

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ "एफ" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE S/SHRI B.R.BASKARAN, AM AND AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.3940/Mum/2011
(निर्धारण वर्ष / Assessment Year: 2007-08)

Vithal Electronics and Manufacturing Company, EL-104, Electronic Zone, MIDC, Mahape, Navi Mumbai-400709.	बनाम/ Vs.	Dy.Commissioner of Income Tax – 22(3), Mumbai
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

I.T.A. No.5484/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2007-08)

Asstt. Commissioner of Income Tax, 22(3), 3 rd floor, Tower No.6, Vashi Railway Station Complex, Vashi, Navi Mumbai	बनाम/ Vs.	Vithal Electronics and Manufacturing Company,
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AAAFV2161P

अपीलार्थी ओर से / Assessee by	Shri Rajesh Athawale
प्रत्यर्थी की ओर से/Revenue by	Shri Mohammad Rizwan

सुनवाई की तारीख / Date of Hearing : 26.8.2015
घोषणा की तारीख /Date of Pronouncement: 16.10.2015

आदेश / O R D E R**Per B R Baskaran, AM:**

The assessee has filed appeal challenging the order dated 09-03-2011 passed by Ld CIT(A)-33, Mumbai for assessment year 2007-08 and the revenue has filed appeal challenging the rectification order dated 21-06-2012 passed by Ld CIT(A) for that year. Both the appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the case are that the assessee is a partnership firm consisting of three partners. Out of the three partners, one partner named M/s Hermes Electronics P Ltd retired from the partnership firm w.e.f. 31.3.2007 and it was paid non-compete fee of Rs.60,73,438/-. The assessee treated the said payment as deferred revenue expenditure and accordingly debited 10% of the same to the Profit and Loss account. The AO examined the said claim, but took the view that the assessee has failed to prove the necessity of payment with required evidences. Hence the AO added the above said sum of Rs.60,73,438/- to the total income even though the assessee had debited the profit and loss account with Rs.6,07,343/- only. The assessee claimed before the AO that the non-compete fee was an "Intangible asset" acquired by the assessee and accordingly claimed depreciation thereon. The said claim was also rejected by the AO. The assessing officer also disallowed 25% of wages and certain purchases for want of proper evidences.

3. In the appellate proceedings the Ld CIT(A) dismissed the appeal of the assessee originally. However, by way of rectification order, the Ld CIT(A) allowed depreciation on the non-compete fee paid and in this regard, he placed reliance on various case laws submitted by the assessee.

4. The first issue relates to the non-complete fees. Though the assessee has assailed the decision of Ld CIT(A) on this issue as per the original appellate order, the Ld A.R submitted that the grounds relating to the same have become infructuous in view of the rectification order passed by Ld CIT(A). The revenue is agitating the decision of Ld CIT(A) in allowing depreciation on the non-compete fee.

5. We heard the parties on this issue and perused the record. We notice that the following decisions support the case of the assessee that the depreciation is allowable on non-compete fee:-

(a) Ind Global Corporate Finance P Ltd (2012)(IDI)-GJX-3531-TBOM

(b) Serum Institute of India Ltd Vs. ACIT (ITA No.948/PN/05 dated 18-01-2012)

(c) M/s Pentasoft technologies Ltd Vs. DCIT (Tax case (Appeal) No.1195 of 2008 dated 29-10-2013 by Hon'ble Madras High Court.

Hence, in principle, we agree that the assessee would be entitled to depreciation on non-compete fee. However, we have earlier noticed that the assessing officer has disallowed the claim for want of proper explanations and evidences to support the payment of non-compete fee, i.e., the assessing officer was of the view that the payment of non-compete fee was a colourable device adopted by the assessee and accordingly held that it was an application of income. Hence, in effect, the assessing officer has doubted about the necessity of payment of non-compete fee and according to the AO, the assessee has failed to substantiate the same. However, we notice that the Ld CIT(A) did not address those aspects in the rectification order. In fact, after agreeing with the views expressed by the AO in his original order, the Ld CIT(A) has allowed depreciation thereon in the rectification order without

contradicting the view expressed by the AO. Thus there is contradiction in the view taken by Ld CIT(A). In our view, the Ld CIT(A) should first address the issue relating to the necessity or genuineness of the payment of non-compete fee and then adjudicate the issue relating to depreciation. Accordingly, this issue requires fresh examination at the end of the Ld CIT(A). Accordingly, we set aside the order of Ld CIT(A) on this issue and restore the same to his file with the direction to adjudicate the same afresh by duly considering the stand of the assessing officer.

6. The next issue relate to the disallowance of 25% of the wages for want of evidences. We notice that the AO asked the assessee to furnish the details in a particular format. However, the assessee failed to furnish the same and hence the AO disallowed 25% of the wages expenses claimed by the assessee. The Ld CIT(A) also confirmed the same. Before us, the Ld A.R submitted that the wages were paid to regular workers and contract labourers and they are supported by the vouchers. Before us, the assessee has filed copies of wage sheets containing the signature of the recipients. However, the details relating to the labourers were not furnished. Hence, in order to put this issue at rest, we direct the AO to disallow 5% of the wages claimed by the assessee, which in our view would cover the deficiencies, if any, in payment and maintenance of wages. The order of Ld CIT(A) on this issue stands modified accordingly.

7. The next issue relate to the disallowance of 25% of the purchases. The AO disallowed a portion of certain purchase bills, since the assessee failed to furnish relevant details. Before Ld CIT(A), the assessee furnished the details of suppliers and hence the first appellate authority called for a remand report from the AO. The assessing officer submitted that one of the suppliers is placed at Singapore and the notices issued to some of the

suppliers returned back. Further two of the suppliers did not respond to the notices. In reply to the remand report, the assessee sought time to obtain confirmation letter from the Singapore supplier and further gave addresses of the persons whose notices were returned back. However, the Ld CIT(A) chose to confirm the disallowance of 25% of the purchases amount made by the AO.

8. We heard the parties and perused the record. We notice that the assessee did not shy away in giving the relevant details. The assessee has in fact furnished the correct addresses along with contact numbers of the persons whose notices were returned back by the postal authorities. Further, in respect of the party placed at Singapore, the assessee has sought time to get confirmation letter. However, the Ld CIT(A) chose to confirm the disallowance without examining these details. We notice that the assessee has furnished copies of invoices of purchases in the paper book. However, the assessee has not taken steps to obtain confirmation letters from the suppliers. The assessee has also not given proper explanation as to why some of the suppliers did not respond to the notices, even though it claimed before the Ld CIT(A) that it will obtain confirmation letters from all the suppliers. Hence, in our view, the assessee has not discharged its responsibility fully. However, we notice that the assessing officer has accepted the genuineness of purchases to the extent of 75%. At the same time, we notice that the assessee has also co-operated with the tax authorities by furnishing the address details and phone number of suppliers. Hence the disallowance of 25% made by the AO appears to be on the higher side. Hence, in order to put this issue at rest, we direct the AO to restrict the disallowance to 10% and the order of Ld CIT(A) on this issue stands modified accordingly.

9. In the result the appeal filed the assessee is treated as partly allowed and the appeal of the revenue is treated as allowed for statistical purposes.

Pronounced accordingly on 16th Oct, 2015.

घोषणा खुले न्यायालय में दिनांक: 16th Oct, 2015 को की गई ।

Sd

sd

(AMARJIT SINGH)
JUDICIAL MEMBER

(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai: 16th Oct, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai