

**IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER..**

I.T.A. No. 182/Nag/2012.
Assessment Year : 2007-08.

Asstt. Commissioner of Income-tax,
Circle-8, Nagpur.
Appellant.

Vs.

M/s V.D. Kanal,
Nagpur.
Respondent.

I.T.A. No. 220/Nag/2012.
Assessment Year : 2007-08.

M/s V.D. Kanal,
Nagpur.
Appellant.

Vs.

Dy. . Commissioner of Income-tax,
Circle-8, Nagpur.
Respondent.

Revenue by : Shri A.R. Ninawe..
Assessee by : None..

Date of Hearing : 22-03-2017.
Date of Pronouncement : 24th March, 2017.

ORDER.

PER SHAMIM YAHYA, A.M. :

These are cross appeals by the Revenue and assessee and directed against the order of learned CIT(Appeals)-II, Nagpur dated 23-02-2012 and pertains to assessment year 2007-08.

2. The grounds of appeal in Revenue's appeal read as under :
 1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.1,25,000/-

2. On the facts and in the circumstance of the case, the Ld. CIT(A) has erred in treating the income on account of capital gains as part of income surrendered during survey.

The grounds of appeal in Assessee's appeal read as under :

1. The Appellant is a registered partnership firm carrying on business as Civil Contractor and Engineers. The Appellant for the above assessment year shown Income as per return of Rs. 1,21,08,655/- & Remuneration paid to partners of Rs. 6,48,500.00, hence the total Income of Assessee is Rs.1,27,57,155/-which has been assessed as a total income of Rs. 1,34,86,093/- vide order u/s 143(3) dated 23.02.2012.
2. The Learned Commissioner of Income Tax (Appeal-II), Nagpur had ignored the working sheet of tax payable as submitted to survey team (above working sheet is mutually agreed between assessee & survey team) and according to the above working (as approved by survey team) tax of Rs. 30.18 lac paid by the assessee & declared the Income as promised to survey team. Assessee in his 15yrs of existence had not paid any tax in cash, tax payable by assessee is adjusted against TDS deducted & every year he had got refund from TDS amount. To honour the commitment made to survey team he had paid tax of Rs.30.18 lacs as agreed by survey team. The Learned Commissioner of Income Tax (Appeal-II), Nagpur had ignored the above working & further added Rs.7,28,941/- in assessee's total income. I request for the deletion of the additional amount of Rs. 7,28,941/-.
3. In this case the assessee is a contractor. The AO in this case has observed that there was a survey u/s 133A and the assessee had offered additional income of Rs.1.25 crores for assessment year 2007-08. However, the AO noted that the assessee has not reflected the same in the accounts and return of income. He noted that the assessee has shown profit on sale of asset at Rs.96,50,000/- in the profit and loss account and the business profit was shown at Rs.24,58,655/-. The assessee explained that the assessee firm purchased residential house of partner Shri V.D. Kanal for Rs.50 lakhs and ultimately sold it to Smt. Varsha Kondawar in March, 2007. The AO further observed as under:

“ The transfer of the property from partner to firm was legally incorrect. It was further argued, because the transfer is evidenced by mere book entries, there is neither a proper conveyance deed nor registration by paying appropriate stamp duty. It was further argued that the final sale deed bears the name of Shri V.D. Kanal alongwith his individual PAN as seller which clearly shows the intention of the parties was to carry out the transaction in the individual capacity. It was therefore argued that the short term capital gain shown in the case of the firm should be disregarded and the capital gains should be taxed in the hands of the partner.”

The AO was not convinced. He held as under :

“ The submission of the assessee was considered. However, it is not acceptable because the assessee has himself made entire in his capital account evidencing the transfer to the firm. Secondly, after the registration of the sale deed the assessee filed return of income in which the firm has claimed short term capital gains in its hands on account of the sale of property at plot No. Q-9, Laxminagar, Nagpur. It therefore, becomes clear that the claim of Rs.96.50 lacs under the head short term capital gain by the firm is a well thought transaction. Subsequent, submission to the contrary, are motivated to achieve the commitment of additional income declared at the time of survey. Hence it is not accepted.”

Further the AO added Rs.1.25 crores on the basis of survey statement observing as under :

“8. Since the assessee did not disclose the income as committed by him, he was required to produce all the above books as per annexure ‘A’. The assessee initially stalled the time saying that the partner has sold his house and shifted to Buldhana. Hence he needs time to sort out the records etc. But ultimately as the deadline approached he submitted that they are not able to trace out the record.

9. The surrender of income of Rs.1.25 crore was made on the basis of the discrepancies which were identified by the survey party from the record as per annex-A.

10. Although the assessee has not fulfilled his part of the commitment, he has also not produced the original record which result into additional income of Rs.1.25 crore. However, contemporary record in the shape of his voluntary letter dated 12.01.2007 clearly proves that there was additional income of Rs.1.25 crore in this case for this A.Y. I therefore, add the same to the normal income declared by him for the year. Penalty proceedings u/s 271(1)(c) are initiated for furnishing in accurate particulars of income.”

4. Upon assessee’s appeal learned CIT(Appeals) observed as under :

“5.2 In appeal before me, appellant has requested that if books of accounts are found defective, then the estimated addition can be made and has pleaded that appellant being a civil contractor, 8% can be a reasonable estimate. Even in the remand report, AO. has pointed out that appellant has not declared true and full income as books of account were defective.

The appellant has been showing net profit in the activity at 2% in the past and during the year a survey was conducted, the appellant raised the net profit ratio and showed total income at RS.1 ,27,57,155/- including RS.96,50,000/- as capital gain i.e. appellant showed business income at RS.31 ,07,155/-.

5.3 Now as per disclosure of survey and as per appellant's past record of

Showing 2% business income, appellant should have shown atleast :

1. Income declared during survey	Rs.1,25,000/-
2% of Rs.4,79,51,169	<u>Rs.9,59,023/-</u>
	Rs.1,34,59,023
II What appellant has shown	
Income as per return	Rs.1,21,08,655/-
Remuneration paid to partners	<u>Rs. 6,45,520/-</u>
	Rs.1,27,57,155/-
III Hence appellant has not shown the full income s per disclosure Made by him in the extent of;	
Income as it should have been shown	Rs.1,34,59,023/-
Income as shown	<u>Rs.1,27,57,155/-</u>
	Rs. 7,01,868/-
IV If we are to find out the business income in addition to Capital gain offered by the appellant, which appellant should have	

offered for taxation as per his letter of surrender to make up for discrepancies in his books of account, it comes to ;

Rs.1,34,59,023/-
Rs. 96,50,000/-
 Rs. 38,09,023/-

but Rs.38,09,023 is 7.94% of turnover of the appellant of Rs.4,79,51,169/-.

Hence, it is seen that appellant has not offered even 8% of his turnover as income from business besides capital gain.

5.4 Since, books of account were defective and appellant could not offer any satisfactory explanation to the A.O. nor before me anything special has been brought on record, hence, in facts and circumstances of the case, I hold that 8% of turnover be treated as income of the appellant from contract receipt. Hence, addition to the extent of Rs.7,28,941/- is confirmed and balance is deleted i.e. besides capital gain shown by the appellant 8% of turnover is treated as income of the appellant during the year. Hence, the income of the appellant during the year will be ;

Rs.96,56,000/-
 + Rs.38,36,093/-
 Rs.1,34,86,093/- ”

5. Against the above order the assessee and Revenue are in cross appeals before us.

6. We have heard the learned D.R. None appeared on behalf of the assessee. Since several notices have been issued and none has appeared, hence we proceed to adjudicate the issue on the basis of perusal of records and hearing the learned D.R.

7. We find that the AO in this case has only added Rs.1.25 crores which was offered by the assessee on the basis of discrepancies identified by the survey party as per Annexure A. However, learned CIT(Appeals) has proceeded to

reject the books of accounts and estimated the profit at the rate of 8% without assigning any cogent reason. In our considered opinion when the assessee has offered Rs.1.25 crores on survey on the basis of discrepancies found during the survey, there was no reason to ignore the same and agree the assessee's request to reject the books of accounts and make an estimate of profit. In our considered opinion learned CIT(Appeals) has not properly applied his mind. When the assessee has offered Rs.1.25 crores in the course of survey on the basis of discrepancies found therein there was no reason for the learned CIT(Appeals) to interfere with the order of the AO. Moreover the AO has clearly brought in his order that the short term capital gains shown by the assessee were mere book entries. In these circumstances, in our considered opinion, learned CIT(Appeals) has erred in his action of setting aside the AO's order and making an estimate of income. Hence we set aside the order of learned CIT(Appeals) and restore that of the AO. Hence the Revenue's appeal stands allowed. Since we have set aside the order of learned CIT(Appeals) and restored that of the AO, the assessee's appeal has now become infructuous and the same is dismissed as infructuous.

8. In the result, the Revenue's appeal is allowed and the assessee's appeal is dismissed.

Order pronounced in the Open Court on this 24th day of March, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 24th March, 2017.

Copy forwarded to :
1. M/s V.D. Kanal, Flat No. 9, Bldg. No. 2, Akar Builders, Byramji Town, Nagpur-440013.
2. A.C.I.T., Circle-8, Nagpur.
3. CIT(Appeals)-II, Nagpur.
4. C.I.T.-IV, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.