

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM

आयकरअपीलसं/I.T.A. No.83/Mum/2023
(निर्धारणवर्ष/Assessment Year: 2016-17)

Sivira Organiks Pvt. Ltd. 113, Matermind-I, Aarey Milk Colony, Goregaon(E) Mumbai-400 063	<u>बनाम</u> Vs.	Income Tax Officer, 13 (2) (2) Room No.147, 1 st Floor, AayakarBhavan, M.K. Road Mumbai-400 020
स्थायीलेखासं./जी. आइ. आर. सं./PAN/GIR No: .AAMCS2596J		
अपीलार्थी/ Appellant	..	प्रत्यर्थी / Respondent

Assessee by:	Smt Lavanya Rajpurohit
Revenue by:	Shri Anil K.Das

सुनवाईकीतारीख/Date of Hearing : 09/03/2023
घोषणाकीतारीख/Date of Pronouncement : 26/04/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee company against the order of Commissioner of Income Tax Appeals .the Ld, Mumbai [hereinafter referred to as the “Ld. CIT(A)”]/NFAC, dated 11.11.2022 for AY. 2016-17.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) dismissing the appeal of the assessee.

3. The brief facts are that the assessee company had filed its return of income on 14.10.2016 for assessment year 2016-17 declaring total income of Rs.13,65,860/- and the same was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”); and later the case was selected for limited scrutiny under CASS. The Assessing Officer (AO) notes that assessee is



engaged in the business of manufacturing chemicals. The AO notes in this assessment order, the reason for selection of the limited scrutiny viz “*Whether deduction claimed on account of business expenses is admissible*” Therefore, on this issue the assessee was asked to provide details along with the documentary evidence of various expenses incurred during the year. And on perusal of the audited profit and loss account, he noted that the assessee had booked commission expenses to the tune of Rs.1,33,87,316/- as incurred by it, so he asked assessee to provide party-wise details of commission expenses incurred along with copy of invoice, commission agreement etc. However according to the AO, except for one (1) or two (2) parties, assessee failed to provide any documentary evidences in support of such expenses. The AO noted that from the commission details (party-wise) the rate of commission varied from 5% to 30% and also commission was paid on sales as well as purchase of materials. Therefore, the AO issued show-cause notice (SCN) dated 27.12.2018 to the assessee and directed it to justify the commission expenses and provide copy of all invoices raised by the parties, commission agreement etc. Pursuant to the SCN, the assessee replied through the e-proceedings portal along with debit/credit notes for the payment of commission; and it was brought to the notice of the AO that the assessee procured goods for their business activities through brokers; and these brokers not only contacted the potential buyers but also displayed before them the samples of the product; negotiated for rates; and other terms of sales and also procured sale orders; and thereafter, collected the receivables from them and then handed it over to assessee. According to the assessee, all the recipients i.e. the brokers worked hard and had to travel to far of places for procuring sales order and for such travelling also they incurred considerable expenses. It is also stated that all the recipients of brokerage are regular income tax assesseees/payees; and that the assessee has deducted TDS from payments made to all of them; and that all of them have given debit note;



and assessee also had duly issued credit note for such commission. It was also stated that there is no practice of entering into any written agreement with brokers in the line of business carried out by assessee, and the debit/credit notes are based on oral agreements. And thus the assessee contented that expenditure incurred (commission) are wholly and exclusively for the purpose of business and since the expenditure was genuine and bonafide one, it need to be allowed and for that cited several case laws. However, the AO did not accept the contention of the assessee because according to him, the entire commission/brokerage payments are not made to the brokers and the same are shown as payable. According to the AO, the assessee failed to prove that the expense incurred were wholly and exclusively for the purpose of business. And merely deducting TDS according to AO cannot prove the genuineness of the expenses. Therefore, he disallowed commission expenses exceeding 10% on purchase/sales which he computed at Rs.66,60,296/-. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who noted that even though assessee was provided opportunity of hearing on several occasions especially vide notice dated 11.01.2021 to file written submissions on or before 26.01.2021, the assessee failed to file reply. Therefore, another notice was issued on 16.12.2021 to file submissions before 23.12.2021 which was also not replied by assessee. Therefore, the Ld. CIT(A) again issued notice on 11.03.2022 fixing the hearing on 22.03.2022 and final notice was issued on 07.10.2022 calling for compliance on or before 14.10.2022. However, according to Ld. CIT(A), the assessee did not respond. Therefore, he decided the appeal based on material on record. The Ld. CIT(A) was of the opinion that assessee never bothered to give any explanation on the grounds raised by it before him, despite several opportunities given to it. And since, the assessee failed to prove that the expenses incurred by it was wholly and exclusively for the purpose of business, he confirmed the action of the AO.

4. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us and has assailed the action of the Ld. CIT(A) to be bad in law for violation of the principle of natural justice. After carefully going through the assessment order as well as the impugned order of the Ld. CIT(A), it is noted that the AO has issued SCN notice which is reproduced at page 2 of his order dated 27.12.2018 and after going through the reply of assessee given in the e-proceedings portal, he has disallowed the claim of expenses to the tune of Rs.66,60,296/-. The plea of the assessee that there has been violation of natural justice is found to be valid for the simple reason that AO had issued SCN dated 27.12.2018 and had framed the assessment order u/s 143(3) of the Act on 29.12.2018 meaning thereby assessee had been granted only two (2) days within which AO had passed the adverse order of making the addition/disallowance. This action of the AO cannot be countenanced on the legal maxim. *“Justice should not only be done but it should be seen to be done.”* So we find force in the submissions of Ld. AR that assessee did not get proper opportunity of hearing before the AO during assessment proceedings and he relied in the order of the Hon’ble Supreme Court in the case of **Tin Box Company Vs. CIT (249 ITR 216) (SC)**, wherein the Hon’ble Supreme Court has held that if the assessee did not get proper opportunity before the AO, then the matter should be restored back to the file of AO for *de novo* assessment and the Hon’ble Supreme Court has held as under:

“It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard".

That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts .That order must be made after the assessee has been given a reasonable opportunity of setting out his case .We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment

and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

2. Two questions were placed before the High Court, of which the second question is not pressed. The first question reads thus:

"1.

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee?"

In our opinion, there can only be one answer to this question which is inherent in the question itself: in the negative and in favour of the assessee.

3. The appeals are allowed. The order under challenge is set aside. The assessment orders of the Commissioner (Appeals) and of the Tribunal are also set aside. The matter shall now be remanded to the assessing authority for fresh consideration, as aforesaid. No order as to costs."

5. In the light of the Hon'ble Supreme Court action (supra), and taking note that the assessee did not get proper opportunity before the AO, we are of the opinion that the assessment has to be done *de-novo*, so, we set-aside the order of Ld. CIT(A) and restore this issue back to the file of AO for fresh assessment. The assessee is directed to file all documentary evidences to substantiate the claim of commission expense. And the AO to frame *de-novo* assessment on this issue in accordance to law and give opportunity to assessee before passing the assessment order.

6. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on this 26/04/2023.

Sd/-

(OM PRAKSH KANT)

ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)

JUDICIAL MEMBER

मुंबई/Mumbai

दिनांक/Dated 26/04/2023

Mahesh R. Sonavane



आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार / (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai