

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
and
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

**ITA No.121/Bang/2013
(Assessment year: 2005-06)**

Asst. Commissioner of Income-tax,
Circle 1(1),
Mangalore. ... Appellant

Vs.

Shri G.Balaraj,
PWD Contractor,
6-112-81, Netravathi Nagar Layout,
Nagori, Kankanady,
Mangalore. ... Respondent
PAN:ABZPB 5464 B

AND

**Cross Objn.No.93/Bang/2013
(In ITA No.121/Bang/2013)
(Assessment year: 2005-06)
(By the assessee)**

Revenue by: Dr.Shankar Prasad, JCIT(DR).
Assessee by: Shri S.Ramasubramanian, CA.

Date of hearing : 22/01/2015.
Date of pronouncement: 30/01/2015.

O R D E R

Per Smt. P.MADHAVI DEVI, JM:

The appeal filed by the Revenue and the cross-objection by the assessee are directed against the order of the CIT(A), Mysore, dated 09/10/2012 for the assessment year 2005-06.

2. Brief facts of the case are that the assessee, an individual, carrying on contract works, filed his return of income for the assessment year 2005-06 on 25/10/2005 declaring total income of Rs.76,45,620/-. The return was initially processed u/s 143(1) of the Income-tax Act, 1961[hereinafter referred to as 'the Act'] resulting in a refund of Rs.20,820/-. Subsequently, on perusal of the TDS certificates, the Assessing Officer (AO) noticed that the contract amount received works out to Rs.9,26,78,463/- whereas in the profit and loss account, the amount offered was only Rs.7,39,50,140/-. Therefore, the AO observed that there was under-assessment of income from contract receipts to the tune of Rs.1,87,28,323/-. In view of the same, the AO sought to reopen the assessment by issuance of notice u/s 148 of the Act on 25/02/2011. In response to the said notice, the assessee filed his return of income on 11/04/2011 returning the same income and requested for supply of reasons recorded for reopening of the assessment. The reasons were supplied to the assessee to which the assessee filed his objections. Order justifying the validity of the re-assessment proceedings u/s 147 of the Act was passed on 14/10/2011 and subsequently, during the assessment proceedings u/s 143(3) read with sec.147 of the Act, the AO proceeded to consider under-assessment of income of contract receipts. He observed that as per TDS certificates, total contract receipts were Rs.9,26,78,463/- whereas total contract receipts

shown by the assessee is only Rs.7,39,50,140/- and that the assessee has not offered a sum of Rs.1,87,28,323/- as part of his turnover but has claimed TDS of the entire amount of Rs.19,39,115/-. The AO, therefore, asked assessee to re-concile the discrepancy in contract receipts offered to tax. The assessee submitted that his contract receipts were only Rs.7,39,50,141/- all of which passed through his books of account and that he has shown a commission of Rs.3,34,218/- from one Shri Bapuji on contract gross turnover of Rs.1,54,73,053/-. It was explained that he had entered into agreement dated 17/06/2003 with one Shri J.Bapuji and as per the agreement, the entire contract receipts were diverted at source to Shri J.Bapuji and a joint account was opened at the place of the work and the entire power was given to Shri J.Bapuji to collect the contract receipts and also to withdraw the amount according to his needs for any purpose. Thus as per the agreement, the entire profit or loss was that of Shri J.Bapuji and that the assessee was entitled only to retain the income-tax deducted at source as commission. It was also submitted that Shri J.Bapuji was independently assessed to income-tax and he has reflected the entire contract receipts in his books of account. It was also submitted that for the assessment years 2006-07, 2007-08 and 2009-10 where similar circumstances exist, the assessing authority treated the same as income from sub-contract and taxed the same u/s 40(a)(ia) and on appeal the ITAT has held that it was not his

turnover and deleted the addition. The AO, however, was not convinced with the assessee's submission and observed that the entire contract receipts of Rs.1,54,73,053/- stated to be diverted at source to Shri J.Bapuji is not acceptable. He held that it was a sub-contract and since TDS was not made at the time of payment, the contract receipts of Shri J.Bapuji should be disallowed u/s 40(a)(ia) of the Act. Further he proceeded to consider the difference in the contract receipts as per the TDS certificate and as offered by the assessee. The assessee, vide reply dated 14/12/2011 stated that Form 16A dated 20/06/2005 issued by the Executive Engineer, Bangalore, related to only release of security deposit held in the department which was earlier shown by the assessee as an asset and therefore release of security deposit was not a contract receipt. The AO, however, held that the contention of the assessee that the department retained a portion of the amount as security deposit which is shown as an asset is not acceptable for the reason that the assessee should have accounted for the entire contract receipt as per TDS certificates. He observed that the assessee is following mercantile system of accounting which is based on accrual principle and therefore profits arising or accruing on the date of transaction are liable to be taxed notwithstanding the fact whether they are actually received or deemed to have been received under the Income-tax Act. He, therefore, brought to tax the difference in the gross receipts.

3. Aggrieved, the assessee preferred an appeal before the CIT(A) who confirmed the findings of the AO as regards the nature of the contract between the assessee and Shri J.Bapuji as sub-contract but granted relief to the assessee by following the decision of the Special Bench of Tribunal in the case of *Merilyn Shipping and Transport* wherein it was held that disallowance u/s 40(a)(ia) can be made only if the amount was payable and since the contract amount was already paid to Shri J.Bapuji, the same cannot be disallowed u/s 40(a)(ia). As regards difference in the contract receipts is concerned, the CIT(A) considered the assessee's submission that the security deposit released during the relevant financial year was actually offered in gross receipts of the relevant assessment years and this is only a refund of security deposit and hence the same should be excluded. Thus holding, the CIT(A) deleted the additions made by the assessing authority. Before the CIT(A), the assessee had also raised a ground of appeal against the validity of the reopening of the assessment. However, since the CIT(A) has given relief to the assessee on merits, he has not adjudicated this ground of appeal.

4. Against the relief given by the CIT(A), the revenue is in appeal before us while the assessee is in cross-objection before us against non-adjudication of the ground of appeal against validity of the reopening. However, there is a delay of 88 days in filing of the cross objection before us. Since the cross

objection is against the validity of the reopening of assessment which goes to root of the matter, we take up the cross-objection first.

5. In the application for condonation of delay in filing of the cross-objection, it is stated by the assessee that since the revenue had filed an appeal before the Tribunal against the order of the CIT(A) on merits, the assessee was under the impression that it could challenge the order of the CIT(A) under rule 27 of the Income-tax Rules. However, on legal advice that the assessee would have to raise cross-objection, the assessee has filed this cross-objection before us with a delay of 88 days and therefore the delay is not willful or wanton but is due to reasonable cause. The learned counsel for the assessee relied upon the contents of the affidavit while the learned Departmental Representative opposed the condonation of delay.

6. Having regard to the rival contentions and the material on record, we are satisfied with the reasons stated by the assessee for delay. In our view they are reasonable for condonation of delay. We, accordingly, condone the delay and proceed to consider the cross-objection of the assessee.

It is the case of the assessee that the assessee has filed detailed objections before the AO for reopening of the assessment and the AO has rejected the objections and proceeded to complete the re-assessment against which the

assessee had preferred specific grounds before the CIT(A) but since the CIT(A) has decided the appeal on merits in favour of the assessee, he has failed to consider and give a finding on the validity of the reopening of the assessment. Since there is no finding of the CIT(A) on this ground, we are unable to decide the ground against the validity of the re-assessment. Therefore, we remand this issue to the file of the CIT(A) with a direction to decide the issue after considering the assessee's objections in detail in accordance with law. The assessee's cross-objection is therefore allowed for statistical purposes.

7. Coming to the Revenue's appeal, we find that the gross receipts as per TDS certificate is Rs.9,26,78,463/- whereas according to the assessee, it is Rs.7,39,50,140/-. The explanation of the assessee for the difference is that Public Works, Port Inland Water, National Highways, Government of Karnataka had mentioned these sums in Form 16A though there was no deduction of tax at source on these receipts. It was further explained that these sums represent the refund of security deposit withheld by the Department in the earlier years and are not the contract receipts of the relevant financial year. It is also stated that these security deposits formed gross receipts of the earlier assessment years and therefore cannot be treated as contract receipts of the relevant assessment years. For this purpose, the learned counsel for the assessee had relied upon the letter of the Executive Engineer dated 05/06/2012 as

well as 22/05/2012 explaining that these were not contract receipts but were refund of security deposit. The learned counsel for the assessee has also filed before us copies of the ledger account of EMD & SMD Account, assessee's balance sheet as on 31/03/2005, profit and loss account for the year ending 31/05/2005 and the annexure to the contract receipt, bank interest and TDS as on 31/03/2005 to demonstrate that these were refund of security deposits and not contract receipts. He submitted that all these documents were filed before the CIT(A) who has considered the same before giving relief to the assessee.

The learned Departmental Representative, on the other hand, supported the order of the AO and submitted that the assessee has not filed any proof before the CIT(A) to demonstrate that these amounts were refund of security deposits which were part of gross receipts of the earlier years. Therefore, according to him, the relief given by the CIT(A) is erroneous and unjustified.

8. Having regard to the rival contentions and the material on record, we find that the difference in the gross receipts as per TDS certificate and as per profit and loss account of the assessee is Rs.1,87,28,323/-. Out of this, the assessee has explained that Rs.1,54,73,053/- relate to the gross turnover of one Shri J.Bapuji with whom the assessee had entered into agreement and the entire contract receipts were diverted at

source to Shri J.Bapuji. The learned counsel for the assessee had placed reliance upon the decision of the ITAT in the assessee's own case for the assessment years 2006-07, 2007-08 and 2008-09 wherein the Tribunal has held that the turnover received by Shri J.Bapuji is not on account of sub-contract and therefore was not amenable to TDS provisions. We find that the CIT(A) has followed the decision of the ITAT in holding that these amounts were not the receipts of the assessee. The Revenue has filed an appeal before the Hon'ble High Court against the said finding of the Tribunal which is pending adjudication. However, since the issue is covered in favour of the assessee by the decision of the co-ordinate bench to which one of us viz., the Judicial Member is the signatory, we do not see any reason to interfere with the order of the CIT(A) on this issue. Further, the CIT(A) has also followed the decision of the Special Bench of the Tribunal in the case of *Merilin Shipping and Transport* to hold that the amounts paid are not amenable to the provisions of sec.40(a)(ia). The principle has also been affirmed by the Hon'ble Supreme Court in the case of *Vector Shipping in SLP CC No.8068/2014* dated 02/07/2014. Therefore, the decision of the CIT(A) on this issue is in consonance with the judicial precedents on the issue and we see no reason to interfere with the order of the CIT(A). This, ground Nos.2 and 3 are rejected.

As regards the balance of Rs.32,55,270/- is concerned, we find that it consists of four amounts i.e. Rs.12,35,773/-, Rs.6,65,000/-, Rs.11,24,000/- and Rs.2,29,636/-. As regards the first three amounts, the Executive Engineer of the National Highways, Government of Karnataka has given the letter stating that these sums are refund of security deposits and not contract receipts and further that the actual refund of security deposit dated 16/3/2005 is only of Rs.3,57,879/- as against Rs.11,24,860/- shown in Form No.16A. As regards the balance of Rs.2,29,636/- also there is a letter issued by the Executive Engineer dated 22/05/2012, stating that it is a refund of security deposit which was withheld and not contract receipt. Further, on going through the details of works bills and recoveries made in respect of Shri J.Bapuji as issued by the Executive Engineer, the National Highways Division, Mangalore, these sums are without deduction of tax at source. Further, from the balance sheet and profit and loss account in the re-conciliation statement filed by the assessee also, we find that these amounts were received by the assessee as refunds of security deposit and no deduction of tax was made at source from these amounts. Therefore, it is clear that the presumption of the AO that the gross receipts of the assessee as per TDS certificates is more than actual receipts shown by the assessee is itself incorrect. As regards the finding of the CIT(A) that the refund of security deposit treated as contract receipts are also offered in gross receipts of the earlier

years, we find that the assessee has not produced any evidence to this effect either before the authorities below or before us. But even if it is found that these security deposits are the amounts withheld out of contract receipts of the earlier assessment years and not pertaining to the relevant assessment year, then they cannot be brought to tax in the relevant assessment year i.e. 2005-06. Therefore, grounds of appeal No.4 & 5 are allowed.

9. In the result, the revenue's appeal is partly allowed.

Pronounced in the open court on 30th January, 2015.

sd/-
(Jason P Boaz)
ACCOUNTANT MEMBER
eksrinivasulu

sd/-
(Smt. P.Madhavi Devi)
JUDICIAL MEMBER

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore