

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member)

**ITA No. 978/Kol/2016
Assessment Year: 2011-12**

Deputy Commissioner of Income Tax, Circle-10(2), Kolkata.....Appellant

Vs.

M/s. Vineetaz Exports Pvt. Ltd.....Respondent

24/25, Moulana Abul Kalam Azad Road

41/A, AJC Bose Road

2nd Floor

Room No. 206

Howrah - 711 101

[PAN: AAACV 8640 E]

Appearances by:

Shri Subash Agarwal, A/R, appeared on behalf of the assessee.

Shri S. Dasgupta, Addl. CIT, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : July 16th, 2018

Date of pronouncing the order : September 7th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the revenue directed against the order of the Commissioner of Income Tax (Appeals) - 4 Kolkata, (hereinafter the 'Ld. CIT(A)'), dt. 22/02/2016, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2011-12.

2. The assessee is a company and is in the business of manufacturing and trading of textiles and machinery products. It filed its return of income on 30/09/2011, declaring total income at Rs.1,77,45,540/-, for the Assessment Year 2011-12. The Assessing Officer passed an order u/s 143(3) on 10/03/2014, determining the total income at Rs.6,30,05,406/-, *interalia* disallowing the claim of expenditure of commission paid to foreign agents for exports, ad-hoc disallowance of 20% of the salary paid to employees u/s 40A(2), disallowance entertainment expenditure and expenditure incurred on foreign tours, disallowance u/s 40(a)(ia) of the Act etc. Aggrieved, the assessee carried the matter in appeal. The ld. First Appellate Authority granted part relief.

3. Aggrieved on the issues on which the ld. CIT(A), granted relief to the assessee, the revenue is in appeal before us on the following grounds:-

“(1) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of commission paid to foreign agents of Rs. 2,24,46,915/-.

(2) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of Disallowance of salary paid to employees/executive of Rs. 12,49,999/-.

(3) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of Disallowance of entertainment expenses of Rs.14,48,806.14/-.

(4) That the Ld. CIT (A) has erred in law as well as on fact by deleting' the addition made on the account of Disallowance of expenses on foreign tours of Rs.24,82,434.96/-.

(5) That the Ld. CIT (A) has-seed in law as well as on fact by deletfn9the addition made on the account of Disallowance of designing fees of Rs. 6,72,808/-.

(6) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of Disallowance of expenditure related to sampling expenses of Rs. 40,00,684/-.

(7) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of Disallowance u/s 14A of Rs.34,60,969/-.

(8) That the Ld. CIT (A) has erred in law as well as on fact by deleting the addition made on the account of Disallowance of payment towards PF & ESI of Rs.3,88,475/-.

(9) That the appellant craves to add, delete or modify any of the grounds of appeal before or at the time of hearing.”

4. Heard Shri S. Dasgupta, Addl. CIT, D/R, on behalf of the revenue and Shri Subash Agarwal, Id. Counsel on behalf of the assessee. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5. The first issue is the deletion of disallowance being commission paid to foreign agents of Rs.2,24,46,915/-.

5.1. The Id. First Appellate Authority gave a factual finding that the assessee had achieved total export turnover of Rs.102.28 Crores, during the year and that commission was paid to foreign agents, only on an export turnover of Rs.22.92 Crores. He held that

commission was paid only in those cases where it was required to be paid and that the assessee has produced all details, co-relating the commission paid with shipping bills, export invoices, BRC, bank payments advices etc. The Id. CIT(A) pointed out that the commission in question was mentioned in the corresponding export invoices and relevant customs documents. He also held that most of the foreign agents were regular agents of the assessee, who were associated with the assessee company for a number of years and that commission was paid to these agents on export turnover made through them for all the earlier Assessment Years as well as for the exports made through them for the subsequent Assessment Years and that these claims for expenditure and that these claims for expenditure were allowed by the revenue. Thus, on the ground of consistency, this claim of the assessee has to be allowed. We find force in these findings of the Id. CIT(A)

5.1.1. The Id. CIT(A) further held that, the evidence filed demonstrates that the disallowance cannot be made just because there was no written agreement between the assessee and its foreign agents. He also found fault with the comparison of the rate of commission paid to a domestic agent with the rate of commission paid by the assessee to a foreign agent. He held that the chart furnished by the assessee in support of the rate of commission paid justifies the payment. He relied on the decision of the Hon'ble Supreme Court in the case of *CIT v Toshoku (1980) 125 ITR 525 (SC)*, for the proposition that no TDS is required to be made in this case as the foreign agents have rendered services outside India and as they do not have any permanent establishment anywhere.

5.2. We find no infirmity in these factual findings of the Id. CIT(A). The Id. D/R, could not controvert these factual findings of the Id. CIT(A). Hence, we uphold the order of the Id. CIT(A) and dismiss Ground No. 1 of the revenue.

6. Ground No.2, is on the issue of disallowance of salary paid to employees and executives @ 25%, by invoking Section 40A(2) of the Act.

6.1. The Id. CIT(A) found that the assessee furnished a complete list of details such as qualification, experience, association of the relatives, who are the employees of the assessee, nature of work handled by them etc. with comparative charts. He held that the Assessing Officer has made an ad-hoc disallowance of 25%, without giving any reason, as to why it is excessive or unreasonable.

