

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA Nos. 6658,6659/Del/2013
Asstt. Years 2003-04, 2005-06

Vygon India (P) Ltd. C/o M/s. RRA Taxindia D-28, South Extension, Part-1 New Delhi – 110 049 PAN AABCV0776C	Vs.	ACIT, Circle-17(1) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ashwani Taneja, Advocate Shri Rajat, CA
Department by :	Shri Amit Jain, Sr. DR
Date of Hearing	19/06/2018
Date of pronouncement	17/ 09/2018

ORDER

PER AMIT SHUKLA:

The aforesaid appeals have been filed by the assessee against separate impugned order of even date 12.9.2013, passed by Ld. CIT(Appeals) 19, New Delhi, for the quantum of assessment passed u/s 143(3) for the assessment year 2003-04 and assessment year 2005-06. Since similar issues are involved in both the appeals including the grounds raised, therefore, same were heard together and are being disposed of by way of this consolidated order. For the sake of

ready reference grounds of appeal for the assessment year 2003-04 are reproduced hereunder:-

1. *“That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in disallowing a sum of Rs. 4,13,855/- out of staff incentive under the main head salary and bonus by holding that it pertains to prior period whereas assessee has submitted complete working for calculation of staff incentive based on performance during the financial year 2002-03.*
2. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in disallowing a sum of Rs.4,87,968/- out of performance based incentives payable to employees by holding that the assessee has not paid these before the due date of furnishing of return and be disallowed in view of section 43B of the Act.*
3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.25,48,000/- on adhoc basis at imaginary rate of gross profit of 40% as against 35.52% as declared by the assessee whereas assessee company given the reasons for decline in the gross profit rate as increase in the value of Euro resulted in higher purchase price.*
4. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in disallowing a sum of Rs.25,000/- out of sales promotion expenses and that too without any basis and with providing adequate opportunity of hearing.*
5. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld.*

AO in disallowing a sum of Rs.50,000/-out of conveyance expenses and that too without any basis and with providing adequate opportunity of hearing.

6. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in disallowing a sum of Rs.50,000/- out of travelling expenses and that too without any basis and with providing adequate opportunity of hearing.*

7. *That in any case and in any view of the matter, impugned disallowance and impugned assessment order are bad in law, illegal, unjustified, contrary to facts & law and based upon recording of incorrect facts and finding, without giving adequate opportunity of hearing, in violation of principles of natural justice and the same deserves to be quashed.*

8. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest U/S 234B of Income Tax Act, 1961.”*

2. The facts in brief are that qua the issue raised in ground No. 1 are that, assessee company had made a provision of Rs. 15,43,815/- on account of staff incentive for the “year 2002” on 31.12.2002. Ld. AO treated Rs. 3,85,953/- (1/4th of Rs. 15,42,815/-) as prior period expense on the ground that the total provision was made for the calendar year 2002; and therefore, the provision was disallowed on proportionate basis. Further, the assessee company made a provision for staff incentive of Rs. 37,203/- (5,345 + 31,858/-) on 29.8.2002 based on the turnover achieved between 01.01.2002 to 30.4.2002. Ld. AO on perusal of the details of staff incentives noted that assessee has claimed certain amount which relate to the prior period and held that

3/4th pertains to prior period needs to be disallowed and also 1/4th of the total the provision for the staff incentive of Rs. 15,42,815/-.

3. Ld. CIT (A) has confirmed the said disallowance on the ground that such a provision cannot be allowed under the mercantile system of accounting during the financial year 2002-03 and assessee could not produce any evidence in support of this claim.

4. Before us, Ld. Counsel has submitted that the staff incentive is based on achieving certain sales targets and excellent performance of employees and the incentive payable, if any, is determined only after the end of the period for which the incentive plan is fixed. Since, the incentive based sale targets have been fixed on calendar year basis and the assessee is required to wait till the end of the calendar year to make a provision for the same, therefore, assessee cannot provide for incentive payable for the proportionate period (01-01-2002 to 31-02-2002) assuming that the employees shall meet their sales targets at the end of 31.12.2002. It was pointed out that if the assessee resorts to providing proportionate incentive for three months, then it would qualify as a provision for contingent expenses and would in any case be disallowed under the Income Tax Act. In view of these fact and circumstances he submitted that the aforesaid provisions made on account of staff incentive have accrued in the impugned year and the liability of the assessee company ahs crystallized in the year under consideration and therefore this amount being an actual provision is an allowable expense. In support, Ld. Counsel has also drew our attention to the copy of computation of income, audited balance sheet and profit and loss account for assessment year 2003-04, details of other incentives as filed in the paper book including copy of history chart showing the treatment of expenses for incentives right from the assessment year 2002-03 to 2010-11.

5. On the other hand Ld. DR strongly relied upon the order of the AO as well as Ld. CIT (A).

6. We have considered the rival submissions and also perused the relevant finding given in the impugned orders. The assessee has made provision for the staff incentive based on achieving certain sales targets and performance of employees on which the incentive was payable. The same was determined only after the end of the period for which time is fixed. Since the incentive was based on sales target which has been fixed on calendar year basis, therefore, assessee was required to wait till the end of the period to make provision of the same and based on that the incentive payable for the proportionate period i.e. 1.1.2002 to 31.4.2002 has been made. If the provision made for the sales incentive is based on actual proportionate basis based on its past history, then such a provision has to be allowed because, here in the case of the assessee sales incentive is based on sale target fixed on calendar year basis, therefore, the provision for staff made incentive made on 31.12.2002 to represent the actual sale target and towards the actual liability crystallizing in the impugned year itself. Once the provision is based on actual expense directly directing to the financial year 2002-03 the same has to be allowed as expense. Before us, Ld. Counsel has given us the history chart showing treatment of expenses for incentives to staff in the previous and subsequent years right from the assessment year 2002-03 to 2010-11 and from there he pointed out that the figure of mercantile system of accounting provided at the end of the calendar year and the total incentive for the entire financial year. From the perusal of the same, we find that the assessee has actually claimed on the basis of actual expenditure incurred and hence same cannot be disallowed on the ground that it pertains to the prior period. Accordingly, ground No. 1 as raised by the assessee is treated as allowed.

7. Now coming to the issue of disallowance of Rs. 4,87,968/- which was based on performance based incentive payable to the employees, the same has been disallowed by the Revenue authorities on the ground that assessee has not paid these amount before the due date of furnishing the return and hence, is disallowable in view of section 43B. Ld. AO and Ld. CIT (A) have made the disallowance out of performance based incentive payable to the employees treating the payments as bonus to be covered by the provision of section 36(1)(ii) and hence, if such an amount has not been paid before the due date of furnishing of return of income same is to be disallowed u/s 43B.

8. On the perusal of the relevant facts as culled out from the impugned order and submissions made by the assessee it is noticed that the assessee has claimed staff incentive and anniversary incentive amounting to Rs. 5,00,226/- and Rs. 1,65,000/- respectively which were payable as on 31.3.2003. In so far as the amount of anniversary incentive is concerned, same has been paid before the due date of return of income and only the amount of Rs. 3,33,968/- out of sale incentive was paid beyond the due date. It is not the case of the Revenue that such an additional payment by the assessee to the employees is not based on commercial expediency which otherwise is allowable u/s 37. Ld. AO and Ld. CIT (A) on the contrary have held that it is in the nature of the 'bonus' within the meaning of section 36(1)(ii) and hence its allowability is subject to provision of section 43B. Before us, judgment of Hon'ble Jurisdictional High Court in the case of Shriram Pistons & Rings Ltd. Vs CIT reported in (2008) 307 ITR 363 (Delhi) has been brought to our notice by the Ld. Counsel, wherein the Hon'ble High Court has considered, where 'good work reward' given by the assessee to the employees whether constitutes bonus within the meaning of section 36(1)(ii) or not, the Hon'ble Court noted that bonus has though not been defined anywhere but for the

purpose of industrial law, four types of bonus have been recognized which are as under :-

- a) Production bonus; b) Contractual bonus; c) Customary bonus; and d) Profit sharing bonus.

The Hon'ble Court held that the good work reward does not fall in any one of these categories. Further the Hon'ble Court has relied upon the judgment of Delhi High Court in the case of CIT vs. Kelvinator India Ltd., wherein it was held that bonus is related only to the profit that a company makes and is not relatable to production incentive. Accordingly, it was held that such a reward is allowable as business expenditure u/s 37(1).

9. Here also the nature of payment is performance based incentive payable to the employees and cannot be reckoned as bonus as envisaged u/s 36(1)(ii) and therefore, such a disallowance u/s 43B cannot be justified. Thus, respectfully following the judgment of Hon'ble jurisdictional High Court we hold that such a payment of incentive which is not in the nature of bonus cannot be disallowed u/s 43B but has to be allowed as business expenditure u/s 37(1). Accordingly ground No. 2 is allowed.

10. In Ground No. 3, assessee has challenged the addition of Rs. 25,48,000/- on the adhoc basis by taking GP rate of 40% as against 35.52 % declared by the assessee. The AO noted that there is a decline in GP rate in the current year as compared to the GP of asstt year 2002-03 which is at 35.52% as against GP rate of 46.82% shown in the immediately preceding year. In response to the show cause notice by the Assessing Officer, assessee has given reasons for fall in GP which was mainly increase in the value of Euro which resulted in higher import purchase and increase in the charges on account of duty, freight, clearing etc. which had increased substantially in this

year. Ld. AO held that assessee could not produced any evidence for comparing the sale price of the goods so purchased i.e., at what rate the goods were sold in A.Ys. 2002-03 and 2003-04. Accordingly, he held that even though the cost of purchase have increased but in absence of evidence of sale price, the GP rate shown in this year is not acceptable and accordingly, he estimated the GP @ 40% and consequently made the disallowance of Rs. 25,48,000/-.

11. Ld. CIT(A) has confirmed the said addition relying upon the finding of the AO.

12. After hearing both the parties and on perusal of the relevant material based on record, we find that neither the AO nor Ld. CIT(A) have either rejected the books of accounts or have pin pointed any specific defect in the trading account. The assessee has demonstrated that the fall in GP rate was due to substantial increase in Forex rate i.e., increase of import in Euro which was approximately 18% increase in the impugned year as compared to the earlier years and there was increase in purchase cost also which directly affected the gross profit. Similarly, it was pointed out that there was increase in charge of duty, freight, clearing etc. which also led to the increase in the direct overheads factors alone amounted to Rs. 72,88,545/-. The assessee in his reply to the AO has given detail justification for decline in gross profit and also produced entire set of books of accounts along with all the bills as mentioned in the reply filed before the Assessing Officer, (copy of which as appearing at page 90-91 at the paper book). Once the assessee's books of account has neither been rejected nor any discrepancy has been pointed out, we do not find any reason for such an adhoc estimate of GP and thereby making addition on the profit of the assessee. Accordingly, ground No. 3 as raised by the assessee is allowed.

13. Issues raised in ground Nos. 4 and 5 are on account of disallowance sum of Rs. 25,000/- out of sales promotion expenses and disallowance of sum of Rs. 50,000/- out of conveyance expenses. The AO has made the disallowance on the ground that possibility of personal use cannot be ruled out. Ld. CIT (A) too has confirmed the said addition made by the AO.

14. Before us Ld. Counsel submitted that, assessee has produced complete set of books of accounts, bills and vouchers etc. and also given the details of sales promotion and conference expenses which are appearing at pages 82 to 86 of the paper book and also details of travelling and conveyance expenses which are appearing at page 116 to 122. The Revenue, without pointing out any defect in such details and evidences cannot make such adhoc disallowance. On the other hand Ld. DR strongly relied upon the order the AO and Ld. CIT (A).

15. After considering the relevant finding given in the impugned order as well as material preferred to before us, we find from the perusal of the details of the conference / sales promotion as appearing in paper book, the assessee has given the entire details of conference held, the cost of stall at various places and also the details of expenses incurred by the staff. On such details, no discrepancy whatsoever has been specified by the authorities below except for stating that some of the expenses cannot be said to be incurred for the business purpose cannot be upheld. Thus, in so far as disallowance on account of sales promotion expenses same cannot be disallowed and same is directed to be deleted. Similarly qua the conveyance expenses also entire details date wise alongwith bill/voucher number has been given in which no discrepancy has again been pointed out by the Assessing Officer, therefore, such an adhoc disallowance cannot be sustained. Same is directed to be deleted. Lastly, on the issue of disallowance of

travelling expenses of Rs. 50,000/-, this again is based on similar reason for personal expenditure which in the case of assessee company cannot be disallowed if all the details have been given and all the entries in the books of accounts on day to day basis and supported by the bills without finding any irregularity for specific instance such a disallowance is uncalled for and same is directed to be deleted.

16. In so far as the charging of interest u/s 234B is concerned the same is consequential.

17. In the result appeal of the assessee is allowed.

18. It has been admitted by both the parties that similar facts and issues are involved and even the reasons given by the lower authorities which are the same. Here in this year also the assessee has challenged:-

- i) Disallowance of sum of Rs. 9,28,896/- out of staff incentive by treating it as prior period;
- ii) Disallowance of Rs. 53,750/- as sales incentives;
- iii) Addition of Rs. 1,00,85,890/- on adhoc basis and GP rate 40% as against 27.48%;
- iv) Disallowance of Rs. 50,000/- out of conveyance expenses;
- v) Disallowance of Rs. 75,000/- out of travelling expenses.

19. Since we have already dealt and discuss the issues in the appeal for the assessment year 2003-04, therefore, our reasoning given for deletion of each and every addition will apply mutatis mutandis for these year also, because admittedly similar facts are permeating in this year also and reasoning given by the Authorities below are same. Accordingly, assessee's appeal for the A.Y. 2005-06 is allowed.

20. In the result both the appeals are allowed.

Order pronounced in the Open Court on 17th September, 2018.

sd/-

sd/-

(G.D.AGRAWAL)
PRESIDENT

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 17/09/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi