

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-4971/Del/2011
(Assessment Year: 2007-08)**

Kumaon Mandal Vikas Nigam Ltd. Oak Park Campus, Mallital, Nainital AABCK4290L	vs	DCIT Nainital
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**ITA No.-4981/Del/2011
(Assessment Year: 2007-08)**

ACIT Golghar, Bara Bazar, Nainital	vs	Kumaon Mandal Vikas Nigam Ltd. Oak Park Campus, Mallital, Nainital AABCK4290L
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Assessee by	None
Revenue by	Sh. Amit Jain, Sr. DR

Date of Hearing	17.10.2017
Date of Pronouncement	24.10.2017

ORDER

PER BENCH

These two appeals are preferred by the assessee and Revenue challenging the order dated 17.08.2011 in appeal No. 45/CIT (A)-II/2010-

11 passed by the Ld. Commissioner of Income Tax (Appeals)-II, Dehradun (hereinafter for short called as the "Ld. CIT (A)").

2. Briefly stated relevant facts are that the assessee is a Government Company engaged in various commercial activities which can be categorized into five major groups: Tourism, Construction, Marketing (Trading & Distribution), Industry and Financial Assistance. There are 119 units operating in different parts of the State Uttarakhand and outside. For the AY 2007-08 they have filed the return of income on 31.10.2007 declaring a total income of Rs. 1,17,87,340/- and during the scrutiny AO found that the assessee furnished the return only on the basis of tentative profit and loss account. The assessee has been filed the return of income for every assessment year without complying with the tax audit provisions as enumerated u/s 44AB of the Income Tax Act, 1961 (for short called as the 'Act') and the plea taken by the assessee for the same is that it was due to non completion of statutory audit by C&AG. After considering the fact that the accounts of the assessee are voluminous by virtue of its being engaged in various business activities, the books of accounts are being maintained at the unit level and then compiled and finalized at the corporation level coupled with the fact that accounts of the corporation were not audited and following the complexities that were involved like:

1. The accounts for the AY 2007-08 have not been audited. In the absence of audited accounts, it is not possible to arrive at the correct figure of Net Profit.
2. The profit as shown in the return of income is tentative profit. No Balance sheet has been prepared for the relevant previous year. In the absence of Balance sheet it is difficult to ascertain the assets and liabilities of the corporation.
3. The opening balances, the details of additions to fixed assets and the closing WDV is not known. It is difficult to arrive at the figure of allowable depreciation for the instant A.Y.
4. The figures of opening stock are not acceptable as the accounts for the FY 2006-07 have not been audited.
5. The information on loans taken is not available due to non filing of Balance Sheet, making it impossible to verify the claim of expenditure on account of interest.
6. The statutory audit of the accounts has not been completed as per the provisions of Section 44AB of the Income Tax Act, 1961. It is not possible to rely on these figures for the correct figure of net profit for the corporation as a whole.

the accounts were got audited by a Special Auditor u/s 142(2A) of the Act. In the light of the Special Auditor Report it was found that by report dated 29.05.2010 the auditors opined that they are unable to express their opinion about the true and fairness of the profit arrived it by the provisional profit and loss account, but as per tentative receipts and payment accounts provided to them the profit as depicted in profit and loss account

has been calculated carefully. Out of 11 divisions or activities of the assessee the AO on comparison with the figures relating to the immediately preceding year noticed that there was an increase in GP in respect of 4 divisions/activities, whereas there is reduction of the same in respect of the remaining 7. On this the AO proceeded to enhance the GP rates in the accounts of the divisions/activities where there is a decline in GP in relation to the immediately preceding year but without touching the accounts relating to the divisions/activities, where there is increase in GP in relation to the immediately preceding year. Further, AO treated the entire one time refundable security deposit received from the tenants of the shopping complex as income, besides treating the entire interest earned on year marked funds as income of the corporation. Basing on the above stated opinion of the auditors viz-a-viz the decline of the GP rate in respect of the some divisions/activities AO rejected the books of account. In the appeal preferred by the assessee Ld. CIT (A) deleted the additions made basing on the decline in GP rate relating to FL2 unit, tour division, gas division, Parvat fabrication and Parvat wires besides the additions made on account of interest earned on year marked funds, while confirming the part of additions in respect of parvat fabrication and parvat wires and also the disallowance u/s 40A(3), in respect of payment of

statutory liability of group gratuity to LIC, disallowing the interest paid to the Government, in respect of the security deposits, interest and depreciation on Noida land and the addition made on the presumptive value of equipments detained by the corporation from erstwhile contractor and lease rent.

3. Challenging the confirmation of the additions assessee is in appeal in ITA No. 4971/2011, whereas challenging the deletions as stated above the Revenue is in appeal before us in ITA No. 4981/Del/2011.

4. At the outset, it could be seen from the record that on some occasions like 10.10.2012, 16.05.2016, 01.09.2016 etc. the adjournments were sought on behalf of the assessee but by and large the assessee does not show any interest in prosecuting the matter and has been continuously absent in spite of several notices being issued. Since it is a matter of 2011, we do not find it just and proper to adjourn it from date to date indefinitely. We hold that the conduct of the assessee does not inspire any confidence that any point of time the assessee would cooperate with the disposal of the matter on merits. We, therefore, following the decision in Commissioner of Income-tax vs Multiplan India

(P) Ltd.: 38 ITD 320(Del), dismiss the assessee's appeal and proceed to dispose of the Revenue's appeal.

5. As could be seen from the record the Revenue is challenging the deletion of the additions made on the basis of the fall of GP rate in respect of FL 2 Unit, tourism division, gas division, parvat fabrication and parvat wires besides the adding of interest earned on year marked funds. Ld. CIT (A) observed that the action of the AO in penalizing the assessee in respect of the units where the GP rate is declined without showing any concern to compensate them in respect of the units, where the GP rate was on increase. The variance in GP rate, according to the Ld. CIT (A) had to be considered in holistic view, but picking up some units for penalization without reward to the units where the GP rate was increased is bad. In respect of FL 2 Unit, gas division, parvat fabrication and parvat wires the declination was in significant Ld. CIT (A) observed that there is marginal declination. In respect of all these units Ld. CIT (A) observed that no specific case of inflation of direct expenses or suppression of receipts was found by the AO. Merely because there is decrease in the GP rate addition could be made in the absence of any specific finding as to the incorrectness of the accounts. On this aspect, we are in agreement with the Ld. CIT (A) because the AO had to take both the increased and

decreased in GP rate in respect of all the units as a whole but leaving the profit making units unrewarded it is not fair to pick up only such units where the GP rate is on a fall. No doubt, addition could be made in respect of such units, if the AO finds any specific defect indicating inflation of direct expenses or suppression of receipts. The same method of accountancy had given rise to both rise and fall in the GP rate amongst the divisions of the assessee. In the circumstances, we do not find any justification to interfere with the findings of the Ld. CIT (A) on this aspect, as such, we find that grounds no. 1 to 4 are liable to be dismissed.

5. Now coming to ground no. 5 it relates to the deletion of the addition made on account of interest earned on year marked funds. On this aspect the facts are that the assessee while acting as a Government construction agency has been allotted with the construction work and in that respect certain advances were given to perform these contracts. Unutilized amounts of these advances, called as 'earmarked fund' are kept in fixed deposits in bank earning interest. As per the comments of C&AG the interest earned on these 'earmarked fund' shall be transferred and credited to the 'earmarked fund' and the corporation has no authority to use or expand or utilized the interest earned for its own purposes, and any credit of this 'earmarked fund' to the accounts of the assessee results in

understatement of loss and current liabilities. However, AO felt that the interest earned on the 'earmarked fund' would also go to the same kitty of funds of the company, as such, the interest amount of Rs. 12,32,322/- has to be treated as income. Ld. CIT (A) on this aspect found that in respect of all the assessment years 2005-06 and 2006-07 also in appeal Ld. CIT (A) accepted the contention of the corporation and held that the interest earned on 'earmarked fund' FDR cannot be treated as income of the corporation. Following the same in respect of the AY 2007-08 also Ld. CIT (A) granted relief to the assessee. No change of facts from those of the assessment years 2005-06 and 2006-07 is brought to our notice. We do not find any illegality or irregularity in the Ld. CIT (A) in taking the same view on identical facts. We, therefore, uphold the finding of the Ld. CIT (A) and dismiss the ground no. 5 also.

6. In the result, both the appeals are dismissed.

Order pronounced in the open court on 24.10.2017

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER
Dated: 24.10.2017
*Kavita Arora

Sd/-
(K.N. CHARY)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI