

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, D, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

श्री संजय गर्ग, न्यायिक सदस्य एवं

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Sanjay Garg, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.3719/Mum/2013
Assessment Year: 2008-09**

| | | |
|--|----------------------|--|
| ACIT 25(2) C-11 Pratyakshkar Bhavan, Bandra Kurla Complex Bandra (E) Mumbai-51 | बनाम/ Vs. | Shri Rajiv R. Ahuja, Prop. M/s. Engineers, 301, Dora Rose, Main Road, I.C. Colony, Borivali(W) Mumbai-400103 |
| (Revenue) | | (Respondent) |
| P.A. No. AADPA6445J | | |

| | |
|----------------------|-------------------------|
| Revenue by | Shri B.S. Bist (Sr. DR) |
| Respondent by | None |

| | |
|--|-------------------|
| सुनवाई की तारीख / Date of Hearing : | 03/10/2016 |
| आदेश की तारीख / Date of Order: | 19/10/2016 |

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Revenue against the order of Ld. Commissioner of Income Tax (Appeals), Mumbai-35, (in short 'CIT(A)'), dated 19.02.2013 passed against assessment order u/s 143(3) read with section 254 of the

Income Tax Act, 1961 dated 28.12.2010 for the Assessment Year 2008-09 on the following grounds:

"On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in deleting the ad-hoc disallowance @ 2.5% out of the expenses amounting to Rs.81,13,640/-, on which the A.O. had made the addition, following the decision of the Id.CIT(A) for earlier A.Ys."

"On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in deleting the addition of Rs. 40,05,445/- out of subcontract charges without appreciating the fact that assessee failed to prove the identity and complete details of the sub-contractors to whom the payments were made."

2. In this case none appeared on behalf of the assessee. On earlier occasions also, none had appeared on behalf of the assessee, despite the fact that notices are served. Under these circumstances, we have no option but to decide this appeal ex-parte qua the assessee.

3. Ground No.1: In this ground, the revenue has challenged the action of Ld. CIT(A) in deleting the *ad-hoc* disallowance @ 2.5% out of various expenses aggregating to Rs.81,13,640/-.

3.1. The brief facts and background of the case is that the assessee is a proprietor of M/s. M.S. Engineers engaged in the business of Civil Construction. During the course of hearing the AO *inter alia* made disallowance on ad hoc basis computed @ 2.5% of various expenses incurred on conveyance, gift, sales promotion, staff/labour welfare, traveling expenses, printing & stationary and miscellaneous expenses aggregating to Rs.81,13,640/-.

3.2. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein detailed submissions were filed *inter-alia* that there were no cogent basis with the AO to make disallowance on *ad-hoc* basis. After considering submissions of the assessee, Ld. CIT(A) deleted the disallowance by observing as under:

“The Ld. AR submitted that the payments of expenses were made by account payee cheques, wherever possible. The disallowance of expenses, especially those of payments made by cheque, cannot be arbitrary and random. Further, the appellant had already provided substantive evidences in form of vouchers and other document in support of the incurrance of the above mentioned expenditure and produced books of accounts. It is further seen that there is no description of books of accounts or bills/vouchers which were seen by the AO where discrepancies were observed or where there was lack of proper voucher or bill. There is no mention of any relevant fact in the appellant's case except for AO's observation that some expenditure was not supported by proper vouchers or bills. In the absence of relevant facts, the discrepancies or improper recording of expenditure is neither ascertainable nor evidenced. In the circumstances, the disallowance of Rs.2,02,841/- made by the AO is not sustainable. The Ld. A.R contended that the vouchers can once again be produced. Furthermore, personal expenses of Rs. 52,94,221/- are already debited to the capital account as drawing. He further submitted that similar disallowance made by the AO in AY 2007-08, were deleted by CIT(A) vide order dated 05-11-2012. In this case the CIT (A) had stated that these were ad-hoc disallowance without pointing out any specific deficiency by the A.O. The AR further referred to also been considered in the case of CREATIVE EYE LIMITED Vs. ACIT-11(1) for the A.Y. 2007-08, where the CIT (A)-30,Mumbai has provided that the Assessing Officer cannot

disallow expenses on ad-hoc basis stating them to be personal in nature, without looking into the facts, circumstances and the explanations given by the assessee. Hence, the AR submitted that the said expenses should be deleted.

6.3 *After considering the rival stands, it is seen that the AO did not consider that to earn income there has to be expenditure like electricity expenses, conveyance, staff welfare travelling expenses etc. & that the said expenditure should be allowed against the income. From the Vouchers, bills & supporting, it was not found that particular expenses under various heads were not supported by proper vouchers & bills to the extent of Rs.2,02,841/- & even this was disallowed. To my mind it is an ad-hoc disallowance without pointing out any specific deficiency by the AC. Hence the addition of Rs. 2,02,841/- and Rs. 142912/- of telephone expenses is deleted.”*

3.3. During the course of hearing nothing has been argued by the Ld. DR to show anything wrong in the detailed findings of the Ld. CIT(A). No arguments were made with regard to this ground and only reliance was placed upon the order of the AO. We find that order of Ld. CIT(A) is well reasoned and based upon factual appreciation of this case. Nothing wrong has been pointed before us and therefore order of Ld. CIT(A) on this ground is upheld. This ground is dismissed.

4. Ground No.2: In this ground, the assessee has challenged the action of Ld. CIT(A) deleting the addition of Rs. 40,05,445/- out of subcontract charges, on the ground that this could not be verified properly.

4.1. Being aggrieved, the assessee filed an appeal where these disallowance made by the AO was deleted by Ld. CIT(A).

4.2. Being aggrieved, the Revenue filed appeal before us. During the course of hearing, it was submitted by the Ld. DR that since AO could not verify sub-contractors, therefore, these were rightly disallowed and requested for confirming the order of AO.

4.3. We have gone through the orders passed by the lower authorities. It is noted by us that Ld. CIT(A) had made detailed verification before deleting the disallowance made by the AO with following observations:

“8.7. I have considered the stand of the AO as well as submissions of the appellant. I have also gone through the remand report of the AO on the specific issues which were referred to him during the remand proceedings. In the remand report the AO, has basically reiterated the earlier stand taken by the AO. It is further seen that no specific adverse comments/objections have been raised in the remand of the AO in respect to admissibility of any details or documents or otherwise with regard to Rule 46A of the I.T. Rule, 1962. Keeping in view all the aspects, the issue regarding ad-hoc disallowance of Rs.40,05,445/being 10% of Rs. 4,00,54,448/- on account of sub contract labour charges is decided hereinafter. It has been brought on record that no show cause notice was issued to the appellant by the AO and no reasonable opportunity of being heard for such a huge ad-hoc disallowance was given. It has been demonstrated by the appellant that the Assessing officer has passed order on 28th December, 2010 disallowing the payment to subcontractor without giving any reasonable opportunity. Last time the case was fixed for hearing by the AO was on 28-12-2010. It has been explained by the AR that he was present in the office of the AO who was busy with other time barring matters and was called in his chamber only at 6.00 P.M. and thereafter

did not take any further hearing. Therefore the AO requested for adjournment in writing and requested to be heard on the immediate next day if the AO does not wish to extend time of hearing on the same date i.e. 28-12-2010 beyond 6.00 P.M. The AR has shown copy of letter for adjournment where the AO under his signature has mentioned "received at 6.00 P.M. letter for adjournment, but received after the officer hours, so no adjournment will be given and order will be passed on the merits". The AR submitted before me that the assessing officer himself had accepted submission personally on 29/12/2010 submitted by AR for the relevant A.Y. even though the assessment order under appeal is dated 28-12-2010. It is further seen that although the AO had issued notices u/s.133(6) to the five parties viz. Najimuddin Yadu Mandal(1,83,273/-), Jai Prakash(1,18,752/-), Ramkirit Shah (1,14,170/-), Santosh Kumar Singh (5,02,726/-) and Chabbi Behra(2,59,940/-) which total upto only Rs.11,78,861/-- However the AO disallowed 10% on ad-hoc basis without giving any specific finding, reasoning, or commenting on any particular reason. It has been explained that no such disallowance was and has been made in any previous as well as subsequent assessment year on this ground where all the assessment has been completed by all competent, Income Tax officer u/s 143(3) of I.T. Act, 1961.

Another aspect relates to Subcontractor charges paid for the contract receipt for the A.Y. which is far less compared to what was paid in previous years in term of percentage as a major part of cost. These are as under:

| Sr. NO. | Asst. Year | Contract receipt(Rs.) | Subcontractor Charges(Rs.) | Percentage |
|---------|------------|-----------------------|----------------------------|------------|
| 1 | 2005-06 | 26,96,99,746 | 3,63,41,272 | 13.47% |
| 2 | 2006-07 | 45,96,93,142 | 9,07,07,386 | 19.73% |
| 3 | 2007-08 | 48,08,81,945 | 9,02,37,267 | 18.76% |
| 4 | 2008-09 | 43,57,40,094 | 4,00,54,448 | 9.19% |

Thus it is seen that in terms of percentage the appellant's expenses on subcontract labour charges was comparatively at quite lower side being 9.19 % in AY

2008-09 compared to 19.73% in AY 2006-07. Even in absolute term the payment of Rs.4.00 crores on the total contract receipt of Rs.43.57 crores is at a lower side compared to Rs.9.07 crore in AY 2006-07. Thus historically speaking, with no stretch of imagination, the payment towards labour subcontract charges can be said to be unreasonable in the present assessment year. Therefore in this situation making any adhoc disallowance by the AO in the assessment order was not justified.

It is further seen that all the parties to whom labour charges were paid, were subject to TDS by the appellant and sum of tax deducted at source were deposited as per law by the appellant. It has been explained copies of TDS return were also produced before AO. This being the case the AO could not have disallowed the payment either on ad-hoc basis or even on absolute and specific basis. At the best the AO could have informed the concerned jurisdictional AOs of those parties to do the needful at their end.

Undisputedly, none of the contractor's balances are outstanding nor the AO has made any such reasoning for disallowance. The appellant has submitted that the parties were paid by account payee cheques as per bank statement submitted before AO which is matter of record. Subcontractors were paid on the basis of bills received from all the parties. Thus in a situation where the amounts were paid by the appellant to the respective parties through banking channel and where payments/transactions are complete and over, the appellant can neither be subjected to produce those parties or force to give the whereabouts of the labour subcontractor since they are not supposed to stick to only one client and keep on moving from one client to other. Further, such labour contractor can also be on mobile and move from work place to another without giving any information to its principle contractor. Therefore the issuance of notice u/s.133(6) to such parties were not in right direction. The AO has not brought any material on record to prove that whatever amount was paid to these labour contractors, they are ultimately return to the

appellant in the form of cash and thereby the net profit of the appellant increased to that extend of amount and the corresponding ratio. Therefore, even from aspect the disallowance made by the AO cannot be sustained.

Keeping in view of, all the aspects, the disallowance of Rs.40,05,445/- is deleted. In the result this ground of the appellant is allowed.

4.4. It is noted by us that Ld. CIT(A) had sent entire details and evidences submitted by the assessee to the AO for his Remand Report. Remand Report was sent by the AO which was duly considered by the Ld. CIT(A). It is noted that the assessee has submitted various documentary evidences with regard to the aforesaid creditors e.g. copy of PAN Card, bills receipts, copy of bank statement and confirmation of accounts etc. It is undisputed that PAN Card Numbers of these persons were made available to the AO. It is also not disputed that TDS was deducted on all the payments as applicable. It is also not disputed that payments were made through account payee cheques. There is no contrary material available with the AO to negate these transactions. It is also noted by us that ratio of subcontractor charges paid by the assessee to total contract amount received during the year was 9.19% which is lowest as compared to all the preceding years. Thus, viewed from any angle these expenses were duly substantiated and explained by the assessee. It is found that the findings given by Ld. CIT(A) are well reasoned and based upon material available on record. Nothing wrong could be pointed out therein by the Ld. DR. Under

these circumstances, we uphold the order of Ld. CIT(A).
Ground no.2 is dismissed.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 19th October, 2016.

| | |
|---------------------------------|--------------------------------|
| Sd/- (Sanjay Garg) | Sd/- (Ashwani Taneja) |
| न्यायिक सदस्य / JUDICIAL MEMBER | लेखा सदस्य / ACCOUNTANT MEMBER |

मुंबई Mumbai; दिनांक Dated : 19 /10/2016

Patel, P.S. नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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