

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.830/Kol/2013**  
Assessment Year:-2009-10

DCIT, Circle-3, Asansol at "Parmar Building", 54, G.T. Road (West), Asansol-713 304	V/s.	M/s Sanjay Transport Agency, 41, N.S.B. Road, Raniganj-713 347 Burdwan [PAN No.AAVFS 6659 N]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	Shri Dinabandhu Naskar, JCIT-SR-DR
प्रत्यर्थी की ओर स/By Respondent	Shri S.M. Surana, Advocate
सुनवाई की तारीख/Date of Hearing	12-07-2016
घोषणा की तारीख/Date of Pronouncement	26-08-2016

**आदेश / O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-Durgapur in appeal No.262/CIT(A)/ASL/ACIT,Cir-3/ASL/2011-12 dated 30.01.2013. Assessment was framed by ACIT, Circle-3, Asansol u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 27.12.2011 for assessment year 2009-10. The grounds raised by assessee per its appeal are as under:-

*"1. That the Ld. CIT(A), Asansol has erred in law and on facts by allowing the relief of ₹49,29,534/- disallowed by the Assessing Officer on account of showing low Net Profit percentage over turnover;*

*2. That the Ld. CIT(A), Asansol has erred in law and on facts by allowing the relief of ₹76,49,136/-, disallowed by the Assessing Officer u/s.*

*40A(2) on account of excess payments made to relatives and associate concerns."*

Sri S.M. Surana, Ld. Authorized Representative appeared on behalf of assessee and Shri Dinabandhu Naskar, Ld. Departmental Representative appeared on behalf of Revenue.

2. The first issue raised by the Revenue is that Id. CIT(A) erred in deleting addition of Rs.49,29,543/- to the total income of the assessee.

3. Facts in brief are that assessee is a partnership firm and engaged in contract business of earth cutting, coal raising, transporting and road development. The assessee for the AY 2010-11 has shown net profit percentage @2.8% of the turnover but it has shown net profit @ .54% of the turnover for the year under consideration while there is no change in the nature or place of business. The Assessing Officer accordingly doubted on the income declared by the assessee for the year under consideration. As per AO it should be at least 2.8% of the turnover. Besides the AO also observed that assessee has claimed much higher expenses in the AY 2010-11 still showing higher percentage of profit. Accordingly, the assessee must be having higher percentage of profit in the year under consideration. The percentage of expense to turnover is 3.93% for AY 2009-10 whereas for the AY 2010-11 for the same expenses it is 4.63% of turnover. It means assessee has shown lower net profit i.e.  $4.63\% - 3.93\% = 0.70\%$ . So total profit percentage should be  $2.8\% + 0.70\% = 3.5\%$ . The assessee also itself has confessed that profit in this line of business is 3-4% and its average means is 3.5% of the turnover during survey. Therefore the Net Profit (NP for short) should be Rs. 54,78,307/- ( $15,65,22,962 * 3.5\%$ ) and profit already shown is of Rs. 8,48,773.00. Accordingly, the less profit shown by the assessee is of Rs. 49,29,534/- (Rs. 54,78,307.00 - 8,48,773.00) which was added to the total income of the assessee.

4. Aggrieved, assessee preferred an appeal to Id. CIT(A) who has deleted the addition made by the AO by observing that the AO has nowhere shown any dissatisfaction about the books and also not rejected any books of accounts. Without any defect in the books of accounts turnover or income cannot be estimated. The percentage of profit is estimated @ 3.5% is just a figure of average of 3% to 4% as stated by the partner of the assessee. No logical basis of adoption of this percentage is mentioned anywhere. No definite conclusion can be arrived from AO order. There is no specific material found during the survey of the assessee with regard to the undisclosed income.

Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us

5. Before us Ld. DR submitted that the assessee in his statement has accepted that the margin of profit in the aforesaid line of business is between the ranges of 3 to 4%. Accordingly the profit declared at the rate of .54% is under stated. The Id. DR also relied in the judgment of Hon'ble High Court of Madras in the case of B. Kishore Kumar Vs. DCIT 52 taxmann.com 449 with regard to the statement given by the assessee.

*“Section 69A, read with sections 143, 153, 153A of the Income-tax Act, 1961 - Unexplained moneys (Admission in sworn statement) - Assessment years 2001-02 to 2007-08 - Assessing Officer made additions as undisclosed income on basis of sworn statements of assessee during search and seizure - Assessee made out an issue that submissions of certain materials by him were not considered by Assessing Officer - However assessee himself stated in sworn statement that he had separate business income which was not included in his returns and outstanding loans were to be recovered with interest, hence that was a clear admission and there was no necessity to scrutinize documents - Whether therefore Assessing Officer was justified in bringing to tax undisclosed income - Held, yes [Paras 5,6 & 7] [In favour of revenue]”*

The Id. DR vehemently supported the order of the AO. On the other hand the Id. AR submitted that if the depreciation and interest element is reduced then the profit is higher than the rate estimated by the AO. The AO failed to bring any defect in the books of accounts. The Id. AR vehemently supported the order of the Id. CIT(A).

