

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

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

आयकरअपीलसं./ITA No.324/Kol/2014

(निर्धारणवर्ष / Assessment Year:2009-10)

ITO, Ward-12(3), Kolkata	Vs.	M/s S.B. Pigments Pvt. Ltd. 212A, Shakespeare Sarani, 2 nd floor, Kolkata-17.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADCA 8665 P		
(Assessee)	..	(Revenue)

Assessee by : Shri Robin Choudhury, Add. CIT Sr. DR
Respondent by : Shri Subash Agarwal, Advocate

सुनवाईकीतारीख/ Date of Hearing : 25/02/2019

घोषणाकीतारीख/Date of Pronouncement : 30/04/2019

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to assessment year 2009-10, is directed against an order passed by the learned Commissioner of Income Tax (Appeals)-XII, Kolkata (in short the ld. '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 27.12.2011.

2. Grounds of appeal raised by the Revenue are as follows:

1. Whether, on the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing the expenses of Rs. 71,85,948/- as Business expenses instead of bogus expenses.

2. *Whether, on the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing Rs. 4,01,478/- for Brokerages or commission for non-deductions of TDS u/s 40a(ia).*

3. *Whether, on the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing the expenses on account of Travel Expenses, Staff Welfare Expenses, Repairs, Others and Sales promotion of Rs. 26,39,072/-.*

4. *Based on the facts and in the circumstances of the case, the ld. CIT(A) has erred in allowing the interest paid as an allowable expenditure. However, the same has not been utilized for purpose of the business.*

3. Ground No. 1 raised by the Revenue relates to bogus expenses of Rs. 71,85,948/- as Business expenses instead of bogus expenses.

4. Brief facts qua the issue are that during the assessment proceedings, the assessing officer issued notices u/s 133(6) of the Act to various parties for the purpose of verification of business transactions of the assessee. The notices u/s 133(6) of the Act, addressed to the following parties could not be served by the postal authority:

- a) M/s Yashoda Distributors (P) Ltd.
- b) M/s Narmada Dealcom P Ltd.
- c) M/s Sagar Vintrade P Ltd.
- d) M/s Diven Trading Co.

During the course of hearing, the assessee furnished new addresses of the parties at Sl. No. 1 to 3 above. Again, the notices were sent by AO to the new addresses of the parties, but these have been returned back unserved again by the postal authority. The matter was again informed to the assessee, vide a show cause letter dated 09.12.2011. In response, a submission was made by assessee on 16.12.2011 enclosing some documentary evidences of these parties e.g. PAN card, ledger account, Registration Certificate under VAT, copy of Bank statements of the assessee, bills to prove that transactions. The AO noticed that these transactions were there at least on papers although no evidence could be furnished by assessee in support of its physical existence.

The AO noticed that the assessee has claimed to have entered into the following transactions with the parties.

Name of party	Head of Expenditure	Details of expenses	Amount debited (in Rs.)	Amount paid during F.Y. 2008-09
M/s Yashoda Distributors P Ltd.	Repairs of Plant & Machinery	Purchase of Aluminium Tray	26,00,000	NIL
M/s Narmoda Dealcomm Pvt. Ltd.	Do	Iron and Steel (M.S. Sheet, M.S. Rod, M. S. Channel, M.S. Angel), material supply for generator overhauling, lift overhauling etc.	30,65,156	NIL
M/s Sagar Vintrade Pvt. Ltd.	Do	Bomb kin doors for pigment projects	5,20,000	NIL
M/s Diven Trading Co.	Power & Fuel	Purchase of coke	10,00,792	NIL
		Total	71,85,948	

The following observations were made by the AO in respect of the above parties:

(a). In case of M/s Yashoda Distributors Pvt. Ltd. the assessee has claimed to have purchased huge number of Aluminium trays and has shown the same under the head "Repairs", the reason of which is not known. Purchases are shown only during the last three months of the year and no payments have been made during the F.Y.

In case of M/s Narmada Dealcom Pvt. Ltd. purchases of substantial volume of iron and steel have been claimed during the last two months of the year, the reason for which is not known. The assessee has claimed to have incurred the following expenses also:

Material supply for generator overhauling	7,00,000
Material supply for Forflift overhauling	3,00,000
Hydraulic pressure spares (two bills)	5,00,000
Total	15,00,000

The AO observed that in these bills all figures are round figures and exact details of the items are not known. These were claimed by assessee to be bills for

materials only to avoid TDS provisions. These have been claimed under the head “Repairs” but it is not known who did the labour job with these huge materials, as claimed in the bills of all these parties.

Therefore, the AO was of the view that the assessee actually procured bills from the parties available in the market, who are engaged in giving entries to the business communities for the purpose of booking expenditures and to reduce profit. The assessee tried to furnish some documentary evidences in this regard but could not establish their physical existence. It is surprising to note that the assessee has claimed to have entered into such voluminous transactions with the said parties, but the parties could not be located physically either by the assessee or by the postal authority. The comments given by the postal authority also suggest that these parties never existed physically. Therefore, the AO treated bogus expenditure to the tune of Rs.71,85,948/- and made addition to the income of the assessee.

5. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by assessing officer.

6. We have heard both the parties and perused the material available on record. Before us, Id DR for the Revenue has primarily reiterated the stand taken by the assessing officer whereas, Id Counsel for the assessee defended the order passed by the Id CIT(A). We note that the assessee has submitted the following documents and papers before the Assessing Officer in respect of purchases from Yashoda Distributors Pvt. Ltd., M/s Narmada Dealcomm Pvt. Ltd., M/s Sagar Vintrade Pvt. Ltd.

- Confirmation Letters from the parties.
- Xerox copy of Pan Card.
- Ledger for F.Y. 2008-09 as per their books of accounts.
- Xerox copy of VAT Registration Certificate.
- Xerox copies of the Bills.

- Ledger for F.Y. 2008-09 as per assessee's books of accounts.
- Ledger for F.Y. 2009-10 as per assessee's books of accounts.
- Bank Statement for F.Y. 2009-10 highlighting the payment made through Bank.

Copies of all these documents, as submitted to Ld. A.O. are also submitted before the Bench.

We note that the reason for disallowing the expenses by the AO is mainly due to the fact that the notices U/s 133(6) of the Act, could not be served to the parties, and thus these parties are non-existent and transactions made with them are bogus transaction. The other observation of the AO in this regard is that the assessee actually procured bills from the parties available in the market, who are engaged in giving entries to the business communities for the purpose of booking expenditures and to reduce profit. The AO is also of the opinion that all these are claimed to be bills for materials only to avoid TDS provisions. With the above observations and findings, and following the principal laid down in a plethora of judgments, the AO has made the impugned additions disbelieving the explanation of the assessee. The Id Counsel for the assessee, on the other hand has submitted that the materials purchased are either store items and used for storing liquid blue while drying and the life span of such Trays is only for 4-5 user because of chemical effect or MS Rods, channels etc which were used for repairing of factory shed. It is also submitted that there were overall repair of Generator, Fork lifts and Hydraulic Pressure. Further one door of kiln was also replaced during the year. Thus, it is argued that the assessee had to procure these items for the business necessity and the procured items were duly used for the business of the assessee.

7. At the cost of repetition we would like to state that the AO has disallowed the claim of purchases of the items by treating as bogus only for the reason that the notices U/s 133(6) of the Act could not be served to the parties assuming the parties as non-existent and transactions made with them as bogus. In this regard, the Id Counsel contended that the assessee has produced all the reasonable evidences before the AO, which shows that assessee made genuine purchase from

them by paying applicable VAT. All the parties are assessed to Income Tax, as well as VAT, hence it is not the case of the AO that on the enquiry conducted by him from AO or Sales Tax Authority in respect of these parties any adverse material/Information was found. The payments of the purchase bills were made through banking channels. The three parties are Pvt. Ltd, Companies, whose master data as per MCA Website is also furnished in the Paper Book. Therefore, it is argued that the other allegation of the AO that "assessee procured bills from the parties available in the market who are engaged in giving entries to the business communities for the purpose of booking expenditure and reduce profit", is nothing but general in nature made on his own surmises and conjectures in disregarding the evidences furnished by the assessee.

We note that without bringing on record any material evidence, the AO has leveled this allegation upon the assessee which has no legal sanctity and is being factually incorrect. We note that the assessee has furnished all reasonable evidences before AO and simply because notices U/s 133(6) issued to the parties returned by postal authorities with remark "Not Known" or parties are not cooperating with the assessee, purchases made from them cannot be treated as Bogus or not genuine by disregarding all other overwhelming evidences furnished to the AO and brought on record. We note that the judgment of the jurisdictional High Court in the case of *M/s. Diagnostics v. CIT* in ITA No. 153 of 2004 and the judgment of the coordinate Bench of ITAT, Kolkata in the case of *DCIT, Cir -12 v. Maple Exports Pvt. Ltd.* in ITA No. 202/Kol/2012, wherein it was held that the transactions having taken place through payment by account payee cheques with the third parties who are also registered in sales tax, having VAT Nos. any addition made in respect of the transactions with those parties cannot be sustained.

Therefore, after perusing the entire facts of the case including the findings of the Assessing Officer in the impugned assessment order and respectfully following the judgments of the jurisdictional High Court (supra) and coordinate Bench of ITAT (supra), we are of the view that the A.O. is not justified in making the impugned disallowance of Rs. 71,85,948/- claimed under the head "Repairs of plant &

machinery” and power & fuel treating the same as bogus merely on the ground that the notices u/s 133(6) returned back unserved giving rise the character of the transactions as the bogus liability. That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid additions. His order on these this issue is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

8. Ground No. 2 raised by the Revenue relates to disallowance of Rs. 4,01,478/- on account of non-deduction of TDS on brokerage and commission.

9. We note that the Id. CIT(A) has already adjudicated this issue against the assessee, therefore the Id. DR for the revenue informed the Bench that this ground raised by the revenue becomes infructuous and need not to be adjudicated. We note that the Id. CIT(A) has already adjudicated this ground against the assessee and in favour of the revenue, therefore the ground raised by the revenue becomes infructuous and hence we dismiss the same.

10. Ground No. 3 raised by the Revenue relates to disallowance of expenses on account of Travel expenses, Staff Welfare expenses, Repairs, others and Sales promotion of Rs. 26,39,072/-.

11. Brief facts qua the issue are that during the assessment proceedings, the Assessing Officer made addition in respect of Travelling Expenses of Rs. 12,37,500/-, Staff Welfare Expenses of Rs.3,18,784/-, Repairs & Others of Rs. 14,37,705/- and Sales promotion expenses of Rs. 8,82,583/- due to mere belief that the said expenses were excessive as compared to the earlier year and not for the purpose of the business.

12. On appeal by assessee, the Id CIT(A) deleted the additions except addition on account of Travelling Expenses of Rs.12,37,500/-. Aggrieved, the Revenue is in appeal before us.

13. We have heard both the parties and perused the material available on record. Before us, the Id. DR for the Revenue, has primarily reiterated the stand taken by the Assessing Officer which we have already discussed in our earlier para and the same is not being repeated for the sake of brevity and on the other hand the Id. Counsel of the assessee has defended the order of the Ld CIT(A). We note that the Id. Counsel has explained the business necessity of the expenses and has submitted that the expense has been incurred for the purpose of the business of the assessee. The issue of disallowance of repair expense has already been covered in ground no. 2 of the appeal. It is noted that the A.O. has made the disallowance on vague reason that the expense of this year is more than earlier year and the expense has not been incurred for the purpose of the business of the assessee. However, the A.O. has not pointed out any specific instance to support his observation hence in view of the following decisions of the Coordinate Benches of ITAT the disallowance was not justified:

Daman Lal Damodar Das Mehta & Sons Vs. ITO 1983 15 TTJ 310.

Patwa Kiraniwala Electronics Vs. ITO 24 TTJ 284.

Coca Cola India (P) Ltd. vs. CIT (2008) 116 TTJ (Pune-Trib) 880.

Beta Naphtol vs. ACIT (1994) 50 TTJ 374.

We note that assessee has paid FBT on these expenses. For this reason also, the AO was not justified in disallowing the expense. We note that having gone through the order of the Id. CIT(A), we do not find any infirmity in the order passed by the Id. CIT(A), therefore we uphold the order of the Id. CIT(A) and dismiss the grounds of appeal raised by the revenue.

14. Ground No. 4 raised by the Revenue relates to disallowance on account of interest paid which were not utilized for the purpose of business.

