

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI A.T.VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.484/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2012-13)

Abhoy Kumar Pandey 9, Akshoy Dutta Lane, Bally, Howrah-711201	Vs.	ITO, Ward-47(4), Kolkata
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AFSP 7087 H		
(Assessee)	..	(Revenue)

Assessee by : Shri M.D. Shah, AR
Respondent by : Shri Radhey Shyam, CIT DR

सुनवाईकीतारीख/ Date of Hearing : 31/12/2018

घोषणाकीतारीख/Date of Pronouncement : 06/03/2019

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the Assessee pertaining to assessment year 2012-13, is directed against an order passed by the learned Commissioner of Income Tax (Appeals)-14, Kolkata (in short the Id. CIT(A)], which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short the Act) dated 18.03.2015.

2. The grievance raised by the assessee are as follows:

1. FOR THAT the Ld. CIT(A) was not justified in law in upholding addition of Rs. 5,82,626/- on account of non-reconciliation of commission received from BSNL merely relying on entry in 26AS statement completely ignoring the ratio of the judgement of Hon'ble Delhi High Court in the case of 'Court on its Own Motion v. UOI and Ors(W.P.)(C) 2659/2012 & W. P.(C) 5443/2012 dated 14-3-2013.

2. FOR THAT the Ld. CIT(A) did not appreciate the petitioner's written submission in proper perspective and he was not justified in arbitrarily sustaining estimated disallowance of discount to field staff and salary to staff to the tune of 15% of the expenses made.

3. FOR THAT the Ld. CIT(A) erred in law in sustaining disallowance to the tune of Rs. 1,33,500/- on account of advertisement charges U/S 40(a)(ia) although no TDS was deductible under the law on the said expenses as the sums were paid to various advertisers through agent and each payment being below threshold limit for deduction of TDS.

4. FOR THAT the Ld. CIT(A) was not justified in sustaining 15% of ad hoc disallowance of bona fide and genuine supervision charges without bringing any material on record for confirming such disallowance.

5. FOR THAT the Ld. CIT(A) failed to appreciate that the legal charges paid amounting to Rs. 34,700/- to Advocate which was inclusive of various reimbursement of expenses and such payment cannot be subjected for Tax Deducted at Source.

6. FOR THAT the Ld. CIT(A) omitted to adjudicate the appellant's submission and Grounds of Appeal in relation to disallowance of Rent U/S 40(a)(ia) amounting to Rs. 3,98,193/- paid to three different owners cash payment being below the threshold limit prescribed for deduction of tax for rent.

7. FOR THAT the Ld. Authority below most arbitrarily upheld the disallowance to the tune of 15% on genuine and bona fide business expenses aggregating to Rs. 30,56,072/- on account of Conveyance, General Charges, Misc. Expenses, Printing, Repairs and maintenance. Tour Expenses which disallowance is liable to be deleted at this forum.

8. FOR THAT the Ld. CIT(A) erred in law in not appreciating petitioner's submission or Service Tax liability of Rs. 20,90,729/- without at all considering the cited case law and facts and circumstances of the case.

Your appellant craves leave to add supplement or amend further ground or grounds at the time of hearing.

3. Ground no. 1 raised by the assessee relates to addition of Rs. 5,82,626/- on account of non-reconciliation of commission received from BSNL.

4. Brief facts qua the issue are that the assessee is the proprietor of M/s International Telecom Network and is serving as a BSNL franchisee and the marketing partner of BSNL. In respect of commission and discount received from BSNL a sum of Rs. 1,65,71,193/-, the assessee filed sanction memos that out of Rs. 1,65,71,193/-, Rs. 20,94,135/- received as service tax on 24.02.2012 as reflected in ITS details, and Rs. 65,67,998/- received as service tax on 31.03.2012 as reflected in ITS details. But the assessee has also filed another two sanction memos of service tax of Rs. 2,92,131/- and 19,956/- which were not tallied with payments as reflected in ITS details. And as such, these two memos of service tax are not considered. Therefore, out of commission and discount received of Rs. 1,65,71,193/- (Rs. 20,94,135/- + Rs. 65,67,998/-) Rs. 86,62,133/- was received as service tax. Hence gross receipt of commission and discount of the assessee is Rs. 79,09,070/- (Rs. 1,65,71,193/- - Rs. 86,62,123/-). But the assessee has shown its gross receipts of commission and discount of Rs. 73,26,444/- in his return of income. Hence, an amount of Rs. 5,82,626/- (Rs. 79,09,070/- - Rs. 73,26,444/-) as

commission and discount has escaped assessment. As such Rs. 5,82,626/- was added back to its total income as undisclosed commission and discount.

5. Aggrieved by the addition made by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the addition made by the Assessing Officer.

6. Aggrieved by the order of the Ld. CIT(A) the assessee is in appeal before us.

7. The Id. Counsel for the assessee reiterated the submissions made before the authorities below whereas the Id. The Id. DR has primarily reiterated the stand taken by the Assessing Officer which we have discussed in our earlier para and the same is not being repeated for the sake of brevity.

8. We have heard both the parties and perused the material available on record. We note that the assessee was unable to reconcile the difference in Form 26AS and Id. Counsel also fairly agreed with us that assessee has failed to reconcile the difference. However the counsel submitted before us that the entire difference of Rs. 5,82,626/- should not be treated as income of the assessee. Only the gross profit rate should be applied on Rs. 5,82,626/-. The Assessing Officer as well as Id. CIT(A) both were wrongly treated the entire receipt as undisclosed income of the assessee instead to tax the profit element. We note that the gross profit rate of assessee is 5% therefore to meet the end of justice, we are of the view that ad hoc disallowance @ 6.5% should be sustained on the differential amount of 26AS to the tune of Rs. 5,82,626/- which comes to Rs. 37,870/-. Therefore we direct the Assessing Officer to disallow, only 6.5% of Rs. 5,82,626/-. Accordingly, we allow this ground partly.

9. Ground no. 2 raised by the assessee relates to estimated disallowance of discount to field staff and salary to staff to the tune of 15% of the expenses made.

10. Brief facts qua the issue are that the assessee claimed discount and salary paid to field staff at Rs. 31,90,617/- and Rs. 19,52,536/- respectively and support of such claim the assessee has filed before Assessing Officer various names and phone numbers of Easy Recharge provider but Assessing Officer noted that they were not at all staff of the assessee. Verification of phone numbers were made and reported that they are all easy recharge providers of locality and getting 2.5% discount on recharge amount from the BSNL franchisee assessee concern and they were not getting any salary from the assessee. In this respect Assessing Officer issued show cause notice. In response to show cause notice, assessee has made a reply without any supporting evidences, therefore Assessing Officer did not accept the same. The assessee was given second opportunity by giving an another show cause notice dated 10.03.2015 duly served on 11.03.2015 but the assessee could not substantiate its claim as reasonable. The assessee made sales of Rs. 9,44,97,724/- and allowed discount @ 2.5% i.e. Rs. 23,62,443/- to the Easy Recharge provider. Hence Rs. 27,80,709/- (Rs. 31,90,617/- + Rs. 19,52,536/- - Rs. 23,62,443/-) was disallowed and added back to the total income.

11. Aggrieved by the addition made by the Assessing Officer the assessee carried the matter in appeal before the Ld. CIT(A) who has partly allowed the grounds raised by the assessee.

12. Aggrieved by the order of the ld. CIT(A) the assessee is in further appeal before us. The ld. DR for the revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. On the other hand, ld. Counsel relied on the submissions made before authorities below.

13. We have heard both the parties and perused the material available on record. We note that the Assessing Officer has not quoted various cases in respect of salary paid by the assessee found to be bogus. He has not pointed out any reason by which it can be inferred that the assessee's employment of persons on salary

would have been for non-business purposes and to inflate the expenses. Apart from this we note that the discount allowed to field staff were for the purpose of assessee's business therefore it is allowable expenses u/s 37 of the Act. We note that the Assessing Officer could have ventured into estimation only after rejecting books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, the Assessing Officer has not passed any order u/s 144 of the Act. The Assessing Officer thus without rejecting books of accounts of the assessee has gone for estimation on suspicion and conjectures that the assessee may be inflating its expenses by paying salary to staff and allowing discount to field staff. Therefore, action of the Assessing Officer is not acceptable. On appeal by the assessee, the Id. CIT(A) held that in order to protect the interest of revenue, it would be suffice to make an estimated disallowance of 15% of the claim of the salary. We note that Id. CIT(A) also sustained the addition based on estimation which is not acceptable for the reasons given above.

As regards the discount claimed by the assessee the Id. CIT(A) noted that discount allowed by the Assessing Officer as per his own estimates is more than the amount claimed by the assessee, therefore Id. CIT(A) restricted the claim of the assessee to the lesser of the two figures.

However, we note that assessee claimed discount given to field staff at Rs. 31,90,617/- and salary paid at Rs. 19,52,536/-. The Assessing Officer computed the discount @ 2.5% at Rs. 9,44,97,724/- which comes to Rs. 23,62,443/-; as against the claim of the assessee to the tune of Rs. 31,90,617/-. Thus, the Assessing Officer made the total disallowance of Rs. 27,80,709/- (31,90,617 + 19,52,536 – 23,62,443) which is hereby deleted.

14. Ground nos. 3 and 4 raised by the assessee relate to disallowance to the tune of Rs. 1,33,500/- on account of advertisement charges u/s 40a(ia) of the Act and 15% ad hoc disallowance of supervision charges Rs. 1,69,207/- (15% of Rs. 11,28,047/-).

15. The brief facts qua the issue are that the assessee has claimed the Advertisement charge paid to Mr. Subir Das at Rs. 6,28,978/- during the F.Y. 2011-12. Assessee also paid Legal charges to Mr. Legum Jure at Rs. 2,41,500/-. In show cause notice issued by the Assessing Officer the assessee was asked to offer explanation as to why advertisement charge paid to Mr. Subir Das and legal charges paid to Mr. Legum Jure should not be disallowed u/s 40a(ia) of the Act. In response the assessee submitted explanation but the Assessing Officer rejected the assessee's explanation and made addition of Rs. 6,28,978/- and Rs. 2,41,500/- respectively.

The Assessing Officer has also disallowed supervision charges of Rs. 11,28,044/- u/s 40a(ia) of the Act on the ground that no TDS was deducted on contractual payments to supervisors.

16. On appeal, the Id. CIT(A) deleted the addition partly. Aggrieved the assessee is in appeal before us.

17. We have heard both the parties and perused the material available on record. We note that the Id. CIT(A) deleted the addition of Rs. 4,95,478/- which pertains to advertisement expenses, as the expenses were related to purchase of goods/material on which no TDS is required to be deducted. However, Id. CIT(A) has confirmed the addition for the balance amount of Rs. 1,33,500/- (Rs. 6,28,978/- - Rs. 4,95,478/-)

However for the balance amount of Rs. 1,33,500/- as confirmed by Id. CIT(A), the Id. Counsel explained the Bench that the recipient of the said amount has shown in his return of income, as income and offered the taxes thereon. We find merit in the submissions made by the counsel that if the payee has included the receipts of Rs. 1,33,500/- in his books of accounts and has offered for taxes then disallowance on account of non-deduction of TDS, will not arise. The Id. DR for the revenue has fairly agreed with the submission made by Id. Counsel, therefore, we remit this issue back to the file of Assessing Officer with the direction to

examine whether receipts of Rs. 1,33,500/- has been offered for taxation by the payee. If the payee has offered for taxation then no disallowance shall be made in respect of receipts of Rs. 1,33,500/-

In respect of supervision charges of Rs. 11,28,047/- the Id. CIT(A) disallowed, on ad hoc basis 15% of the said supervision charges. We note that Id. Assessing Officer disallowed the supervision charges on the ground that no TDS was deducted on contractual payments to supervisors. However, the Id. Counsel pointed out before the Bench that these supervisors are regular employees and each payment is below the threshold limit for deduction of TDS. We note that Assessing Officer has not denied in the assessment order that supervision charges were not paid. We note that these payments are not contractual in nature therefore provisions of section 194C does not apply. Hence, we delete the entire addition made by Assessing Officer at Rs. 11,28,047/-.

18. Ground no. 5 raised by the assessee relates to addition on account of legal charges paid by the assessee amounting to Rs. 34,700/- to Advocate.

19. The brief facts qua the issue are that the assessee has paid legal charges to different lawyers of a solicitor firm Legum Jure. Payments were made directly to the individual advocates. A list of which is available in the written submission and paper book. The assessee's explanation was rejected by the Assessing Officer in limine without ascribing any reason or discussions. As per assessee's paper book a sum of Rs. 34,700/- was paid to Adv. Amitava Ghosh. This payment disallowance was confirmed u/s 40(1)(ia) of the Act.

20. On appeal the Ld. CIT(A) partly deleted the addition. Aggrieved the assessee is in appeal before us.

21. We have heard both the parties and perused the material available on record. We note that the payments were made directly to the Government Advocates and the assessee submitted the list of advocates during the appellate proceedings. The assessee's explanation was rejected by the Ld. CIT(A) without ascribing any

detailed reasoning. We note that the Id. Counsel submitted before the Bench that this payment is against the reimbursement of expenses and does not contain any income element therefore no TDS is required. We find merit in the submissions of the assessee that the said advance is against the reimbursement of expenses which does not require deduction of any TDS, hence, we delete the addition of Rs. 34,700/-.

22. Ground no. 6 raised by the assessee relates to disallowance of rent u/s 40a(ia) of the Act to the tune of Rs. 3,98,193/- paid to three different owners.

23. At the outset itself we note that the assessee has paid rent below threshold limit to three persons the details of which are given below:

Smt. Sur	Rs. 1,71,000.00
Mr. Yogesh Nigam	Rs. 75,731.00
Mr. Abhishekh Nigam	Rs. 75,731.00
Ms. Ankita Nigam	<u>Rs. 75,731.00</u>
	<u>Rs. 3,98,193.00</u>

We note that all the payments to each person is below threshold limit of Rs. 1,80,000/-, and since it is below threshold limit therefore this does not require any deduction of TDS. However, considering the principle of natural justice and fair play we remit this issue back to the file of the Ld. Assessing Officer to examine whether each payment to these three land lord is below threshold limit of Rs. 1,80,000/- or not, if it is below Rs. 1,80,000/- no disallowance would be made. Therefore we direct the Ld. Assessing Officer to examine the payments and adjudicate this issue in accordance with law. Hence we allow this ground raised by the assessee for statistical purposes.

24. Ground no. 7 raised by the assessee relates to ad hoc disallowance to the tune of Rs. 30,56,072/- on account of general expenses, miscellaneous expenses, conveyance expenses, printing, repairs and maintenance expenses.

25. The brief facts qua the issue are that the Assessing Officer made the estimated disallowance @ 20% of business expenses like conveyance, general expenses, misc. expenses, printing, repair and maintenance and tour expenses. On appeal, the Id. CIT(A) reduced it to 15%. We note that the Assessing Officer has not pointed out any cogent reasoning for making these disallowances. We note that assessee's books of accounts are not rejected by Assessing Officer u/s 145(3) of the Act and the assessment was carried out u/s 143(3) of the Act. Moreover, the Assessing Officer has not examined the genuineness of these expenses item wise. The Assessing Officer ought to disallow only those expenses for which the assessee has not submitted bills and vouchers to substantiate the bona fide of the claim. We note that without rejecting the books of accounts of the assessee and to make estimated disallowance is not justifiable and it needs to be deleted. Accordingly, we delete the disallowance of Rs. 30,56,072/-.

26. Ground no. 8 raised by the assessee relates to service tax liability of Rs. 20,90,729/-.

27. At the outset itself, we note that at the assessment stage no documentary evidence in support of his claim was furnished by the assessee therefore Assessing Officer treated the same as bogus liability of Rs. 20,90,279/-. The counsel explains before us that the same pertains to service tax liability which was directly paid by BSNL after year end from deduction of their account. However no documentary evidence in support of this claim could be brought on record in the assessment stage and even at the appellate stage. In the absence of documentary evidence this ground was dismissed. We note that Id. DR for the revenue disputed that it is not certain whether impugned amount of Rs. 20,90,729/- is a service tax liability or not. Therefore we are of the view that this fact needs to be examined by Assessing Officer whether the impugned amount of Rs. 20,90,729/- is pertained to service tax liability or not. If it is a service tax liability no disallowance is warranted u/s 43B of the Act. Therefore we set aside the order of Id. CIT(A) for this issue and remit the issue back to the file of Assessing Officer to adjudicate the

issue in accordance with law. Statistical purposes, this ground of the assessee is treated to be allowed.

28. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 06.03.2019

Sd/-
(A.T.VARKEY)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 06 /03/2019

(SB, Sr.PS)

Copy of the order forwarded to:

1. Abhoy Kumar Pandey
2. ITO, Ward-47(4), Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

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By Order

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