आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
" A" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 3505/AHD/2014**
निर्धारण वर्ष/Asstt. Year: 2011-2012

Viral Ashish Parikh, Ashish Bunglow, Atira Road, Panjarapole Cross Road, Ambawadi, Ahmedabad. **PAN: AGXPP3933A**	Vs.	The A.C.I.T,(OSD), Circle-10, Ahmedabad.
(Applicant)		**(Respondent)**

Assessee by	:	Shri M.K. Patel, A.R
Revenue by	:	Shri S.S. Shukla, Sr.D.R

सुनवाई की तारीख/**Date of Hearing : 11/08/2021**
घोषणा की तारीख /**Date of Pronouncement: 17/09/2021**

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)-XVI, Ahmedabad, dated 09/11/2017 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") relevant to the Assessment Year 2011-2012.

2. The assessee has raised the following grounds of appeal:

> *1. That on facts, and in law, the learned CIT(A) has grievously erred in not admitting the additional evidence filed in term of Rule 46A of the IT Rules.*
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> *2. That on facts, and in law, the learned CIT(A) has grievously erred in confirming the disallowance of Rs.11,11,349/- on account of travelling expenses.*
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> *3. That on facts, and in law, the learned CIT(A) has grievously erred in confirming the disallowance of Rs.4,50,000/- on account of salary expenses.*
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> *4. That on facts, and in law, the learned CIT(A) has grievously erred in confirming the disallowance made u/s.40(a)(ia) of the Act of Rs.82,200/- on account of advertisement expenses, Rs.92,800/- on account of embroidery expenses and Rs.78,595/- on account of fashion show expenses.*
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> *The appellant craves leave to add, alter, amend any ground of appeal.*

3. The 1st issue raised by the assessee in ground No. 1 and 2 is interconnected and therefore we have clubbed both of them together. The assessee assailed that the learned CIT (A) erred in not admitting the additional evidences filed under rule 46A of Income Tax Rule with respect to travelling expenses of Rs. 11,11,349/- and therefore disallowed the same.

4. The facts in brief are that the assessee in the present case is an individual and claimed to be engaged in the business of ladies designer dresses, ethnic wear etc. the assessee in the year under consideration has claimed the travelling expenses of Rs. 11,11,349/- in his profit and loss account. The assessee in support of travelling expenses has filed bills of Royal Orient Tours of ₹ 1,27,200/- only. However, the AO found that the assessee failed to furnish the tickets bank, statements or other supporting documents to prove the genuineness of the travelling expenses. Therefore the AO disallowed the same and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT (A).

6. The assessee before the learned CIT (A) submitted an application under Rule 46A by filing the additional evidences. The learned CIT (A) forwarded the additional

evidences for the comments of the AO vide letter dated 14th August 2014. The AO vide letter dated 27th August 2014 submitted that there were enough opportunities provided to the assessee for furnishing the necessary evidences but the assessee failed to file the same. Accordingly, the AO in the remand report contended that the case of the assessee does not fall in the circumstances provided under Rule 46A for the admission of additional evidences. Accordingly the AO submitted that the application of the assessee for the admission of additional evidences deserves to be dismissed.

6.1 The remand report furnished by the AO was forwarded to the assessee for his rebuttal. The assessee vide letter dated 24th September 2014 submitted that the accountant who was looking after the income tax proceedings was not competent enough and therefore he failed to take the proceedings seriously. Accordingly, the assessee requested to admit the additional evidences.

6.2 However the learned CIT (A) rejected the contention of the assessee by observing that the assessee was afforded various opportunities during the assessment proceedings but the assessee failed to furnish the requisite details. The learned CIT (A) also observed that the case of the assessee does not fall in the circumstances specified under Rule 46A for the admission of additional evidences. Accordingly the learned CIT (A) rejected the contention of the assessee.

7. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

8. The learned AR before us submitted that the assessee could not file supporting evidences during the assessment proceedings due to unavoidable circumstances. As such, the case of the assessee falls within the parameters specified under rule 46A of Income Tax Rules. Accordingly the learned AR requested to restore the issue to the file of the AO for fresh adjudication as per the provisions of law.

9. On the other hand the learned DR contended that the assessee cannot take the benefit provided under rule 46A of Income Tax Rules as a matter of right. There were various opportunities granted by the AO during the assessment proceedings but the assessee failed to avail the same. The learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. Under the provisions of Rule 46A, there are certain circumstances under which the assessee can file the additional evidences. As such, the onus lies upon the assessee to justify based on the documentary evidence that his case falls under the circumstances specified under Rule 46A of Income Tax Rule. However, from the preceding discussion, the assessee has not brought any cogent reason with the documentary evidence justifying that he was prevented by sufficient cause to file the additional evidences before the AO during the assessment proceedings. It was only contended by the assessee that the accountant who was looking after the income tax proceedings was not competent enough. But this justification of the assessee was without any documentary evidence on record such as the affidavit of the accountant, qualification of the accountant etc. Furthermore, we find that the AO during the assessment proceedings was requiring the assessee to furnish the specific details in support of travelling expenses but the assessee failed to do so despite having granted sufficient opportunities by the AO. To our mind, furnishing the basic details does not require much competency, therefore the argument of the assessee does not hold good.

10.1 Besides the above, we also find that the assessee has furnished additional evidences before the learned CIT (A) in the form of credit card statements which was containing the details of the websites through which the tickets were booked such as makemy trip, cleartrip, specific airlines etc. However, in our understanding,

these details alone do not justify that such travelling expenses were incurred for the purpose of the business.

10.2 Even before us, the learned AR for the assessee has not filed any evidence to justify the travelling undertaken in a foreign country. It was only submitted that the foreign trip was undertaken to participate in a fashion show in London without any supporting evidence. In the absence of necessary supporting evidence it is not possible to establish that the expenses were incurred for the purpose of the business especially in the case of international travelling expenses. In view of the above, we do not find any merit in the argument advanced by the learned AR for the assessee and therefore we decline to interfere in the order of the authorities below. Hence, the ground of appeal of the assessee is dismissed.

11. The 2nd issue raised by the assessee in ground No. 3 is that the learned CIT (A) erred in confirming the disallowance made by the AO for Rs. 4,50,000/- on account of salary expenses.

12. The assessee in the year under consideration has claimed salary expenses amounting to Rs. 76,24,000/- only. Most of the salary was paid by the assessee in cash except a sum of Rs. 3,65,000/- which was paid through the banking channel. However, the AO during the assessment proceedings observed certain defects as highlighted below:

i. In many cases vouchers were not signed by the payees.
ii. In some of the cases, the salary vouchers were not available for verification.
iii. The Auditor in his Audit Report has also recorded the aforesaid facts.

12.1 In view of the above defects the AO was of the opinion that it was not possible to verify the genuineness of salary expenses. On question by the AO, the assessee agreed for the disallowance of salary expenses in part. Accordingly the AO made disallowance of Rs. 4,50,000/- and added to the total income of the assessee.

13. Aggrieved assessee preferred an appeal to the Ld. CIT(A), who confirmed the order of the AO by observing as under:

> *6.2 I have considered the facts of the case and (he submissions made by the appellant. The appellant has not given any justification regarding why salary expenses of Rs 4,50,000/- disallowed by the AO out of the total salary expenses claimed should be allowed now. He has reiterated that many employees had left the job and were not available, and that the signatures were also not available. Under the circumstances, I see no reason to interfere with the decision of the AO and the disallowance of Rs 4,50,000/- is confirmed. In view of this, ground of appeal I No 2 is dismissed.*

14. Being aggrieved by the of the order of Ld. CIT(A), the assessee is in appeal before us.

15. The Ld. AR before us submitted that the AO has made the disallowances on ad hoc basis which is not desirable under the provisions of law. Furthermore, the salary expenses claimed by the assessee in the year under consideration is commensurate to the sales shown by him. In fact in the earlier years, the same amount of salary expenses was admitted by the revenue.

16. On the contrary the Ld. DR, vehemently supported the order of the authorities below.

17. We have heard the rival contentions of both the parties and perused the materials available on record. The assessee in the present case has claimed salary expenses amounting to ₹ 76,24,000/- in the profit and loss account. The onus lies upon the assessee to justify that the impugned amount of salary expenses were genuine in nature. But the assessee failed to prove the genuineness of the expenses during the assessment proceedings. Therefore, part disallowance of ₹ 4,50,000/- was made by the AO which was subsequently confirmed by the learned CIT (A).

17.1 From the preceding discussion, there are certain undisputed facts as detailed below:

i. The assessee himself admitted that he failed to furnish the ID proof of certain workers who were not regular and left the job. Likewise it was

also admitted that the signature of these workers were also not appearing in the salary registers.

ii. The auditor in his audit report has also given remark that in certain cases the signature of the payees were not available in the salary vouchers. Likewise, some salary vouchers were not available for the purpose of the audit.

iii. All the salary expenses were incurred in cash except a meagre amount of ₹ 3.65 lakhs out of the total salary expenses of ₹ 76,24,000/-.

iv. The assessee during the assessment proceedings himself admitted to the disallowances made by the AO for ₹ 4,50,000/- only.

17.2 Besides the above, we have perused the comparative chart furnished by the assessee showing the salary expenses over a period of 3 years which is placed on page 62 of the paper book. It was noticed that the assessee in the immediate preceding year has claimed salary expenses amounting to ₹ 49,73,140/- against the sales of ₹ 1,99,55,006/- whereas in the under consideration the assessee has claimed salary expenses amounting to ₹ 76,24,000/- against the sales of ₹ 2,90,91,928/-. Admittedly, the sales and the salary expenses shown by the assessee in the year under consideration have increased in comparison to the immediate preceding assessment year. However, the salary expenses have increased more in proportion to the increase in the value of the sales i.e. 24.92% of sales in immediate preceding year to 26.2% in current year. Thus, a cumulative reading of all these facts create a doubt on the genuineness of the expenses shown by the assessee. The learned AR at the time of hearing has not brought anything on record suggesting that the impugned salary expenses were genuine which were based on the documentary evidence. Thus, in the given facts and circumstances, we do not find any reason to interfere in the finding of the authorities below. Hence, we uphold the order of the learned CIT (A). Thus the ground of appeal of the assessee is dismissed.

18. The issue raised by the assessee in ground no. 4 is that the Ld. CIT(A) erred in confirming the disallowance of Rs. 2,53,595/- on account of non-deduction of Tax u/s 40(a)(ia) of the Act.

19. The AO during the assessment proceedings found that the assessee has claimed certain expenses without deducting the TDS under the relevant section of the Act. The details of such expenses stand as under:

i. Advertisement Expenses of Rs.82,200/-
ii. Embroidery Expenses of Rs.92,800/-
iii. Fashion Show Expenses of Rs.78,595/-

19.1 Accordingly, the AO treated the assessee in default and made the disallowance of Rs. 2,53,595.00 and added to the total income of the assessee.

20. Aggrieved assessee preferred an appeal to the Ld. CIT(A), who confirmed the order of the AO by observing as under:

> *7.2 I have considered the facts of the case in the light of submissions made by the appellant and the assessment order. The amended section 40(a)(ia) by the insertion of second proviso by the Finance Act 2012 is effective from 1-4-2010 and is thus prospective in nature. Moreover, in order to provide clarity regarding discharge of tax liability by the payee on payment of any sum received by him without deduction of tax, section 201 was also amended by Finance Act, 2012 to provide that the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee* ***shall not be deemed to be an assessee is default in respect of such tax if such resident payee***
>
> *i) has furnished his return of income u/s. 139, ii) has taken inio account such sum for computing income in his return of income, iii) and has paid the tax due on the income declared by him in such return of income,* ***and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.***
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> *The appellant has not fulfilled the above condition, and thus, this plea of the appellant is not acceptable. Further, he has also not denied the fact that tax at source had not been deducted by him. The disallowance made u/s. 40(a)(ia) on account of non deduction of tax is therefore confirmed and the ground of appeal No, 3 is dismissed.*

21. Being aggrieved by the of the order of Ld. CIT(A), the assessee is in appeal before us.

22. The Ld. AR before us submitted that the matter can be restore to the file of the AO in view of the 2nd proviso to section 40(a)(ia) of the Act. As such the payees have included the amount received from the assessee in their respective books of accounts and offered the same to tax.

23. On the contrary the Ld. DR, vehemently supported the order of the authorities below.

24. We have heard the rival contentions of both the parties and perused the materials available on record. The controversy in the present case relates to the disallowance of the expenses on account of non-deduction of TDS under the provisions of section 40(a)(ia) of the Act. However, the learned AR at the time of hearing before us has submitted that the payees have already included the amount received from the assessee in their financial statements and paid the due taxes thereon. This fact can be verified by the AO from the respective parties. Accordingly, there cannot be any disallowance by virtue of the 2nd proviso to section 40(a)(ia) of the Act. For this purpose, the ld. AR requested that the matter can be referred back to the AO for the necessary verification.

24.1 Undoubtedly, the primary onus lies upon the assessee to deduct the TDS under chapter XVIII-B of the Act. In case, the assessee fails to deduct the TDS, then the assessee is not eligible for deduction of the corresponding expenditure.

24.2 However, the lawmakers have given relief to certain assessee by inserting the 2nd proviso to section 40(a)(ia) of the Act which reads as under:

> ***Provided further*** *that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid*

the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.

24.3 It is also important to refer the provisions of section 201 of the Act which reads as under:

*[**Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—*

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed[68];

24.4 From the preceding discussion it is transpired that Payers defaulting in deducting TDS from payments to resident payees need not to be deemed as Assessee in Default in the following conditions:

(A) Payee has included the impugned amount on which tax was not deducted/short deducted by the payer in his return of income filed under section 139 and pays the taxes due on returned income and

(B) Payer produces a certificate in prescribed form from a CA to the effect that the payee has included the income in return and paid taxes thereof.

24.5 The CBDT has prescribed Form No. 26A for CA certificate to be obtained and furnished by payer evidencing compliance by payee.

24.6 From the above discussion, it is transpired that the assessee can be granted immunity from disallowances of expenses on account of non/short deduction of taxes provided that the assessee (payer) furnishes the certificate in the prescribed form. Thus the onus is upon the assessee. However we find that assessee has not furnished the necessary certificate in form 26A prescribed by the CBDT.

24.7 We also find that similar prayer was also made by the assessee before the learned CIT (A) but the same was rejected by him by observing that the assessee has not complied the conditions as specified under the provisions of law i.e. furnishing the certificate of the CA.

24.8 Now at the time of hearing before us, the learned AR has also not furnished any certificate in form 26A prescribed by CBDT. Now the issue arises, can the matter be set aside to the file of the AO for collecting the necessary evidences from the respective payees to ensure that such payees have paid the taxes on the amount received from the assessee?

24.9 In this regard we note that it is the duty of assessee to deduct appropriate tax from the amount paid/payable to any party i.e. payee if such amount falls under the purview of the provision of chapter XVII (B) of the Act i.e. deduction at source. Further the provision of section 40(a)(ia) of the Act provides that if assessee failed to deduct or failed to deduct appropriate tax on amount paid on which it was liable to deduct tax then such amount will not be allowed as business expenses. However the legislator provided relaxation to the assessee by inserting the 2nd proviso to section 40(a)(ia) on account of failure to deduct the tax if it fulfills the condition prescribed under proviso to section 201(1) of the Act i.e. furnishing a certificate from accountant in from 26A. To our understanding the duty cast on the assessee cannot be transferred to revenue. If such burden is transferred to Revenue then the importance of provision of tax deduction at source under the provision of chapter XVII (B) of the Act i.e. deduction at source will be of no relevance. However, in the interest of justice and to avoid the double taxation, we set aside the issue to the file of the AO with the direction to the assessee to submit the CA certificate to the effect that the payees have included the amount received in their income return and offer

the same to tax. Hence, the ground of appeal of the assessee is allowed for the statistical purposes.

25. In the result, the appeal of the assessee is partly allowed for the statistical purposes.

Order pronounced in the Court on 17/09/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 17/09/2021

Manish