15. The observation of the Assessing Officer in the assessment order in respect of this issue is as under:

“From the above details it is seen that the assessee has actually advanced interest free loans to the extent as mentioned above and as there had been no significant re payment, the closing Balance as on 31.03.2009 was Rs. 9,45,02,003/-. It is also seen from the details for A.Y.2010-11 also, there had been almost no business

transactions apart from interest free loan transactions. It is seen from the Balance Sheet that Total Loans taken as on 31.03.2008 and 31.03.2009 are Rs. 5,66,92,115/- and Rs. 9,33,58,489/- respectively. Therefore, there is increase of loans taken, amounting to Rs. 4 crores approximately, whereas there is increase of interest free loans given, amounting to Rs. 5.5 crores and Security Deposits of Rs. 1.5 crores - all without having any business connections. So, loans taken during the year were actually utilized for advancing interest free loans and security deposit, which are unrelated to the business activity of the assessee. The loans were taken from the Banks and were utilized by the assessee not for business purposes. The interest paid by the assessee during the year was Rs. 77,89,408/-, which is considered to be expended not for the assessee's business activity. Reliance is placed on the decisions of K. Somasundaram & Brothers v. CIT (1999) 238 ITR 939,944-45 (Mad) and CIT v. Window Glass Ltd. (2003) 179 CTR (Cal) 602, 602-603 where it has been observed that interest paid on the capital borrowed by the assessee-firm and diverted the same as interest-free loans to the relatives of its partners is not deductible. In the decision of Tirupati Trading Co. v. CIT (2000) 242 ITR 13, 18 (Cal) it has been observed that where there was no evidence to prove that the amount had been borrowed for purposes of the business of the assessee, interest on such borrowings was held not deductible. Interest on borrowed capital used for advancing interest-free loans to subsidiary company, Lions Club and EmployeesConsumers Co-operative stores has been held not deductible CIT v Orissa Cement Ltd. (2002) 258 ITR 365, 368, 369-70 (Del).

In view of the above, whole sum of interest paid of Rs. 77,89,408/- is disallowed, being not incidental to the assessee's business activity and added back to the total income of the assessee."

16. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by AO.

17. We have heard both the parties and perused the material available on record. Before us, the Id. The Id. DR for the Revenue 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 and on the other hand the Id. Counsel for the assessee has defended the order passed by the Id CIT(A). We note that these grounds of appeal relate to the erroneous belief of the A.O. that the advances and security deposits were in disguise interest free loans given out of the loans taken from the bank and thereby disallowance of the interest expenses of Rs.77,89,408/- by the Assessing Officer rejecting the explanation furnished by the assessee which is bad both in facts and law. We note that allowability of interest expenses in business scenario is governed by section 36(1)(iii) of the Income Tax

Act. One has to see the utilization of borrowings made by the assessee. If borrowings were made by the assessee and had been utilized for the purpose of business then no disallowance of interest paid is called for.

18. We are of the view that there is considerable force in the submission of the Id Counsel for the assessee that as the term loan was first time taken for acquisition of factory in the assessment year 2007-08 and was utilized for that purpose only, hence the interest of Rs. 65,07,730/- paid on the term loan cannot be disallowed. As regard the interest of Rs. 1,05,553/- paid on Auto loan, we are of the view that as the interest was paid on loan taken for purchase of vehicle hence the interest payment of Rs.1,05,553/- is an allowable expense. So far as interest paid on packing credit loan and interest paid on over draft and cash paid accounts, we are of the view that the interest on amount which is used for the purpose of giving interest free loan to sister concern can at most be disallowed. As per the working given by the Counsel, the assessee has paid interest of Rs.3,18,525/- on the amount utilized for the purpose of giving interest free loan to sister concern. Hence, at the most interest to the tune of Rs. 3,18,525/- can be disallowed. Since, the working of Rs. 3,18,525/- given by the Counsel requires verification, hence the A.O. is directed to verify this working of Rs.3,18,525/- given by the Id Counsel in his submission.

Therefore, considering the above facts and circumstances of the case, we find no infirmity in the order passed by the Id. CIT(A), therefore we uphold the order passed by the Id. CIT(A).

19. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 30.04.2019

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

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

कोलकाता /Kolkata;

दिनांक/ Date: 30/04/2019

(SB, Sr.PS)

Copy of the order forwarded to:

1. ITO, Ward-12(3), Kolkata
2. M/s S.B. Pigments Pvt. Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches