not of routine in nature but bringing about enduring benefits and (b) that one of the premises was not owned by the assessee on which repair work was done. On account of juxtaposition of both sides of the contentions, I find that such matter has been adjudicated upon by the Apex Court in the case of *Ballimal Naval Kishore vs. CIT*, wherein the acid test of deciding the issue has been expounded as to whether expenditure of such kind would be considered as revenue or capital in nature. From that ruling, I find that the cardinal principle in such matter would be to gauge as to (i) whether the expenditure incurred was to bring in new assets or (ii) whether the expenditure incurred was for the purpose of obtaining new or fresh advantage, I find that neither of the two grounds could be imputed in the instant case going by the facts of the matter at hand. Further, I find that the Assessing Officer's observation that expenditure incurred on rented premises was not eligible for any deduction to be untenable since as per the provision of section 30(a) of the Act, cost of repair on rented property was also an allowable expenditure along with payment of rent of the property. In view of the foregoing discussion, I do not find any merit in the action of the AO in resorting to

make the impugned disallowance of ₹1,07,03,835/- on both facts and law for which the same is directed to be deleted. This ground is allowed.”

Learned Departmental Representative vehemently contends during the course of hearing that the Assessing Officer had rightly disallowed the assessee's impugned claim to be not incurred in routine manner and in view of the fact that the repaired premises was not in its ownership. We find no substance in either of these two arguments. We afford sufficient opportunities to the Revenue to refer to the case record for the purpose of pin-pointing any capital expenditure element in assessee's claim i.e. creation of altogether a new asset or any enduring advantage etc. There is no such rebuttal coming from the case file. The Revenue's latter argument raising ownership issue of the repaired premises also has no force as there is no such pre-condition in the Act that only self-owned asset or premises of the concerned assessee can be repaired for the purpose raising the consequential claim as revenue expenditure. The CIT(A) has duly taken into consideration hon'ble apex court's decision (supra). We therefore reject Revenue's both arguments.

10. The Revenue's latter grievance pleaded in the instant appeal seeks to revive the Assessing Officer's action disallowing its employees contribution PF/ESI u/s. 36(1)(va) of the Act on account of late payment. Suffice to say, it has come on record that the assessee had paid the sum in question of employees' contribution to PF and ESI amounting to ₹44,655/- before the date of filing its return u/s. 139(1) of the Act. Hon'ble jurisdictional high court's decision in *CIT vs. M/s Vijay Shree Ltd.* (2011) 224 Taxman 12(Cal) has already decided the very issue in assessee's favour as relied upon in the CIT(A)'s findings. We therefore reject Revenue's instant latter substantive ground as well as its main appeal ITA No.1793/Kol/2016.

11. This leaves us with assessee's cross-appeal ITA No.2219/Kol/2016 raising sole substantive ground challenging correctness of both the lower authorities' action disallowing its write off claim of excessive VAT paid

amounting to ₹13,39,900/-. Both the Learned Representatives fairly state at the outset that the instant issue is squarely covered by our findings in former assessment year 2011-12 decided hereinabove in assessee's favour in preceding paragraphs. We adopt the said discussion *mutatis mutandis* to accept assessee's impugned claim as well as its latter appeal ITA 2220/Kol/2016.

12. These two assessee's appeal ITA No.2219 and 2220/Kol/2016 are allowed and Revenue's appeal ITA No.1793/Kol/2016 is dismissed.

Order pronounced in the open court 20/07/2018

Sd/-

(लेखा सदस्य)

(Dr. A.L. Saini)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 20/07/2018

कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

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

1. आवेदक/Assessee-M/s Saraswati Press Ltd., 11, B.T.Road, Belgharia, Kolkata-700056
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6. गार्ड फाइल / Guard file.

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By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।