6.2. In our view, the disallowance u/s 40A(2), cannot be made on ad-hoc basis. The Assessing Officer is bound to demonstrate that the payments made is excessive and unreasonable, as compared to the fair market value of such services. No such finding is given by the Assessing Officer. Thus, we uphold the finding of the Id. CIT(A) and dismiss this ground of the revenue.

7. Ground No. 3, is on the deletion of a disallowance of entertainment expenditure by the Id. CIT(A).

7.1. The Id. CIT(A) at para 6.3. page 27 of his order, has confirmed the disallowance to the extent of Rs.13,09,895.55/-, out of the total disallowance and for the balance, he held that the Assessing Officer has not brought on record any material to establish that the expenses in question were not incurred for the purpose of business or are personal in nature. He further held that the assessee has substantiated its claim to the extent he had given relief. We have gone through the factual finding of the Id. CIT(A). We find no infirmity in the same. The Id. D/R, could not controvert the factual finding of the Id. CIT(A).

7.2. Under these circumstances, we uphold the order of the Id. First Appellate Authority and dismiss this Ground No. 3 of the revenue.

8. Ground No. 4, is on the disallowance made of expenditure incurred on foreign tours.

8.1. The Id. CIT(A) at para 7.3. of his order, held that the assessee is engaged in business of exports and the Directors have to visit foreign countries in connection with these business meetings on many occasions. He further held that the assessee company has furnished all the required details in support of the claim of foreign travel expenses. From these details, the Id. CIT(A) found that only in one case, the wife of the employee, Mr. Bijay Mawandia, accompanied the employee on a foreign tour. He directed that the disallowance be restricted to the extent of expenditure incurred for the foreign tour of the wife of Mr. Bijay Mawandia. He also recorded on facts that the Assessing Officer has not brought on record any material to establish that, the expenses were personal in nature. The Id. D/R, could not controvert these factual findings of the Id. CIT(A). We find no infirmity in the factual findings.

8.2. Hence we uphold the order of the Id. First Appellate Authority and dismiss this ground of the revenue.

9. Ground No. 5, is against the deletion of disallowance of designing fees.

9.1. The Assessing Officer found that the 15CA certificates demonstrate that the assessee had paid designing fee to the extent of Rs.6,27,868/-, and that this fees was remitted in US \$ (dollars) to the payee at United Kingdom, without deducting tax at source. He disallowed the expenditure u/s 69C of the Act. The Id. CIT(A) at para 8.2., held that the assessee has filed complete details along with supporting evidence to prove that the payments is question were made from purchases and import of labels, buttons, tags, hangars etc. for the purpose of manufacturing and fabrication of goods which had to be exported. He held that the term "fabrication services" was wrongly used and in fact this was a payment made for import of goods and he deleted the disallowance.

9.2. We find no infirmity in this order of the Id. CIT(A). The addition u/s 69C, cannot be made when admittedly the expenditure in question has been recorded in the books of accounts. No tax need be deducted at source u/s 195 of the Act for purchase of goods. Thus, the disallowance u/s 40(a)(ia) of the Act, is also uncalled for. In the result, Ground No. 5 of the revenue is dismissed.

10. Ground No. 6, is against the deletion of the disallowance of expenditure relating to sampling expenses.

10.1. The assessee claimed expenses towards sampling to the tune of Rs.40,00,684/-. This was less than ½% of the turnover of the assessee. The Id. CIT(A) gave a finding that such expenditure was essential for the export business of the assessee and that the assessee has provided all necessary evidence in support of its claim. He pointed out that the assessee had a dedicated sampling department. As the Assessing Officer could not bring on record any evidence against the assessee, the Id. CIT(A) deleted the disallowance.

10.2. This factual finding of the Id. CIT(A), could not be controverted by the Id. D/R. Thus, we uphold the same and dismiss Ground No. 6 of the revenue.

11. Ground No. 7, is against the deletion of disallowance u/s 14A.

11.1. The Id. CIT(A) deleted this disallowance by observing that, the assessee has sufficient interest free funds for making investment and that no interest bearing funds were utilized for investments. This factual analysis could not be controverted by the Id. D/R. This decision of the Id. CIT(A) is in line with the propositions of law laid down by the Hon'ble Bombay Court in the case of *HDFC Bank Ltd. vs. DCIT [2016] 383 ITR 529 (Bombay)*.

11.2. Hence, we find no infirmity in this order of the Id. CIT(A), we uphold the same and dismiss this ground of the revenue.

12. Ground No.8, is directed against the deletion of disallowance of PF & ESI payments.

12.1. Admittedly, these amounts were paid before the due date of filing of the return. The Id. CIT(A) delete the disallowance by following the decision of the Hon'ble Jurisdictional High Court in the case of *M/s. Akzo Nobel India Ltd. Vs CIT in ITA 110 of 2011 order dated 14.06.2016*. We find no infirmity in such finding of the Id. CIT(A) and accordingly, dismiss Ground No. 8 of the revenue.

13. In the result, appeal of the revenue is dismissed.

Kolkata, the 7th day of September, 2018.

Sd/-
[S.S. Viswanethra Ravi]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 07.09.2018
{SC SPS}

Copy of the order forwarded to:

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24/25, Moulana Abul Kalam Azad Road
41/A, AJC Bose Road
2nd Floor
Room No. 206
Howrah - 711 101**

2. Deputy Commissioner of Income Tax, Circle-10(2), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches