IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: "I" : NEW DELHI

1197

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER &
SHRI B.C. MEENA, ACCOUNTANT MEMBER

I.T.A. No. 60/Del/2011
Assessment Year : 2007-08

Widex India Pvt. Ltd., 333, Ansal Chamber-II, Bikhaji Cama Place, New Delhi. (PAN: AAACW 3207 E)	Vs.	D.C.I.T., Circle 18 (1), New Delhi.

I.T.A. No.949/Del/2011
Assessment Year : 2007-08

D.C.I.T., Circle 18 (1), New Delhi	Vs.	Widex India Pvt. Ltd., 333, Ansal Chamber-II, Bikhaji Cama Place, New Delhi. (PAN: AAACW 3207 E)
[Appellant]		[Respondent]

Assessee by : Shri Ved Jain, Ram Jain & V. Mohan CAs.
Revenue by : Dr. B.R.R. Kumar, Sr. D.R.

ORDER

PER DIVA SINGH, JM

These are Cross Appeals filed by the assessee and the Revenue against the order dated 03.12.2010 of CIT(A) XXI, New Delhi pertaining to 2007-08 Assessment Year (A.Y.) wherein both the assessee and the Revenue are in appeal before the Tribunal on account of the quantum of relief given by the CIT(A).

2. The grounds raised by the assessee are as under :-

"1. On the facts and circumstances of the case, the order passed by ld.CIT(A) is bad both in the eye of law and on facts.
2.(i) On the facts and circumstances of the case, the ld.CIT(A) has erred both on facts and in law in confirming disallowance of an amount of Rs. 27,47,880/- out of advertising expenses incurred by the assessee.
2.(ii) On the facts and circumstances of the case, the ld.CIT(A) has erred both on facts and in law in arbitrarily upholding the disallowance @ 10% without pointing out any specific expenditure not eligible for deduction.
(iii) That the above said disallowance has been upheld merely on surmises and conjectures.
3. That the appellant craves leave to add, amend or alter any of the grounds of appeal."

2.1. The departmental ground is reproduced hereunder. :

"On the facts and circumstances of the case, the ld.CIT(A) has erred in restricting the disallowance of Rs. 1,00,00,000/- made out of advertisement expenses to only Rs. 27,47,880/- at a random rate of 10% of such expense claims inspite of admitting in his own order that there was sum and substance in the findings of the AO and that there was tremendous increase in the advertisement expense claims in comparison to the preceding year."

3. The relevant facts emerging from the Assessment Order are that the assessee is in the business of trading in hearing aids and allied instruments which are mostly imported from its Associated Enterprises M/s Widex Corporation, Copenhagen, Norway.

3.1. The subject matter of appeal before us is the assessee's claim of expenses amounting to 2,74,78,793/- towards advertising expenses. The A.O. observed that out of this, Rs.96,97,561/- had been paid to one M/s Buzz Inc for release of various advertisements in Newspapers all over India. He also observed that apart from this a further amount of Rs.45,03,206/- had been claimed to have been paid to M/s Ad-Line for hoardings, bus ads and pillar ads.

3.2. In the circumstances, the Assessing Officer made an addition of Rs.1,00,00,000/-, giving the following reasons :-

"It is seen that advertisement expenses claimed this year has gone up by 200% from the immediate preceding year. Though the sale have increased from Rs.10,87,57,714/- to Rs.15,30,75,408/-, the expenditure claimed at Rs.2,74,78,793/- is illogical and unreasonable. Due to the nature of expenses claimed, it is not possible to verify the genuineness of the expenses. However, clearly the expenditure claimed on advertisement is disproportionate to the size of the business, the turnover and the income declared by the assessee. In the case of CIT vs. S.P. Nayak 235, 94 the Hon'ble court has held :

"If the assessee fails to produce cogent evidence to prove the entirety of the claim, it is the duty of the assessing authority to assess the allowable part of the expenditure to the best of his judgment,"

An amount of Rs.1 crore is disallowed and added back to the income of the assessee (Rs.1,00,00,000)."

4. Aggrieved by this, the assessee came in appeal before the CIT(A).

5. Before the CIT(A) it was canvassed that the details of advertising expenses were made available before the AO despite that the addition was made. A perusal of paragraph no.4.1 of the impugned order further shows that the details of advertisement expenses were submitted before the CIT(A) in the paper book filed before the said authority and were available before him from pages 64 onwards.

6. Considering the same the CIT(A) restricted the disallowance to 10% of the total advertisement expenses observing as under.

"4.2. *I have gone through the details furnished by the ld.A.R. and findings of the A.O. There is sum and substance in the finding of the AO and her reliance on the judgement in the case of CIT vs. S.P.Nayak, 235 ITR 94, wherein, it has been emphasized that it is the duty of the assessing authority to assess the allowable part of the expenditure to the best of judgement. However, ratio of disallowance arrived at by the AO has not been worked out properly as to how she has disallowed a sum of Rs. 1,00,00,000/- out of total advertisement expenses of Rs. 2,74,78,793/-. It is also very true that there is tremendous increase in the advertisement expenses as compared to last year as it has gone up by 200%*

from the immediately preceding year as is observed by the A.O. So, in my considered view it would be reasonable to restrict disallowance to the extent of 10% of total advertisement expenses. Thus, a disallowance of Rs. 27,47,880/- is confirmed. The assessee gets a relief of Rs. 72,52,120/- on this account."

7. Aggrieved by this, both the assessee and the Revenue are in appeal before the Tribunal.

8. It was the common stand of the parties before the Bench that arguments in the Cross Appeals would be lead by the Ld. A.R. Accordingly, in the context of the above facts it was contended by the Ld. A.R. that the assessee has been in this line of business and has been claiming advertisement expenses in an identical manner over the years and never such a disallowance has been made. It was his contention that there is no suggestion in the Assessment Order that the books of accounts had not been maintained or that the vouchers in regard thereof were not available/or were defective. It was emphasized that the assessee's books of accounts were audited and paper book page no.64 summarises the description of the advertisement expenditure. Paper Book page nos.65 to 100, it was stated sets out the details of the advertisement expenses which clearly reflect the date of voucher, detailed description of the same along with the amounts. It was clarified that the page numbering in the paper book is the same as was available before the CIT(A) as the very same paper book has been filed before the Tribunal. It was submitted that no defect in the books of accounts or vouchers has been pointed out either by the A.O. or by the CIT(A). It was his stand that there is not even a single instance of any un-vouched expenditure. The reliance placed upon the judgement of the Hon'ble Supreme Court in the case of CIT vs. S.P. Nayak, 235 ITR 94 by the Assessing Officer it was argued is misplaced. It was contended that the principle laid down therein is not applicable as the facts in the present case

vis-à-vis the said judgement are entirely distinguishable. It was his contention that adhoc disallowance in the manner made is contrary to the settled legal principles and for the said proposition reliance was placed upon the orders of the Co-ordinate Bench in the case of ACIT vs. Talbros, 10 DTR 149, Coca Cola India Ltd. vs DCIT (2008) 116 TTJ (2008) 10 DTR 149. Specific attention was invited to page 19 para 35 of the same so as to contend that adhoc disallowance cannot be made. Reliance was also palced upon the order of the Delhi Bench in the case of Nestle India Ltd. vs Dy.CIT (2007) 111 TTJ Del 489, specific attention was invited to Page 18, Para 22 of the same . Based on these decisions it was his contention that additions by way of adhoc disallowance based on surmises, estimating ratios and percentage cannot be made. The fact that the expenses have been incurred solely for business purposes cannot be ignored. It was argued that it is for the assessee to judge as to how much expenditure is to be incurred for advertisement and the Assessing Officer cannot sit over in judgement over this decision of an assessee, especially in a case where the books of accounts have been accepted.

8.1. On the basis of the facts available on record and the position of law, it was contended that the CIT(A) was not justified in estimating the quantity of disallowance to be made as there was no basis available on the basis of which AO had estimated the disallowance. Responding to the query from the Bench that the Assessing Officer has made the observation that due to the nature of the expenditure genuineness could not be verified. It was his submission that if the Assessing Officer had any doubts on genuineness, he could have issued summon under section 133 to the parties to whom payments have been made as the addresses of the parties concerned are available in the vouchers. It was argued that no such query was raised by the A.O. It was stated that neither the A.O. made his own efforts nor did he

ask the assessee to explain something which was not clear to the A.O. All the details and vouchers were available before him and he has not chosen to point out what was not verifiable. No specific instances for making the adhoc disallowance have been pointed out and only general observations have been made that it is not possible to verify but what was not possible to verify has not been specified.

8.2. Inviting attention to page nos.107 & 121, which contains the copies of the assessment made under section 143(3) for 2006-07 & 2005-06 A.Ys it was submitted and no such disallowance has been made in the earlier years. The general suspicion based on the amount of increase in the expenditure in the year under consideration it was submitted that it was based on the business decision of the assessee. Inviting attention to the Paper Book filed by the assessee it was submitted that a new product had been launched by the assessee as would be evident from Paper Book page no.64 which gives the break up of advertisement expenses claimed. It was submitted that this summary would show that expenses on this account necessarily were not there in the earlier years on account of the new product. It was contended that this fact was argued before the CIT(A) and attention was invited to paragraph no.6 of the written submission placed before the CIT(A) which is placed at Paper Book page 138 to 142 at page no.141. Accordingly it was his argument that on facts no disallowance could have been made as such the entire addition sustained by the CIT(A) should be deleted.

9. The ld. Departmental Representative Dr.BRR Kumar, on the other hand, heavily relied upon the Assessment Order and the judgment of the Apex Court relied upon by the Assessing Officer. It was his submission that since the expenses had increased inordinately by almost 200%, the Assessing Officer took a conscious decision that looking at the nature of expenses, the genuineness could not be verified. Responding to the

argument advanced on behalf of the assessee that the accounts are audited it was his submission that the auditor can prepare the books of accounts taking note of the vouchers, however he has no occasion to consider the genuineness of the same nor the need to incur that expenditure which is why this power is specifically given to the Assessing Officer who has exercised the power as per law. It was argued that simply because the vouchers are available on the basis of which books have been audited they cannot be accepted blindly the nature and genuineness of the expenditure still needs to be considered by the Assessing Officer and the Assessing Officer alone.

10. Responding to the various orders of the tribunal on which reliance has been placed by the A.R. it was his submission that they are not in the context of inordinate increase in the advertisement expenses as such not relevant.

10.1. It was further submitted by him that even if the argument of launch of a product is accepted, even then the expenditure incurred is to the tune of Rs.30 lacs odd for this reason which still does not explain the inordinate increase. It was his submission that he has seen from the paper book that some of the bills are running into 15 pages and it is not possible to say specifically as to which portion is not verifiable. It was argued that the said finding of the Assessing Officer has been accepted by the CIT(A) as both the authorities have held that expenses are not capable of being verified and the difference is only on the quantum. In the circumstances a prayer was made that for this purpose so that specific instance of non-verifiable expenses be identified, the issue should be sent back to the file of the A.O. for verification on facts, let the A.O. look into the same again and point out the specific instances.

11. In reply, the ld. Authorised Representative strongly opposed the said prayer of the Sr.D.R. that the issue may be restored to the AO. It was his stand that the department has not made out any case why the issue should be looked into again by the A.O. as no failure on the part of the assessee has been alleged or demonstrated. It was his stand that when all necessary facts and figures were available before the A.O. and despite that if the AO fails to point out any specific defect and chooses to saddle the assessee with additions based on suspicions there is no reason available under law to justify why the A.O. should be given a second chance. It was his argument that the A.O. has made the disallowance in a mechanical manner, the parties to whom the payments were made were identified and no efforts were made by the A.O. to issue summons to them or call the assessee to further justify the claim. The addition made in a mechanical manner it was argued deserves to be deleted. Reliance was placed upon the Third Member decision of the Tribunal in the case of ACIT vs. Anima Investments Ltd. 73 ITD 125 (Del) TM. It was his argument that the correctness of the books of accounts of the assessee which have been audited can be challenged by cogent and specific evidence and not by general suspicions. Reliance was placed on the judgement of the Delhi High Court in the case of CIT vs. Jay Engineers, 113 ITR 389 (Delhi).

12. We have heard the rival submissions and perused the material on record. On a careful consideration of the same, we are of the view, that in the peculiar facts and circumstances of the case the appeal of the assessee deserves to be allowed It is seen that neither the A.O. nor the CIT(A) has made out the case that full facts and particulars were not disclosed by the assessee. The books of accounts of the assessee admittedly have not been rejected. Further it is seen that it is not a case that the assessee is relying upon the audited books of accounts and has not supported the same by way

of vouchers. It is seen that no defect in the vouchers has been pointed out by the A.O. it is also seen that the parties to whom payments have been made their names, addresses are fully available in the vouchers relied upon by the assessee and made available both to the A.O. as well as to the CIT(A) No steps have been taken by the A.O. to show that the expenses are not genuine. The general observation of the A.O. that it is not possible to verify the genuineness cannot be accepted the reason for coming to the said conclusion has to be set out in the order. It is seen that no reason has been given either by the A.O. nor by the CIT(A). If the increase in expenditure alarmed the A.O. then he should have called the assessee to get confirmation from the party or directly called the party to be examined. There are ample powers with the A.O. to cross check the genuineness. No such effort is available on record. Suspicion backed by no evidence cannot be a cogent reason. The reason for increase in expenditure has been given by the assessee before the CIT(A) and reiterated before us. It is seen that in the year under consideration the assessee had launched a new product and apart from that there were inauguration expenses, business promotion expenses, expenses on account of general advertising expenses, packaging charges, P.R.services and expenses on account of Brand Ambassador etc. The expenses are duly vouched and the audited accounts duly supported by vouchers have been made available to the A.O. who has not rejected the books of accounts. In these peculiar facts the A.O. was not justified in estimating the disallowance to be made as apart from general suspicion there is no material or fact on record. The CIT(A) it is seen has chosen to reduce the addition made by way of reducing the disallowance, however, the reason for resorting to making a disallowance has not been separately addressed by him and he has merely upheld the finding of the A.O. The said finding as observed earlier is without any reason and is purely based on suspicion. The

said action cannot be upheld. The Courts have repeatedly held that the reasoning for conclusion is imperative as without reasoning the conclusion arrived at is open to the allegations of arbitrariness which cannot be upheld.

12.1. We now propose to consider the case law. The A.O. and the Sr.D.R. it is seen have relied on the judgement of the Apex Court in the case of CIT vs S.P.Nayak. A careful perusal of the same shows that the said judgement is of no relevance in the present case. A perusal of the said judgement shows that it was a case where it was not denied and was in fact an admitted fact that the assessee failed to produce cogent evidence to prove the expenditure. In the facts of the present case there is no such finding available on record. The A.O. as has been reproduced in the earlier part of this order has been of the view that it is not possible to verify the genuineness of the expenses. If the A.O. fails to find ways and means despite the ample powers available to him under the Income Tax Act to verify the genuineness we see no reason as why the assessee should be burdened with an addition by way of disallowance in an adhoc manner. The law is settled that specific and cogent reasons have to be given in the orders for making or sustaining or reducing the disallowance. In the facts of the present case we find no such finding recorded in the order of the A.O. nor in the impugned order.

12.2. It is a settled legal position that it is not for the department to dictate what is the amount of expenditure the assessee should incur for advertising its business. The expenditure which an assessee may incur for the running of his business necessarily as per the scheme of the Act can be claimed as a deduction u/s 37(1) of the Income Tax Act, 1961, the said section reads as under:

Any expenditure (not being expenditure of the nature described in ss. 30 to 36 and not being in the nature of capital expenditure or

personal expenses of the assessee), laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head 'profits and gains of business or profession'.

12.3. The expression 'wholly and exclusively' used in S.37(1) of the Income Tax Act has been the subject matter of discussion by the Apex Court in the case of Sasoon J.David & Co. vs CIT, 118 ITR 261 (S.C.). The Apex Court in the said judgement interpreting the expression "wholly and exclusively" as used in s.10(2)(xv) of the Income Tax Act, 1922 held that it does not mean "necessarily". Their Lordships have held that ordinarily it was for the assessee to decide what expenditure should be incurred in the course of his or its business, their Lordships have held that such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, their Lordships have held that the assessee can claim deduction under the said section even though there was no compelling 'necessity' to incur such an expenditure.

12.4. It may be relevant to reproduce from page 275 of the said judgement wherein their Lordhips have cared to discuss the legislative history of S.37 of the Act as has discussed in Sassoon J.David Ltd. cited (supra)

"It has to be observed here that the expression "wholly and exclusively" used in S.10(2)(xv) of the Act does not mean "necessarily". Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction u/s 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure. It is relevant to refer at this stage to the legislative history of S.37 of the I.T.Act, 1961, which corresponds to s.10(2)(xv) of the Act. An attempt was made in the I.T.Bill of 1961 to lay down

the "necessity" of the expenditure as a condition for claiming deduction u/s 37. Section 37(1) in the Bill read "any expenditure..... laid out or expended wholly, necessarily and exclusively for the purposes of the business or profession shall be allowed .....". The introduction of the word "necessarily" in the above section resulted in public protest. Consequently, when S.37 was finally enacted into law, the word "necessarily" came to be dropped."

12.5. Subba Rao J speaking for the Supreme Court, observed in CIT vs. Malayalam Plantations Ltd. : "The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits.....". As such the occasion to relate profits earned vis-à-vis the expenditure where all necessary facts and evidences are available and these amounts have not been rejected the estimates made in an adhoc manner does not arise and such an action cannot be upheld.

12.6. It is further seen that the Apex Court in the case of S.A.Builders Ltd. vs. CIT(A), 288 ITR 1 (S.C.) has held as under.

"35. We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (Bharat) Ltd. (2002) 174 CTR (Del) 188 : (2002) 254 ITR 377 (Del) that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit.

(emphasis provided by the Bench.)

12.7. Considering the settled legal position it is clear that while considering the claim of allowable expenditure within the meaning of section 37(1) it is to be seen that the money paid is **a)** wholly and exclusively for the purposes of business or profession; and further **b)** must not be **i)** a capital expenditure; or **ii)** a personal expense; and also **iii)** should not be expenditure of the nature prescribed in S.30 to 36. In the facts of the

present case it is no ones case that the expenses are capital or personal in nature or for that matter are of the character prescribed u/s 30 to 36 of the Act. The expenditure claimed is stated to be wholly and exclusively for the purpose of the business. The A.O. has not doubted the claim he has merely made general observations while making an adhoc disallowance holding that the extent of the claim is to be limited on an estimate basis without rejecting the accounts and without caring to point out deficiencies in the vouchers produced. The said approach is against the settled judicial principles and cannot be accepted. The action of the CIT(A) in sustaining the same also suffers from this deficiency. The prayer of the ld.D.R. that the issue should go back to the file of A.O. also does not find favour with us as it is not a case where something new is placed by the assessee or there has been a failure on the part of the assessee to lead necessary evidences or satisfy the A.O. in regard to the nature and extent of the claim when the assessee was specifically called for to do so. No such case is made out. All the facts were available before the A.O. and the CIT(A). No doubt the auditors do not comment upon the genuineness of the transactions and they are only required to audit the accounts as per the vouchers available and even after their certification the genuineness can still be looked into by the A.O. For this specific purpose all evidences were available before the A.O. who made no effort to point any specific defect. Disallowances purely on estimates cannot be upheld. In the facts before us it is seen that no such effort has been done and at this stage we find no good reason as to why we should restore the issue back to the file of A.O. as no deficiency on the part of the assessee has been pointed out by the department. The argument that it is for the A.O. to consider the genuineness cannot be faulted, however the A.O. is to consider the evidences as per settled principles of law and not in an adhoc manner based on suspicion. We find support in coming to the said

conclusion from the order of the Tribunal in the case of ACIT vs. Amina Investments Ltd. where it has been held that remand is not made out in the case in order to enable the A.O. to make up his earlier deficient work. Reliance therein has been placed upon the Coordinate Bench Order of Chennai and Chandigarh namely Tatia Skyline and Health Farms Ltd vs ACIT (2000) 70 ITD 387 (Chennai) and Smt. Neena Sanyal 70 ITD 62 (Chandigarh).

13. In the afore mentioned peculiar facts and circumstances of the case, keeping in view the provisions of the Act, and the position of law, we are of the view that the claim of assessee is to be allowed.

14. Accordingly for the reasons state hereinabove the departmental appeal is dismissed and assessee's appeal is allowed.

Order pronounced in the open Court on 2nd December ~~November~~, 2011.

Sd/-

(B.C. MEENA)
ACCOUNTANT MEMBER

Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

Dated : 2nd December ~~November~~, 2011

PBN/*Manga

Copy forwarded to:

1. Appellant;
2. Respondent
3. CIT
4. CIT(A)
5. D.R, ITAT

By Order,

Dy. Registrar,
ITAT, Delhi Benches

Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
नई दिल्ली New Delhi