

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
&
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

I.T.As. No.3270/DEL/2016 & 3271/DEL/2016
Assessment Years 2011-12 & 2012-13

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| M/s. Sara Textiles Ltd., A-31, Sara House, Hauz Khas, New Delhi. | v. | Dy. Commissioner of Income Tax, Circle-7(1), New Delhi. |
| TAN/PAN: AAHCS9602C | | |
| (Appellant) | | (Respondent) |

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|------------------------|-------------------------------|----|------|
| Appellant by: | Shri Sumit Lal Chandani, Adv. | | |
| Respondent by: | Ms. Anima Barnwal, Sr.D.R. | | |
| Date of hearing: | 23 | 08 | 2021 |
| Date of pronouncement: | 23 | 08 | 2021 |

ORDER

PER VIJAY PAL RAO, J.M.

These two appeals by the assessee are directed against two separate orders of Commissioner of Income Tax (Appeals)-XXVIII, New Delhi both dated 29th March, 2016 for the Assessment Years 2011-12 and 2012-13, respectively. The assessee has raised common grounds in these appeals except the quantum of disallowance. The grounds raised for the Assessment Year 2011-12 are reproduced as under:

“1. The Learned Commissioner of Income Tax Appeals has erred in confirming an addition of Rs.1607420 on account of disallowance out of commission expenses claimed by the assessee, with total disregard to the facts and circumstances of the case.

2. The Learned Commissioner of Income Tax Appeals has further erred in rejecting the prayer for admission of additional evidences under Rule 46A, with total disregard to the facts and circumstances of the case.”

2. At the time of hearing, the ld. Authorized Representative of the assessee has pointed out that the Assessing Officer while passing the scrutiny assessment has disallowed the commission paid by the assessee to foreign parties for want of supporting evidence. He has submitted that due to insufficient time granted by the Assessing Officer to the assessee, the assessee could not produce the supporting evidence and consequently the assessee filed an application under Rule 46A of the Income Tax Rules, 1962 before the ld. CIT(A) along with additional evidence. The ld. CIT(A) has rejected the prayer of the assessee and decline to admit the additional evidence and thereby confirm the addition/disallowance made by the Assessing Officer on account of commission paid to the foreign parties. Thus, the ld. AR has pleaded that the impugned order may be set aside as the ld. CIT(A) has rejected the application for admission of additional evidence on technical ground without deciding the issue on merits after considering the additional evidence proposed to be filed by the assessee. In support of his contention, he has relied upon the decision of the Co-ordinate Bench of this Tribunal in the case of **Dhanna Ram Garg Vs. ITO as reported in (2012) 49 SOT 73 (Delhi)/ (2011) 15 taxmann.com 104 (Delhi).**

3. On the other hand, Id. Department Representative has submitted that the Assessing Officer has granted sufficient opportunity to the assessee to produce the supporting evidence to the claim of commission paid to the foreign parties. However, the assessee failed to produce any supporting evidence in support of the commission expenses. Ld. DR has further submitted that the Id. CIT(A) has considered the request of the assessee but it was found that the assessee has failed to explain the sufficient cause as to why the evidence was not produced before the Assessing Officer. He has relied upon the order of the authorities below.

4. We have considered the rival submissions as well as material placed on record. The assessee-company is engaged in the business of manufacturing of Terry towels and trading of textile items. During the scrutiny assessment, the Assessing Officer noted that the assessee has paid commission to the foreign parties. Accordingly, the Assessing Officer asked the assessee to produce the bills, agreement entered into between the parties and details of sales made by these parties. The Assessing Officer thereafter recorded that the assessee has failed to produce the requisite supporting documents and consequently the claim of payment of commission to foreign parties was disallowed by the Assessing Officer. The assessee challenged the action of the Assessing Officer before the Id. CIT(A) and filed an application under Rule 46A of the Income Tax Rules along with additional evidence. The Id. CIT(A) turned down the request of the

assessee on the ground that more than sufficient opportunities were given by the Assessing Officer to the assessee to produce the required details in support of expenditure claimed in the form of commission to foreign parties. The assessee also failed to prove the nexus of the expenditure to the income earned. It is pertinent to note that once the assessee has explained the reasons for not producing the relevant documentary evidence in support of claim of payment of commission to the foreign parties, then the issue of disallowance of commission paid by the assessee ought to have been decided on merits after considering the additional evidence filed by the assessee instead of rejecting the same on technical grounds. The Assessing Officer has not disputed the fact that the assessee has actually paid the commission to certain parties. However, the claim of commission was disallowed for want of supporting evidence. Thus, in the appellate proceedings, before the Id. CIT(A), the assessee wanted to make up the said deficiency of the production of the supporting evidence then having regard to the facts and circumstances of the case as well as acceptance of the claim by the Revenue in the preceding year, though u/s.143(1) of the Income Tax Act, the evidence filed by the assessee ought to have been examined. The Co-ordinate Bench of this Tribunal in the case of **Dhanna Ram Garg vs. ITO (supra)** while considering the identical issue as held in paragraphs 6 to 7 as under:

“6. A bare perusal of this Rule would reveal that appellant i.e. assessee shall not be entitled to produce any evidence whether oral or documentary, other than the evidence produced by him during the assessment proceedings unless conditions enumerated in clause A to D of sub-rule (1) are available. According to these clauses, additional evidence would be permitted, if it is proved that Assessing Officer has refused to admit the additional evidence or assessee was called upon to produce a specific evidence by the Assessing Officer but by virtue of sufficient reasons he could not produce such evidence or assessee was to produced any evidence relevant to the grounds of appeal but he could not produce it before the Assessing Officer or Assessing Officer has passed the assessment order without giving sufficient opportunity to the assessee. If anyone conditions is available then assessee would be permitted to adduce additional evidence. The next step suggested in the rule is that Learned CIT(Appeals) has to record reasons for permitting an assessee to adduce the additional evidence. After this exercise, it has been provided in sub-rule (3) that Learned First Appellate Authority shall not take into account such evidence unless an opportunity to rebut the evidence was given to the Assessing Officer. Assessing Officer shall be provided an opportunity to examine the document submitted by the assessee and he will be provided an opportunity to adduce evidence for rebutting the evidence produced by the assessee. Sub-clause (4) of Rule 46A, is an exception to these conditions. It empowers the first appellate authority to direct the production of any document or examination of any witness which can help the Learned First Appellate Authority to dispose of the appeal in accordance with law and for any other substantial cause. Learned CIT(Appeals)

has remitted the submissions of the assessee along with the documents to the Assessing Officer for his comments. Assessing Officer has submitted two remand report. After an analysis of the remand reports as well as the submissions of the assessee, Learned CIT(Appeals) has observed that the documents submitted by the assessee are not worth admitting. To our mind this is not the right course. Once he called for a remand report on the merits of the evidence and gave an opportunity to the Assessing Officer for rebutting the evidence then conditions of sub-rules (1) and (2) would be construed as fulfilled. Learned CIT(Appeals) may not rely upon the evidence for rejecting the arguments of the assessee on the ground that it is not sufficient to buttress the contentions of the assessee, but he cannot say that evidence is not to be taken on record. The admissibility of the evidence is to be decided at the first stage under sub- rule(1). For that he need not to call for a remand report on the merit of the evidence. He can simply hear the Assessing Officer as is provided in sec. 250(1) of the Act. In other words, Learned CIT(Appeals) supposed to give just an opportunity of hearing to the A.O. before admission of evidence. Once, it is admitted by recording reasons as provided in sub-rule(2) then next stage would come as enumerated in sub-rule(3), where Learned CIT(Appeals) would call upon a remand report of the Assessing Officer on the merit of the evidence and also give an opportunity to the Assessing Officer to lead evidence in rebuttal of the evidence submitted by the assessee.

7. *We find from the analysis of the record that sufficient opportunities were not granted to the assessee by the Assessing Officer. He has completed the inquiry for the purpose of the assessment order within just two months. Therefore, we*

deem it appropriate to set aside both the impugned orders and remit all the issues to the file of the Assessing Officer for readjudication. The observations made by us will not impair or injure the case of the Assessing Officer and would not cause any prejudice to the defence/explanation of the assessee. The assessee will be at liberty to submit any evidence in his defence before the Assessing Officer. Assessing Officer shall grant due opportunity of hearing to the assessee and the assessee shall co-operate with the Assessing Officer.”

5. Thus, in the facts and circumstances of the case, we are of the considered view that the additional evidence produced by the assessee ought to have been examined and the issue was required to be decided on merits. Accordingly, we set aside the impugned order of the Id. CIT(A) and matter is remitted to the record of the Assessing Officer for adjudication of the issue of commission paid to the foreign parties for both the years after verification and examination of the additional evidence filed by the assessee. Needless to say, the assessee be given an opportunity of hearing before passing a fresh order. Hence, both the appeals of the assessee are allowed for statistical purposes.

6. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court on 23rd August, 2021.

Sd/-

[R.K. PANDA]

ACCOUNTANT MEMBER

DATED: 23rd August, 2021

Prabhat:

Sd/-

[VIJAY PAL RAO]

JUDICIAL MEMBER