

आयकर अपील अाधिकरण, अहमदाबाद ढायापीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT
(CONDUCTED THROUGH E-COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.370/RJT/2018
ढाधारण वर्ष/Asstt. Year: 2014-2015

Shri Hitesh Shamjibhai Kataria, Pro. Of M/s Kaizen Metals India, Plot No.375, GIDC, Shanker Tekri, Udhyog Nagar, Jamnagar-361004. PAN: AQZPK9160E	Vs.	Income Tax Officer, Ward 3(1), Jamnagar.
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(Applicant)	(Responent)
Assessee by :	Shri Chetan L. Agarwal, AR
Revenue by :	Shri Praveen Verma, Sr.DR

सुनवाई का ताराख/Date of Hearing : 17/06/2019
घोषणा का ताराख /Date of Pronouncement: 25/06/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals), Jamnagar [Ld.CIT(A) in short] dated 02.08.2018 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 09/12/2016 relevant to Assessment Years (A.Y) 2014-2015.

The assessee has raised the following grounds of appeal:

The impugned order is liable to be quashed and set aside on account of following amongst other grounds which are taken independent of and without prejudice to each other:

- a) *Ld. Income tax Officer, Ward 3(1), Jamnagar has erred in law as well as on the facts in making the assessment on the basis of mere assumption.*
- b) *Ld. Income tax Officer, Ward - 3(1), Jamnagar has erred in law as well as on facts of the case in making addition of Rs. 11,68,480/- on account of Sales Commission Expenses paid to persons referred in section 40A(2)(b) of the Income Tax Act, 1961.*
- c) *Ld. Income tax Officer, Ward - 3(1), Jamnagar has erred in law as well as on facts of the case in making addition of Rs.2,09,327/-disallowed for want of voucher / proof.*
- d) *That the appellant craves leave to and/or to amend to and/or to alter to and/or to substitute to all or any of the grounds of appeal during the hearing of the appeal.*

The 1st issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by disallowing the commission expenses of 11,68,480.00 under the provisions of section 40A(2)(b) of the Act.

2. Briefly stated facts are that the assessee in the present case is an individual and engaged in the trading business of brass scrap and brass parts under the name and style of -M/s Kaizan Metal India.ø The assessee in the year under consideration has paid salary to his staff along with the commission based on the turnover. The details of the amount of salary and the commission to the employees stand as under:

Sr.No.	Name of the assessee	Description	Amount
1.	Dipak Vershibhai Katarmal	Salary	1,44,000/-
		Commission	2,88,203/-
2.	Vijay Babubhai Katarmal	Salary	1,35,000/-
		Commission	2,17,917/-
3.	Prakash Dipakbhai Katarmal	Salary	1,92,000/-
		Commission	6,62,360/-

2.1 The AO during the assessment proceedings found that the assessee has paid the commission based on the turnover, but there was no direct role of the employees in connection with the turnover achieved by the assessee.

2.2 The AO also found that the commission has been paid to the employees who are the relatives of the assessee as specified under section 40A(2)(b) of the Act. In view of the above, the AO held that the commission was paid to distribute the income in the family to take advantage of the basic exemptions provided under the Act. As such the commission has not been paid wholly and exclusively in connection with the business of the assessee. Accordingly, the AO disallowed the same and added to the total income of the assessee.

The aggrieved assessee preferred an appeal to the learned CIT (A).

3. The assessee before the learned CIT (A) submitted that the commission was paid to the employees as part of the salary. As such, there was no role of any of the employees in connection with the turnover of the assessee. In fact, the commission was paid to the employees on account of timely completion of the sales order. As such, the employees were looking after all the supporting activities of the business.

3.1 The assessee also submitted that the commission was paid after the deduction of TDS under section 194H of the Act. As such, the amount of commission income was declared in the income tax return of the respective employees.

3.2 The assessee also claimed that a similar amount of commission paid to the employees was allowed in the earlier years. As such, there was no disallowance made by the AO.

3.3 The assessee also submitted that the AO before making the disallowance of the commission expenses must have enquired from the employees/recipient about the genuineness and the reasonableness of the commission expenses. But the AO has not done so.

4. However, the learned CIT (A) disregarded the contention of the assessee and upheld the order of the AO by observing as under:

The vital aspect of the case of the appellant i.e. evidences regarding rendering of services by the persons to whom commission are paid and who are covered u/s. 40a(2)(b) of the Act is missing in his entire submission. It may be the case that the appellant has made the payments of commission to the persons through account payee cheques after deducting the tax at source on such payments of commission and the recipients of the commission are also filing the returns of income disclosing commission income. But this is not sufficient to establish the genuineness of payments of commission in absence of any documentary proof or evidences, The AO in the assessment order u/s. 143(3) has mentioned that the appellant has not submitted any. proof in support of the work of the persons to whom commission are paid, There is nothing on record to show that the safes have been carried out and the parties to whom sales are made have been convinced for purchase of the materials by the recipients of the commission only, As per the AO the purchasers are foreigners and no foreign visit till the year under consideration have been made by any of the recipients of the commission. As per the AO the commission for sales for the same party has been given to two employees (i.e. the recipients of the commission). As per the AO the appellant was specifically asked to furnish any proof to support that the recipients of the commission has brought/ convinced the purchaser to purchase his product, such as e-mail conversation made by them, details of meeting held by them with the parties etc.. As per the AO the appellant himself has visited the places of the purchasers and the expenses incurred on such visits have been claimed as business expenses. As per the AO thus the salary is paid to the employees for looking after the scraps and hence the commission on the same is not justifiable. The case laws as cited by the AR of the appellant in his submission are not applicable to the case of the appellant. I agree with the findings of the AO and it is held that the AO was justified in making disallowance of claim of commission of Rs.11,68,480/- in absence of any evidences with regard to rendering of services and therefore, such disallowance of the AO is hereby confirmed. Thus the first ground of appeal of the appellant is dismissed.

5. Being aggrieved by the order of the learners ITA, the assessee is in appeal before us.

6. The learned AR before us submitted as under:

Disallowance of Commission Expenses of Rs.11,68,480

1. *Commission paid to employees as apprehended by Id. AO is not commission or brokerage for specific sales or service, but as a matter / of firms policy it was paid as a part and parcel of salary being fixed salary + variable salary, which is calculated at fixed percentage of export sale or domestic sales and loosely termed as commission in books of accounts as tabulated hereunder.*

SN	Name	Fixed Salary	Variable Salary (Commission)	Submission
1	Dipak Katarmal	144000	288203	Calculated @ 1% of export sales
2	Vijay Katarmal	135000	217917	Calculated @ 1% of export sales
3	Prakash Katarmal	192000	662360	Calculated @ 1.35% of scrape sales

2. *Appellant has turnover of Rs.9.73 CR for a year under consideration, hence, salary and incentive paid to persons covered u/s. 40A(2)(b) are commensurate with qualification possess and services rendered by them.*

3. *Ld. AO has not brought out any comparative case to indicate that the variable salary paid was unreasonable or excessive.*

4. *We also rely upon written submission filed before CIT(A) reproduced on page no. 9 to 16 of CIT(A)'s order and also at page no. 33 to 42 of paper book.*

6.1 The learned AR before us also submitted that the assessee claimed similar expenses in the earlier years, which were allowed by the Revenue in the assessment framed under section 143(3) of the Act. The details of such expenses are available on record.

7. On the other hand, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the commission expenses paid by the assessee to his relatives who were working as an employee in the company. The assessee claimed that such expenses were incurred as part of the salary. As such, there was no role of the employees in achieving the turnover for the commission paid to them. Accordingly, the AO held that such commission expenses had not been incurred in connection with the business. Therefore the same was disallowed and added to the total income of the assessee. The learned CIT-A subsequently confirmed the view of the AO.

8.1 At the outset, we note that the assessee has claimed similar expenses in the earlier assessment years, which were allowed in the assessment framed under section 143(3) of the Act. As there was no change in the facts of the year in which the deduction was allowed by the Revenue in the earlier year viz a viz to the year under consideration, therefore in our considered view the assessee is entitled to the deduction keeping in view the principles of consistency. Regarding this we find support and guidance from the judgment of Honøble Supreme Court in the case of *Radhasoami Satsang vs. Commissioner of Income Tax* (1992) 193 ITR 0321 (SC) wherein it was

observed that in the absence of any material change in the facts, the Revenue should not take a different view in the other year.

8.2 We also note that the commission expenses should not be linked with the turnover until and unless it is claimed so by the assessee. In the case on hand, the assessee never claimed that the commission was paid in connection with the turnover of the assessee. But it was paid as part of the salary. Thus the Revenue should have taken the confirmation/ clarification from the parties to whom the commission was paid to find out whether it was paid in connection with the business. But the Revenue has not done. As such, it was to be seen whether the assessee has incurred the commission expenses wholly and exclusively in connection with the business under section 37(1) of the Act. As such, the AO cannot sit on the armchair of the assessee and direct the assessee to incur or not to incur the particular expenses. There was no allegation of the Revenue that the commission expense was not incurred in connection with the business. In view of the above, we hold that the assessee is entitled to the deduction on account of the commission expenses paid to the employees. Accordingly, we reverse the order of the authorities below. Hence the ground of appeal of the assessee is allowed.

The next issue raised by the assessee is that learned CIT (A) order in confirming the order of the AO by disallowing the expenses of 2,09,327.00 for want of vouchers.

9. The assessee in the year under consideration has claimed certain expenses which have been detailed in Para 4 of the assessment order. The assessee out of the total expenses of Rs. 15,31,799.00 has not produced the vouchers in respect of certain expenses amounting to 2,09,327.00.

Accordingly, the AO sought an explanation from the assessee. In response, the assessee produced certain vouchers in support of the expenses as discussed above and submitted that these vouchers were available at the factory premises of the assessee. As such the assessee omitted to file these vouchers in the earlier submission.

9.1 However, the AO did not believe the genuineness of the vouchers produced by the assessee subsequently by observing that these are handwritten and do not match with the expenses as discussed above. Accordingly, the AO disallowed the same and added to the total income of the assessee.

The aggrieved assessee preferred an appeal to the learned CIT (A).

9.2 The assessee before the learned CIT (A) submitted that the amount of salary paid to the employees has been offered by them in their income tax return. Therefore it cannot be said that the salary paid to them was bogus.

9.3 Regarding the payment of the professional fees of Rs. 29,500.00 the copy of the bill and vouchers were produced before the AO during the proceedings.

9.4 The other miscellaneous and office expenses were incurred to meet day to day expenses for which the external vouchers are not normally available. The assessee also claimed that the said expenses are of negligible value keeping the turnover of the assessee.

9.5 The assessee also claimed that the books of accounts were duly audited and no defect of whatsoever was pointed out by the auditor.

9.6 However, the learned CIT (A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

*5.2 The second ground of of the appellant is that the AO has erred in law as well as on facts of the case in making addition of Rs, 2,09,327/- as disallowed for want of voucher/proof. With regard to this ground of appeal, the submission of AR of the appellant is that the-appellant had produced all the vouchers or bills of cash expenses which were rejected by the AO on the grounds of handmade vouchers, As per the AO salary paid to Srnt Rekhaben KatarmaS of Rs, 48,572/~ and Shri Vijaybhai Kartarmal of Rs, 60,000/- have been offered to tax in their individual returns and which was not disputed at al! in assessment proceedings. As per the AR the AO has grossly neglected the payment made of professional fees of Rs, 29,300/- for which bill as well as voucher have been produced. The AR of the appellant has pleaded that no business can be sustained without incurring the day to day expenses for which self made vouchers are being prepared and are falling under the head rnisc, expenses and office expenses. Again this entire submission of the AR of the appellant is not found to be tenable, The AR has not specifically rebutted the findings of the AO, The AO in the assessment order has mentioned that on verification of books of account of the appellant it was noticed that there was no supporting evidences i.e. bills/ vouchers of Rs, 2,09,3S7/- in respect of various expenses debited to P & L account. The AO has quantified these expenses and has given the details of the same as per para 4 of the assessment order. As per the AO these books of accounts were verified in the presence of accountant of the appellant who initially stated that-all the registers and bills and vouchers are produced. As per the AO however, in response to show cause notice, the appellant stated that a bunch of voucher has been forgotten at factory at the time of production of books of account and furnished the copy of some vouchers. As per the AO on going through the same it was noticed that all the vouchers were handmade having same hand writing and same style. As per the AO the vouchers were of different dates and for different heads of expenses which .had no co-relation of keeping the same into one bunch, Thus as per the AR the plea of the appellant that the bunch of voucher were left at factory premise was not acceptable. These findings of the AO are found to be convincing and it can be said that the handmade vouchers in respect of expenses of Rs. 2,09,327/- as produced before the AO at later stage on the pretext that the same were left **at-factory** premise were fabricated. Considering all these facts, it is held that the W3 has correctly **disavowed** these expenses of Rs. 2,09,327/- and therefore, the same is confirmed. Thus the ground of appeal no, 2 of the appellant is dismissed.*

Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

10. The learned AR before us submitted as under:

Disallowance of various expense debited to profit and loss account Rs.209327

1. Ld. AO had made disallowance of Rs.209327 due to missing vouchers at the time of checking books of accounts with voucher file on 02/12/2016. It was explained that the vouchers missing was forgotten to factory and same were produced on 06/12/2016 for AO's verification.

2. However, Id. AO had ignored the same treating it as afterthought.

3. Your honors may appreciate that all expenditure was genuine business expenditure and cannot be disallowed on mere technicalities or without pointing out any defects in vouchers submitted.

4. It also pertinent to note that out of expenditure of Rs.47,64,536 only for Rs.2,09,327 vouchers were missing from files and that also were submitted immediately for AO's verification.

5. Considering overall facts and circumstances genuineness of expenditure cannot be doubted.

6. We also rely upon written submission filed before CIT(A) reproduced on page no. 9 to 16 of CIT(A)'s order and also at page no. 33 to 42 of paper book.

10.1 The learned AR before us also submitted that the assessee claimed similar expenses in the earlier years, which were allowed by the Revenue in the assessment framed under section 143(3) of the Act. The details of such expenses are available on record.

11. On the other hand, the learned DR vehemently supported the order of the authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the disallowance of the expenses made by the AO on account of a defect in the vouchers produced in support of such expenses as discussed above.

12.1 From the preceding discussion, we find that the major disallowance of the expenses relates to the salary expenses which was very much verifiable by the AO by way of issuing the notices under section 133(6) of the Act. But the AO has not done so.

12.2 The remaining expenses claimed by the assessee based on defective vouchers are of the negligible value. As such, keeping in view the turnover of the assessee, we are of the opinion that such expenses were essential for his smooth running of the business.

12.3 We also note that the assessee also claimed similar expenses in the earlier years, which were accepted by the Revenue in the assessment framed under section 143(3) of the Act.

12.4 In view of the above, we are not inclined to uphold the order of the learned CIT (A). But all the expenses cannot be allowed as a deduction in view of the fact that the supporting vouchers were defective as observed by the authorities below. Therefore in the interest of justice and fair play, we are inclined to restrict the disallowance of the expenses at the rate of 10% approx of the disallowance of the expenses made by the authorities below. In effect,

the disallowance is confirmed to the extent of 20,000 only. Hence the ground of appeal of the assessee is partly allowed.

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

Order pronounced in the Court on 25/06/2019 at Ahmedabad.

-Sd-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER

(True Copy)
Ahmedabad; Dated 25/06/2019
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