6. We have heard the rival contentions of both the parties and perused the materials available on record. From the foregoing discussion we find that the AO has made the addition on the ground that the assessee has declared less profit in comparison to the AY 2010-11. However the Id. CIT granted the relief to the assessee as the AO failed to bring any defect in the books. In the instant case the AO has made addition on his surmise. It is well settled proposition of the law that for making any addition to the total income of assessee there has to be cogent evidence. In the absence of the same the addition shall not stand. The submission of Id. AR is that the profit ratio is the same as quoted by the AO i.e. 3.50% if we eliminate the interest and depreciation expenses from the profit. The same fact was communicated in the statement to the AO. There was no iota of defect in the books of the assessee. The case law cited by the DR is not relevant to the facts of the present case as besides the statement the AO has to bring sufficient evidence before making the addition. In this connection we rely on the judgment of High Court of Mysore in the case of P. Venkanna Vs. CIT, 72 ITR 328. The relevant extract is reproduced below :

*"Other things being equal, profits estimated during an earlier period may, in a proper case, guide the estimation of the profits of a subsequent year. But the earlier estimates can have relevance only if the conditions in which the business activity of the later period is conducted are so similar to those of the earlier period that it would be reasonable to infer that the proportion between the turnover and the profits remains unaltered. But there was no institution of any such comparison by the ITO since he did not depend upon the estimation of the profits of the earlier years. His estimation depended on a formula evolved for other assessees without a disclosure of its basis or the grounds for the belief that they were comparable cases. The Appellate Tribunal which made its estimate by an entirely new process bestowed no thought to the question whether the earlier estimates could properly reflect subsequent profits. It assumed they did. The estimate so made, in the erroneous belief that a formula for an estimate once evolved constitutes an infallible basis for all subsequent estimates, cannot be sustained for the reason that what it overlooked was that, normally, a change in market conditions disturbs the old ratio between the turnover and the profits. There was no material for the Tribunal to set aside the order of the AAC."*

There is no material to justify the addition made by the IT authorities to the gross profit shown by the assessee in his account books. The additions were made on ad hoc basis and not on the evidence such as the trading conditions

in similar trade or on the reconstruction of the account books of the assessee on the basis selected by the ITO which was different from the one adopted by the assessee. In view of above we do not find any reason to interfere in the order of the Id. CIT(A). Accordingly, we uphold the same. This ground of Revenue is dismissed.

7. The second issue raised by Revenue is as regards that Ld. CIT(A) gave relief assessee of ₹ 76,49,136/- disallowed by AO u/s 40A(2) expenses paid to the related parties.

8. During the year assessee has claimed several expenses in its business for which the services of family members were availed. The details of such expenses are listed below:-

Nature of expenses	Amount debited in P&L a/c	Amount paid to the family members
Hired truck for sand transportation	Rs.80,05,927/-	Rs.68,02,328/-
Stone picking & stacking expenses	Rs.43,22,000/-	Rs.32,26,640/-
Overburden / coal transportation expenses	Rs.1,48,82,580/-	Rs.1,48,82,580/-
Overburden removal expenses	Rs, 78,62,550/-	Rs. 33,38,800/-
Forestation expenses	Rs 23,46,196/-	Rs. 23,46,196/-
	Total	Rs.3,05,96,544/-

The Assessing Officer, during assessment proceedings, observed that the addresses to all the parties to whom the payment is made is the same as the address of the assessee. The parties to whom the payment has been made are doing the business only for the assessee. For different kinds of job name of same people are appearing again and again. It shows that assessee was debiting its account by giving accommodating entries to its family members. Even the assessee has made the payment after deduction of TDS and through banking channel but these have been claimed at inflated amount. Accordingly the AO disallowed all the expenses paid to the family members to the tune of Rs. 76,49,136/- (3,05,96,544 \* 25%) and added to the total income of the assessee.

9. Aggrieved, assessee preferred an appeal to Id. CIT(A) and submitted that no bar on the payment to the family member except the provision of Sec. 40A(2) of the Act. The AO has not pointed out any unreasonable amount of payment paid to the parties. The Id. CIT(A) has deleted the addition made by AO by observing that the AO has nowhere pointed any case of the applicability of sec40A(2). There is no any evidence by the AO that it is an accommodating entry. There is not any detail of the market rate which shows that the payment has been made excessively. There is no basis for estimating the figure @ 25% for making the disallowance.

Being aggrieved by the order of Id. CIT(A), Revenue is in appeal before us.

10. Both the parties relied on the orders as favoring the same. At the outset we find that the AO has made the addition on his surmise and without bringing any defect in the expenditure incurred by the assessee. we also find that the similar expenses were claimed by the assessee in the earlier years and subsequent years and no disallowance was made. The Id. DR has also failed to bring anything contrary to the findings of Id. CIT(A). In view of above we do not find any reason to interfere in the order of the Id. CIT(A). Accordingly, uphold the same. This ground of Revenue's appeal is dismissed.

11. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 26/08/2016

Sd/-  
(न्यायिक सदस्य)  
(N.V.Vasudevan)  
(Judicial Member)  
Kolkata,

Sd/-  
(लक्षा सदस्य)  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 26/08/2016

कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-DCIT, Circle-3, Asansol at "Parmar Building", 54, G.T. Road, (West), Asansol-713 304
2. प्रत्यर्थी/Respondent-M/s Sanjay Transport Agency, 41, N.S.B. Road, Raniganj-71347
3. संबंधित आयकर आयुक्त / Concerned CIT Asansol
4. आयकर आयुक्त- अपील / CIT (A) Asansol
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेषा सप

/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
**कोलकाता ।**