

ASSISTANT COMMISSIONER OF INCOME TAX vs.ANIL NATH

DELHI TRIBUNAL

R.S. SYAL, AM & A.T. VARKEY, JM.

ITA No. 3805/Del./2013

Jul 31, 2015

715Taxpundit 94

Legislation Referred to

Section 40A(3), 36(2)

Case pertains to

Asst. Year 2007-08

Decision in favour of:

Assessee(Partially)

Counsel appeared:

Y. Kakkar, for the Assessee.: P N Monga, Advocate and Manu Monga for the Revenue.

A. T. VARKEY, JM.

1. This appeal filed by the Revenue is directed against the Order dated 05.3.2013 passed by the Ld. CIT(A)-XXVI, New Delhi pertaining to assessment year 2009-10.

2. The Revenue has raised the following grounds in its Appeal:-

“1. The CIT(A) has erred in deleting the addition of Rs.6,04,805/- made by the Assessing Officer on account of disallowances of bad debts.

2. The CIT(A) has erred in deleting the addition of Rs.2,44,850/- made on account of sundry creditors without appreciating that in absence of proper confirmation, genuineness of the creditor is not established.

3. The CIT(A) has erred in deleting addition of Rs.18,36,524/- made by the AO on account of proportionate disallowance of commission expenses.

4. The CIT(A) has erred in deleting addition of Rs.41,600/- made by the AO on account of contravention of provisions of section 40A(3).

5. The CIT(A) has erred in deleting addition of Rs.11,10,028/- made by the AO out of salary expenses.

6. The Ld. CIT(A) has erred in deleting the addition of Rs.51,707/- made by the AO on account of negative cash balance.

7. The appellant craves leave to add, alter or amend any / all of the grounds of appeal before or during the course of the appeal.”

3. The brief facts of the case are that the assessee, an individual, is the proprietor of two concerns namely M/s. Overseas Associates and M/s. Dyechem Sales Corporation. M/s. Overseas Associates is engaged in the business of trading in surgical instruments, whereas M/s. Dyechem Sales Corporation is engaged in the activities of procuring orders on behalf of manufactures of chemicals on commission basis. The assessee filed his return of income on 29.9.2009 declaring a total income of Rs.1,66,60,730/-. The case was selected for scrutiny under CASS. In compliance to the statutory notices served on the assessee, books of accounts were called for and were verified on test check basis and the assessment was completed in terms of order u/s 143(3) of the Act 1961 (hereinafter ‘the Act’) at an income of Rs.2,02,33,088/- as against the returned income of Rs.1,66,60,730/- and made various additions vide order dated 28.12.2011.

4. Against the aforesaid order of the Assessing Officer, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 5.3.2013 has partly allowed the appeal of the assessee.

5. Now the Revenue is in appeal before us

6. Ld. DR relied upon the order of the AO

7. On the contrary, Ld. Counsel of the assessee has relied upon the order of the Ld. CIT(A) and defended the same and does not want us to interfere in the same.

8. We have heard both the parties and perused the records. With regard to ground no. 1 regarding deletion of addition of Rs. 6,04,805/- made by the AO on account of disallowances of bad debts is concerned, we find that in the course of assessment proceedings, the Assessing Officer noticed that the assessee had debited a sum of Rs.9.23 lakhs as bad debts. The Assessing Officer asked the assessee to show whether all the conditions for allowability of bad debts as per the provisions of section 36(2) and 36(1)(vii) of the Act were fulfilled. Pursuant to the said query of the AO, the assessee vide letter dated 19.12.2011 filed the details of the parties in whose accounts the amounts were written off. On perusal of the details, the Assessing Officer noticed that in the case of the three parties given below, the assessee could not demonstrate as to how and where the following amounts claimed as bad debts were taken bill- wise into account in computing assessable income :-

S.No.	Name of the party	Amount
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1.	Ajit Hospital	Rs. 9,083/-
2.	Aesculap	Rs. 1,27,722/-
3.	Gopal Surgical	Rs. 4,68,000/-
		Rs. 6,04,805/-

Accordingly, the Assessing Officer disallowed an amount of Rs.6,04,805/- the aggregate of the three aforesaid amounts u/s 36(2) of the Act and added to the income of the assessee. During the appellate proceeding, the Ld. CIT(A) on perusal of the material on record, noticed that in response to the query relating to bad debts amounting to Rs.9,23,393/- appearing in the P&L account, the assessee had filed all the details of parties and also his explanations vide letters dated 8.12.2011 and 15.12.2011. It was observed by the Ld. CIT(A) that after taking on record the details and explanation filed by the assessee, the Assessing Officer did not raise any further clarification or enquiry regarding these three parties whose accounts were squared up by writing off the amounts outstanding against their names. From the facts on record, Ld. CIT(A) observed that the assessee had a long business relations with these parties and they were not only old but valuable customers/suppliers of the assessee who given significant business to the assessee. The Ld. CIT (A) takes note that the amounts written off in the case of Ajit Hospital and Gopal Surgical were in respect of sales made by the assessee to these parties. Whereas, in the case of Aesculap the amount represented the excess payment made by the assessee to foreign supplier. The assessee had filed details of bad debts written off with copies of accounts of debtors of the amounts written off stating that they were business transactions and we have perused the same which is placed in pages 1 to 19 of the paper book and finds that the explanation of the assessee is corroborated by the documents placed on record. Having considered all the facts of the case, we find that the Assessing Officer was not justified in making the impugned disallowance as the amounts in question were written off by the assessee in accordance to section 36(2) and 36(1)(vii) of the Act. Accordingly, the addition of Rs.6,04,805/- made by the Assessing Officer was rightly deleted by the Ld. CIT(A), which does not need any interference from our part, hence, we uphold the same by dismissing the Ground no.1 raised by the Revenue.

8.1 Apropos Ground 2 regarding the deletion of addition of Rs.2,44,850/- made on account of sundry creditors. During the course of assessment proceedings, the Assessing Officer asked the assessee to file confirmation pertaining loan amount of Rs.2,44,850/- appearing as sundry creditor in the name of Sh. Amitabh Mendiratta. The Assessing Officer observed that the assessee merely stated that the amount in question does not pertain to the year under consideration but did not furnish the confirmation of the creditor. Therefore, the Assessing Officer treated this sundry creditor as not genuine and accordingly added this amount to the income of the assessee by holding it as bogus. During the appellate proceedings, the Ld. CIT(A) has observed that the Assessing Officer referred to only a part of the reply filed by the assessee dated 15.12.2011 in the course of the assessment proceedings. The contents of the letter of the assessee dated 15.12.2011 is reproduced :-

“Your show cause notice in regard to submission of confirmation of amount due to Mr. Amitabh Mendiratta amounting to Rs.2,44,850/- shown under the head Expenses payable.

It is submitted that the amount pertains to the period 2007-08 and not pertain to the year under reference, Mr. Amitabh Mendiratta who was associated as retainer up to the period March 2008 and left w.e.f 01st April 2008 without getting the final dues which were subjected to reconciliation by the proprietor. The due TDS on the amount was deposited after deduction. The amount is still payable and will be paid immediately the moment the claim is made. Mr. Amitabh Mendiratta who at present is settled abroad and hence the confirmation in regard to the amount could not be obtained.”

We find that the copy of the account of Amitabh Mendiratta for the period from 01.04.2005 to 31.03.2008 (page 22 of paper book) clearly reflects Rs.2,44,850/- as due for payment to Amitabh Mendiratta (closing balance). Page 23 of the paper book is the ledger account of Amitabh Mendiratta for the period 01.04.2008 to 01.03.2009 and it shows the same amount as opening balance. And page 24 of paper book shows ledger account of Amitabh Mendiratta which reflects opening balance as Rs.2,44,850/-. We also note that from a perusal of page 20 reveals that Shri Amitabh Mendiratta had been paid an amount of Rs.5,93,633/- for retainership in the FY 2005-06 and Rs.6,14,700/- for FY 2006-07; and for FY 2007-08 he was paid Rs.3,91,780/- and Rs.2,44,850/- was due for him (page 22 of paper book). Thus, the AO's finding that this amount due to Amitabh Mendiratta is bogus have to fail in the light of the aforesaid evidences on record. A perusal of the above letter of assessee shows that Amitabh Mendiratta was a retainer of the assessee who left the institution on 31.03.2008 and went abroad. The amount shown as sundry creditor by the assessee is the amount due to said Amitabh Mendiratta. Just because the assessee could not give the confirmation about the said amount which is due for Amitabh Mendiratta does not mean that it is a bogus entry made by the assessee. We find that the AO misdirected himself by not going through the entire explanation given by the assessee in respect to his explanation in respect to the sundry creditor as observed by the Id. CIT (A). Therefore, considering the facts of the case, Id CIT(A) has concluded that there is no justification for the Assessing Officer to make the impugned addition. Accordingly, he deleted the addition of Rs. 2,44,850/-, which does not need any interference on our part, hence, we uphold the same and dismiss the ground no. 2 raised by the Revenue.

8.2 Apropos Ground 3 is regarding the deletion of addition of Rs.18,36,524/- made by the AO on account of proportionate disallowance of commission expenses is concerned, we find that in the course of assessment proceedings, on perusal of the audit report the Assessing Officer noticed that though the assessee maintained his accounts on mercantile basis, income from commission was partly accounted for on receipt basis which was, according to AO, evident from the commission earned in the account of M/s. Overseas Associates which clearly showed credit entries of Rs.25,33,952/- dated 05.0.2008, Rs.40,48,271/- dated 27.01.2009, aggregating to Rs.65,82,239/-. The Assessing Officer observed that this kind of accounting treatment had the effect of suppressing taxable income while corresponding commission expenses paid to the sub dealers were claimed on mercantile basis. Accordingly, the Assessing Officer vide order sheet entry dated 19.11.2011 asked the assessee to show cause as to why the corresponding commission expenses be not proportionally disallowed because commission income was partly accounted for on receipt basis, when accounts were maintained on mercantile basis.

According to the Assessing Officer, vide reply dated 8.12.2011, the assessee had accepted that the said amounts were accounted for on receipt basis and stated that the same were from overseas parties and that no commission was due from the overseas parties as on 31.3.2009. The Assessing Officer observed that this reply of the appellant was immaterial. The Assessing Officer observed that the commission earned in the account of M/s. Overseas Associates clearly showed that the said amounts of commission income were credited on receipt basis and not when due. Accordingly, the Assessing Officer worked out proportionate commission expenses and disallowed an amount of Rs.18,36,524/- out of commission expenses and added the same to the income of the assessee. We find that the Id. CIT(A) has perused the reply of the assessee dated 8.12.2011 which has been referred by the Assessing Officer in his order. On perusal of the said reply of the assessee, she finds that the books of accounts were maintained on mercantile basis in respect of incomes and expenditure; and any commission due from the parties and any commission due to sub-dealers have been accounted for on accrual basis. The Id. CIT (A) took note of the fact that the assessee had fully explained the accounting of the impugned commission income. According to the Id. CIT (A), the Assessing Officer had failed to appreciate the correct factual position. The Id. CIT (A) has taken note that the assessee had accounted for these two amounts in his books of account since these had been actually received during the relevant year. The Id. CIT (A) has observed in respect to commission expenses were concerned, they had been paid to the assessee's agents in India who had rendered services to the assessee. The Id. CIT (A) has made a finding that the payments of commissions were made after deducting corresponding TDS as per law. In the said facts and circumstances, Id. CIT (A) held that there was no justification for making any proportionate disallowance out of commission expenses. We have gone through the bank statement of the assessee i.e. of M/s. Overseas Associates with Corporation Bank for the period from 01.04.2008 to 26.08.2008 and 24.01.2008 to 03.02.2009 which is placed at page 25 – 26 PB, and copy of commission earned account in the books of the assessee (M/s. Overseas Associates) for the period 01.04.2008 to 31.03.2009 – PB page 27 & 28 and copy of the letter dated 05.12.2011 from Soring, Germany for payment of commission at page 29 PB and copy of commission paid account for the period 01.04.2008 to 31.03.2009 at page 30 -31 PB and finds no infirmity in the findings of the Id. CIT (A). Therefore, she has rightly deleted the addition of Rs.18,36,524/- made by the Assessing Officer out of commission expenses. In the light of the evidence on record, we do not see any reason to interfere with it; hence, we uphold the same and dismiss the ground no. 3 raised by the Revenue.

8.3 Apropos ground 4 is relating to deletion of addition of Rs.41,600/- made by the AO on account of contravention of provisions of section 40A(3) of the Act is concerned, we find that in the assessment proceedings, on examination of the cash book of M/s Overseas Associates, the AO noticed that the assessee had made payment of Rs.41,600/- in cash without deducting TDS which was so liable to be disallowed u/s. 40A(3) of the Act. Therefore, the AO asked the assessee to show cause to why this payment be not disallowed u/s. 40A(3) of the Act. The AO observed that the assessee had made only submissions in respect of payment of Rs. 41,600/- for purchase of gifts for business promotion, so it was not acceptable. The AO observes that since the assessee failed to furnish any evidence to prove that these payments did not fall within any of the exceptions of Rule 6DD, there was a contravention to the provisions laid down in section 40A(3) of the Act. Therefore, he disallowed the amount of Rs. 41,600/-. However, we find that Ld. CIT(A) found fault with the AO for not giving any reason as to how this

payment contravened section 40A (3) for purchase of gifts; and not a single payment, and has deleted the addition of Rs.41,600/- relying upon the assessee's letter dated 8.12.2011 in respect of this payment stating that the payment was made to an unknown local shop keeper and it was for purchase of gifts for overseas business associates, as there was no other alternative but to pay in cash. Ld. CIT(A), considering the practical problem with the local and small time shopkeepers, justified the cash payment for purchase of gift and she deleted the addition. In our opinion, the view adopted by the Ld. CIT(A) is not correct because she was doubting whether the gift purchase by assessee was for a single transaction on a given day. We find on perusal of page 95 of PB, sale bill of gift for RS.41,600/- dated 08.08.2008, which was paid in cash, so is in contravention of section 40A(3) of the Act. Therefore, we find that the AO has disallowed the amount of Rs. 41,600/- on valid ground. In our view, the AO rightly held that since the assessee failed to furnish any evidence to prove that these payments did not fall within any of the exceptions of Rule 6DD, there was a contravention to the provisions laid down in section 40A(3) as stated before. Therefore, in our opinion, the addition made by the AO amounting to Rs. 41,600/- needs to be upheld, accordingly, we uphold the action of the AO on this account and allow the Ground No. 4 raised by the Revenue.

8.4 Apropos ground 5 relating to deletion of addition of Rs. 11,10,028/- made by the AO out of salary expenses is concerned, we find that in the course of assessment proceedings, vide order sheet entry dated 29.11.2011, the Assessing Officer asked the assessee to file the details in respect of salary expenses amounting to Rs.18,88,656/- with necessary evidence. Since, the appellant did furnish evidence in respect of salary expenses, vide order sheet entry dated 12.12.2011, the Assessing Officer issued a show cause to the appellant as to why the salary expenses be not disallowed in the absence of evidence. The appellant in his reply dated 15.12.2011 filed before the Assessing Officer had submitted as under:

"It is submitted that the salary register which was being maintained on monthly basis for payment of salaries for the year under reference is not traceable at present. In support of which we are submitting herewith the copies of the appointment letters along with the details of payments made to employees on monthly basis giving the complete details of the cheque no. dates and bank and also salaries paid in cash to few of junior employees as well as payment on account of bonus and ex-gratia. That most of the payments towards salaries paid are through payees account cheques which can be verified with the Bank statement submitted.

We hope the enclosed details will satisfy you in regard to be payment made on account of salaries/ex-gratia/bonus in the year under reference."

On perusal of the assessee's reply, the Assessing Officer noted that the aggregate salary issued by the assessee through cheques worked out to Rs.15,16,256/- as against Rs.18,88,656/- debited to the P&L account. Therefore, vide order sheet entry dated 16.12.2011, the Assessing Officer again asked the assessee to show cause as to why the salary not paid through cheques in respect of which no evidence in the form of salary register/voucher is filed be not disallowed. On perusal of the details filed, the

Assessing Officer found that salary aggregating to Rs. 7,82,628/- was paid in cash, which according to him was liable to be disallowed. Therefore, the Assessing Officer disallowed an amount of Rs.11,10,020/- (i.e. Rs.7,82,628/- paid in cash and the difference that worked out amounting to Rs.3,27,400/- (i.e. 18,88,656 - 15,61,256) was added to the income of the assessee. We find that the Ld. CIT(A) has observed that Assessing Officer had not made out of case for making the impugned disallowance and that the Assessing Officer had made vague observation to disallow a major part of the salary debited to the P&L A/c. According to the Ld CIT(A) the Assessing Officer had also wrongly worked out the difference of Rs.3,27,400/-. The Ld CIT(A) notes that the Assessing Officer had not taken into account the names of all the employees while reproducing the names in para 9 of his order. According to Ld CIT(A) the Assessing Officer did not give any clear finding or reasons for making such a disallowance nor brought any adverse material on record. In the absence of any such adverse material, Ld. CIT(A) observed that there is no justification for the Assessing Officer to make such an impugned addition. In the instant case, we find that the AO has reproduced a chart presented by the assessee in page 5 & 6 of his order. From a perusal of the said chart, we find that out of 14 employees to whom the assessee claims to have paid the salary, only 3 were not given salary by cheque. Other 11 employees were paid by account pay cheque and cash. The assessee had produced the appointment letters of the said employees and confirmation from them that they have received the said salary as claimed by the assessee. We were taken through page 37-94 (PB) were the month wise chart showing details of salary paid to employees of the assessee for the period from 1.04.2008 to 31.03.2009 along with confirmation and appointment letter of the employee are on record. In the light of the said evidences, merely because few employees have been paid salary as cash cannot justify disallowance unless the AO is able to bring any adverse material to suggest that the claim of salary incurred by the assessee is bogus. So the Ld CIT(A) rightly deleted the addition of Rs. RS.11,10,028/-, which does not need any interference on our part, hence, we uphold the same by dismissing the ground no. 5 raised by the Revenue.

8.5 Apropos ground No. 6 relating to deletion of the addition of Rs. 51,707/- made by the AO on account of negative cash balance is concerned, we find that in the course of the assessment proceedings, on examination of the cash book vis-a-vis bank account statements, the Assessing Officer noticed that the assessee had shown a withdrawal from Corporation Bank amounting to Rs.67,000/- dated 28.2.2009, when actually as per the bank statement, the withdrawal was on 2.3.2009. Therefore, the Assessing Officer observed that the assessee was trying to mask his negative cash balance with false entries. The Assessing Officer also noted that the assessee had shown a withdrawal from Corporation Bank on 2.3.2009 amounting to RS.25,000/-, whereas actually as per bank statement the withdrawal was on 3.3.2009. Accordingly, the assessee was asked to show cause as to why the negative cash balance due to cash withdrawal shown in cash book earlier than the actual withdrawals made from the banks, as per bank statement be not added to his income. Vide reply dated 8.12.2011, the assessee submitted that entries were made when cheques were issued. This was observed by the Assessing Officer as the assessee's attempt to misguide and in his opinion, the cash was to be debited when actually it came in to cash book and the ensuing negative cash balances due to falsification of entries were liable to be added to the income of the appellant. Therefore, the Assessing Officer worked out the ensuing negative balances as under:

Date	Opening Balance	Cash debited on the day by Book	Cash credited on the day by book	Resultant daily balance
28.2.2009	Debit balance Rs. 4293/-	NIL	Rs. 46,600/- (Salary and imprest expenses)	Negative balance Rs. 41,707/-
1.3.2009	NIL	NIL	Rs. 10000/- (Imprest expenses)	Negative Balance Rs. 10,000+41,707=51,707/-
2.3.2009	Nil	Actual bank withdrawal Rs. 67,200/-	Nil	Debit balance Rs. 67,200/-
3.3.2009		Actual bank withdrawal Rs. 25,000	Rs. 20/	Debit Balance Rs. 92,200/-

Hence, the Assessing Officer worked out the negative balance as aggregating to (Rs.41,707 + Rs.10,000) Rs.51,707/- and added to the income of the assessee. Ld. CIT(A) deleted the addition of Rs.51,707/- by relying on a letter of assessee dated 8.12.2011 wherein she observed that AO did not appreciate the contents of letter properly and failed to comprehend that what was done was only a book entry for both credits and debits. According to Ld CIT(A) the disbursement of Rs.46,600/- was only made on 2.3.2009 when the cheque was encashed. Regarding the amount of Rs.10,000/- the Ld CIT(A) was of the opinion that it was explained by the assessee that since 1.3.2009, being Sunday and since the cash was urgently required for expense, the same was provided by the assessee from his own pocket, therefore, Ld. CIT(A) has deleted the addition of Rs. 51,707/- on this account. Having considered the above factual matrix we are of the opinion that the finding of CIT(A) cannot be countenanced. The undisputed position is that there was negative cash balance on 01 November 2009 of Rs. 51,707/-. The basis of CIT (A) that expenditure incurred as per cash book of Rs. 4,600/- was not actually expended on 28/Feb/2009 is unsupported by any material. It is an afterthought of the assessee, as cash book has been maintained and produced in the course of the proceedings. As regards the explanation of Rs. 10,000/- that the same was incurred out of own sources does not deserve any merit as it is a more self serving explanation without any basis. We therefore reverse the conclusion of CIT(A) and uphold the action of AO in bringing to tax a sum of Rs. 57,707/- as unexplained income of the assessee. Hence, we confirm the action of the AO on this addition and allow ground no.6 filed by the Revenue.

9. In the result, the Revenue's Appeal is partly allowed.

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