

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

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No. 1558/Kol/2014  
Assessment Year : 2009-10

M/s. Mitra Guha Builders (India) Co. -vs.- I.T.O., Ward-33(3)  
Kolkata Kolkata  
[PAN : AAFFM 2988 Q]  
(Appellant) (Respondent)

I.T.A. No.1594/Kol/2014  
Assessment Year 2010-11

A.C.I.T., Circle-33, -vs- M/s. Mitra Guha Builders  
Kolkata (India ) Co. Kolkata  
(Appellant) [PAN : AAFFM 2988 Q]  
(Respondent)

C.O.No.113/Kol/2014  
(A/o I.T.A No. 1594/Kol/2014)  
Assessment Year : 2010-11

M/s. Mitra Guha Builders (India) Co. -vs.- A.C.I.T., Circle-33,  
Kolkata Kolkata  
[PAN : AAFFM 2988 Q]  
(Cross Objector) (Respondent)

For the Assessee : Shri J.M.Thard, Advocate  
For the Assessee : Shri Nicholas Murmu, JCIT, Sr.DR

Date of Hearing : 27.07.2017  
Date of Pronouncement : 31.07.2017.

**ORDER**

**Per N.V.Vasudevan, JM**

I.T.A.No.1558/Kol/2014 is an appeal by the Assessee against the order dated 20.05.2014 of CIT(A)-XIX, Kolkata, relating to AY 2009-10.

2. Ground Nos. 1 and 2 raised by the assessee are with regard to disallowance of a sum of Rs.54,73,328/- by the revenue authorities invoking the provisions of section 40(a)(ia) of the Income Tax Act, 1961 (Act).

3. The Assessee is engaged in the business of carrying out Construction Contract (Civil work) for different projects of the Government. In the course of assessment proceedings, the AO noticed that the assessee had not deducted tax at source on the payments made for execution of contract of work for which the assessee was obliged to deduct tax at source in terms of section 194C of the Act. Under section 40(a)(ia) of the Act any expenditure claimed by an assessee which is claimed as deduction by computing the income from business which are paid without deducting tax at source will not be allowed as deduction. The AO invoking the aforesaid provision disallowed the claim of the assessee for deduction of a sum of Rs.54,73,328/-. The breakup of the aforesaid sum is as follows :-

“i) Rs. 4,40,000/	under the head Consultancy Charges
ii) Rs. 3,99,684/-	under the head Service Charges to Cool Tech
iii) Rs. 1,18,320/-	under the head Generator Hire Charges to M/s. Sivam Generator
iv) Rs. 10,52,320/-	under the head Security Services Charges to M/s. JVS Security P. Ltd. & M/s. Jai Hanuman Security Services
v) Rs. 1,28,903/-	under the head The Fire (Security Services)
vi) Rs. 9,78,818/-	payment to Mr. Mainul and Mr. Raja Ram
vii) Rs. 3,90,847/-	out of Repairing & Maintenance Charges paid to M/s. M/s. Active Engineering Rs.1,37,635/- M/s. Shree Krishna Cool Connexion – Rs.79,682/- & M/s. Rachana Motors – Rs.1,73,530/-
viii) Rs. 6,83,833/-	on account of Consultancy and Designing Services and sub-contractor
ix) Rs.12,80,576/-	Payment to M/s. S.G. Construction regarding contract charges
Total Rs.54,73,328/-“	

4. On appeal by the assessee the CIT(A) confirmed the order of AO. Aggrieved by the order of CIT(A) the assessee is in appeal before the Tribunal.

5. The prayer of the assessee before the tribunal is for a remand of the issue to the AO with a direction to the AO to verify if the payees have declared the receipt from the Assessee in their return of income and if they have so declared then the addition u/s.40(a)(ia) of the Act should be deleted by the AO. The above submission was made in the context of the amendments to the provisions of Sec.40(a)(ia) of the Act by the Finance Act, 2012 w.e.f. 1-4-2013, whereby a second proviso was inserted which provided that if the payees have filed their return of income showing the receipts from the Assessee in their return of income then it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in Sec.40(a)(ia) of the Act.

6. It was argued by the learned counsel for the Assessee that the Assessing Officer and first appellate authorities are vested with statutory powers u/s 133(6) or 131 and or other provisions and they could have made inquiries with the parties or their respective Assessing Officer. In this regard it was submitted that all the relevant details of the payees were furnished and are available on record with their PAN and AO details.

7. It was pointed out that ITAT, Kolkata in the case of Ramakrishna Vedanta Math v. Income-tax Officer, Ward 59 (1), Kolkata, [2012] 24 taxmann.com 29 (Kol.) has taken a view that once assessee furnishes lawfully maintained information about recipients, Assessing Officer should first ascertain related facts about payment of taxes directly from recipients before invoking section 201 (1). It was submitted that the above decision ITAT Kolkata in the above mentioned case will also apply for the purposes of Section 40(a)(ia) of the Act. Further reliance was also placed on the decision of the ITAT Kolkata in the case of Vas Electronics Vs. ACIT, ITAT Kolkata in I.T.A No. 662/Kol/2013 dated 24-11-2015 wherein following the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township P. Ltd. (2015) 377 ITR 635 (Del), the AO is directed to verify whether the recipients have

included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same.

8. It was therefore submitted that the disallowance u/s.40(a)(ia) of the Act to the extent sustained by the CIT(A) should be set aside and remanded to the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act should be made by the AO. In case the recipient parties are not cooperating in providing details, the AO should be directed to call for the information u/s. 133(6) or 131 of the Act, for verification of the same.

9. The learned DR relied on the order of the CIT(A) and submitted that the benefit of the second proviso should not be allowed to the Assessee as the tax deducted at source has not been paid on or before the due date for filing the return of income u/s.139(1) of the Act.

10. We have given a very careful consideration to the rival submissions. The Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (I) Pvt.Ltd., in ITA No.160/2015 judgment dated 26.8.2015 has taken the view that the insertion of the second proviso to Sec.40(a)(ia) of the Act is retrospective and will apply from 1.4.2005. Once it is held that the Assessee is entitled to the benefit of 2<sup>nd</sup> proviso to Sec.40(a)(ia) of the Act, the CIT(A) ought to have directed the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act ought to have been sustained by the CIT(A). We therefore hold and direct that in case the recipient parties are not cooperating in providing details, the AO should call for the information u/s. 133(6) or 131 of the Act, for verification of the same. In this regard we also direct the assessee

to furnish all the details of assessment particulars of the recipients of payment from the Assessee. The AO therefore should not have any difficulty in making the required verification. We therefore set aside the order of the CIT(A) to the extent to which he had sustained the order of the AO on the disallowance u/s.40(a)(ia) of the Act and remand the issue to the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act should be made by the AO. In case the recipient parties are not cooperating in providing details, the AO should be directed to call for the information u/s. 133(6) or 131 of the Act, for verification of the same. Ground Nos.1 and 2 are accordingly treated as allowed.

11. Ground Nos. 3 and 4 raised by the assessee is with regard to disallowance of a sum of Rs. 5,05,060/- for the reason that the aforesaid sum which was claimed as deduction while computing income from business was paid otherwise by way of a crossed account payee cheque and contrary to the provision of section 40A(3) of the Act. Under the provision of section 40A(3) of the Act where the assessee incurs any expenditure of which a payment or aggregate of payments made to a person in a day, otherwise than by way of an account payee cheque or account payee draft exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure. Since the assessee paid a sum of Rs.5,05,060/- to various parties and since each of the payments exceeded Rs.20,000/- and were paid in cash, the AO invoking the provision of section 40A(3) of the Act disallowed the claim of the assessee for deduction of a sum of Rs.5,05,060/-. The break-up of the sum disallowed by the AO is as follows :-

Sl.No.	Name & Address of the Party to whom payment was made	Date of payment	Amount	Mode of payment
1	Khandelwal Enterprise Mohandanga Road, P.O.Chandernagore, Hooghly	16/09/2009	Rs.28000/-	By cash

2.	-do-	15/10/2008	Rs.30,000/-	By cash
3.	Shree Radheysham 17, Sreenath das Lane, Kol-12	25/09/2008	Rs.50000/-	By cash
5.	Mohan Mechanical works	20/02/2009	Rs.90,000/-	By cash
6	Shaurya Bhushan Filing station	25/08/08	Rs.20,000/- Rs.20,000/- Rs.10,000/-	By cash
11.	Navkush Enterprise	04/09/2008 04/09/2008 20/09/2008 2009/2008 27/11/2008 27/11/2008	Rs.20000/- Rs.5000/- Rs.20000/- Rs.5000/- Rs/20000/- Rs.5000/-	By cash
12	Agarwal & Stores	25/06/2008 08/07/2008 15/07/2008	Rs.21420/- Rs.22,223/- Rs.22417/-	By cash
13.	Payments made to Cool tech		Rs.50,000/-	By cash
14.	Payments made to KBS Scaffolding		Rs.60,000/-	By cash
	Total		Rs.5,05,060/-	

12. On appeal by the Assessee the CIT(A) confirmed the order of AO. The prayer of the Id. Counsel for the assessee before us, which was also the prayer before the lower authorities and which was rejected, is that the parties insisted on cash payments owing to business exigencies and therefore payments were made in cash. It was also submitted that keeping in view of business expediency and other relevant factors the disallowance ought not to have been made by the revenue authorities.

13. The CIT(A) in deciding this issue held as follows :-

“I have considered the rival contentions on the issue with regard to the disallowances u/s 40A(3) of the Act. I have gone through the records of the case and have considered the contention of the appellant. I do not find any force in the appellant's contention as the provisions of section 40A(3) are very clear and the prescribed under Rule 6DD of the I.T. Rules. The cases of circumstances in which payment in sum exceeding Rs.20,000/- may be made otherwise than A/c

Payee cheque/A/c Payee draft are specified under Rule 600. The contention of the appellant in this respect is not tenable and deserves to be rejected. The disallowance of Rs.5,05,060/- made by the AO under section 40A(3) of the Act is thus confirmed.”

14. The Id. Counsel for the assessee has however relied on the decision of TAT, Kolkata in the case of Britannia Industries Ltd. Vs JCIT in ITA No.541/Kol/2001 order dated 28.06.2004 wherein the Tribunal took the view that when circumstances under which cash payments were made and genuineness of the payments are not disputed, the disallowance under section 40A(3) of the Act should not be made. Reliance was also placed by him on the decision of the Hon’ble Calcutta High Court in the case of in ITA No.202 of 2008 dated 20.07.2008 in the case of CIT vs Crescent Export Syndicate wherein the Hon’ble High Court while dealing with a case of deletion of addition in respect of purchases made by an assessee, observed as follows :-

*“It also appears that the purchases have been held to be genuine by the learned CIT Appeal) but the learned CIT (Appeal) has invoked Section 40A(3) for payment exceeding Rs.20,000/- since it is not made by crossed cheque or bank draft but by bearer cheques and has computed the payments falling under provisions to section 40A (3) for Rs.78,45,580/- and disallowed @ 20% thereon Rs.15,69,116/-. It is also made clear that without the payment being made by bearer cheque these goods could not have been procured and it would have hampered the supply of goods within the Stipulated time. Therefore, the genuineness of the purchase has been accepted by the Id. CIT. (Appeal) which has also not been disputed by the department as. it appears from the order so passed by the learned Tribunal. It further appears from the assessment order that neither the Assessing Officer nor the CIT (Appeal) has disbelieved the genuineness of the transaction. There was no dispute that the purchases were genuine.*

*Accordingly, in our opinion, the learned Tribunal has correctly come to the conclusion by deleting the addition of Rs. 25,69,116/- under section 40A(3) of the Act. On the other ground as it appears that the CIT (Appeal) has been directed ,to reconsider the matter. In view of that we do not think that any substantial question of law is involved in this matter. Hence the appeal being ITA NO. 202 of 2008 is dismissed.*

15. The Id. DR relied on the order of CIT(A). We are of the view that in the light of the decision of the Hon’ble Calcutta High Court the disallowance ought not to have been made by the revenue authorities. It has not been disputed by the revenue  
ITA No.1558 & 1594/Kol/2014&CO.113/K/2014 M/s. Mitra Guha Builders (India)Co. A.Y.2009-10 7

authorities that customers insisted on cash payments and there were business exigencies and absence of banking facilities which warranted payment in cash. In such circumstances the disallowance was not justified. The same is directed to be deleted.

16. In the result the appeal of the assessee is treated as partly allowed.

17. ITA No.1594/Kol/2014 is an appeal by the revenue against the order dated 20.05.2014 of CIT(A)-XIX, Kolkata relating to A.Y.2010-11.

18. Ground No.1 raised by the revenue reads as follows :-

*"That on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition of Rs.13,14,401/- made on account of interest less shown when compared to the interest detail given in Individual Transaction Statement (ITS)."*

19. As far as ground no.1 is concerned, the facts are that the AO from the Annual Information Report (AIR) ITS noticed that the assessee has received interest income from Canara Bank, Noida of Rs.93,70,300/-. The assessee has however declared only a sum of Rs.80,55,819/- in the profit and loss account. The difference of a sum of Rs.13,14,401/- was added by the Assessing Officer to the total income of the Assessee as interest income not disclosed by the assessee.

20. Before CIT(A) the assessee pointed out that it had offered interest income received from banks on Fixed deposits on accrual basis as per certificate issued by the bank whereas the AIR information obtained by the AO was on the basis of Form No.26-AS filed by the bank. The assessee gave the details of the interest income offered by it in various assessment years and claimed before CIT(A) that the entire interest income received from the bank had been offered to tax in the period from A.Y.2008-09 to 2011-12. The details so filed by the assessee before CIT(A) is given in **Annexure-I** to this order. The CIT(A) on consideration of the aforesaid details deleted the addition made by the AO observing as follows :-

“I have gone through the records and verified the facts. The Certificate of Canara Bank on the basis of which the appellant has included the interest income is for Rs.80,55,819/- and TDS has also been made and claimed by the appellant on the said amount. I have also perused the Bank Certificates for AY 2008-09 and 2009-10 for which separate orders are being passed. The mismatch in the AIR information and Bank Certificates has also been verified by me. I have also gone through relevant provisions of law and the two judgments relied on by the AR in this respect. The overall difference as per Bank Certificate and AIR information has been claimed and explained I also find that the appellant has offered excess interest of Rs.4,27,671/- for taxation as compared to AIR information and interest income from FDs offered by the appellant for four years (AY 2008-09 to AY 2011-12). In view of the law laid in citations and facts explained by the appellant for difference and mismatch, the addition of Rs.13,14,401/- made by AO on account of difference in Bank interest in AY 2010-11 is deleted and the appellant's contention is accepted.”

21. Aggrieved by the order of CIT(A) the revenue has preferred ground No.1 before the Tribunal.

22. The ld. DR relied on the order of AO. The ld. Counsel for the assessee relied on the order of CIT(A). It appears to us that there is no loss to the revenue in as much as interest income received from the bank has in fact been offered at a higher sum by the assessee than what was received by it. It is purely due to mis-match between the AIR information and bank certificates. The order of CIT(A) therefore in our view has to be upheld as it proceeds on the principle that the same cannot be taxed twice. Besides the above, the overall difference as per the bank certificates and AIR as has been properly explained by the assessee. In such circumstances we do not find any ground to interfere in the order of CIT(A). Consequently ground no.1 raised by the revenue is dismissed.

23. Ground No.2 raised by the revenue reads as follows :-

*"2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition of Rs.48,01,645/- made on account of failing to produce any documentary evidence as per conditions laid down u/s. 36(2) of the Income-tax Act, 1961 in respect of bad debts claimed written off."*

24. The assessee claimed as a deduction of a sum of Rs.48,10,645/- on account of bad debts written off. The AO however did not allow the claim of the assessee for the following reasons :-

"It is found from the records submitted by the assessee that during the year debited Rs 48 10,645/- for the bad debts write off. During the assessment proceeding the assessee was asked to explain the following points as per the section 36 (1) (vii) and section 36 (2) of the Income Tax Act, '1961:

(a) Whether the bad debt of Rs.48,10,645/- written off as irrecoverable in the books of account of the assessee for the previous year 2009-10.

(b) Whether the bad debt of Rs.48,10,645/- have been taken into account in computing the income of the assessee for the earlier years. If yes then provide supporting evidences.

(c) Whether the bad debt of Rs.48,10,645/- incidental to the business of the profession of the assessee.

(d) What efforts done by assessee for recovery of debts.

The assessee failed to produce the supporting documents which explain the above points and the condition given in the section 36 (2) of the Income Tax Act, 1961. So the amount of Rs 48,10,645/- is disallowed and added to the total income of the assessee."

25. On appeal by the assessee the CIT(A) deleted the addition made by the AO for the reason that it was no longer necessary for the assessee to establish that the debt written off as bad debts should be shown to become bad in view of the statutory amendment to the provision of section 36(1)(vii) of the Act and the decision of the Hon'ble Supreme Court in the case of TRF Limited 323 ITR 397 (SC).

26. Aggrieved by the order of CIT(A) the revenue has raised ground no.2 before the Tribunal.

27. We have heard the submissions of the ld. Counsel for the assessee and the ld. DR. The details of the debts that were written off as bad debts and the year in which the sums were offered as income by the assessee are given in Annexure-II to this order. Therefore there appears to be no merit in the stand taken by the AO that the debts written off as bad debt was not shown as income in the earlier years. As far as the question whether the assessee has to establish that the debts are bad and irrespective we are of the view that in the light of the statutory amendment and the

decision of the Hon'ble Supreme Court in the case of TRF Ltd (supra) it is no longer necessary for the assessee to say that the debts written off as bad debt has in fact become bd. This objection of the AO is also held to be without any basis. The question whether the debt was written off as bad debts by squaring off the account of the debtors is only aspect which is required to be seen. For this limited purpose we remand the issue to the AO. Ground No.2 is allowed.

28. Ground No.3 raised by the revenue reads as follows :-

*"3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in reducing the disallowance of Rs.1,80,886/- i.e. 1% of Labour Charges to Rs.1,00,000/- by treating the same on higher side as the assessee made the payment of Labour Charges in cash through self-made vouchers having neither the address nor complete identity of the payees."*

29. This ground can be conveniently decided together with the only ground and cross objection of assessment proceedings which is to the effect the CIT(A) ought to have deleted the entire addition made by the AO.

30. The AO in the course of assessment proceedings noticed that the assessee has debited a sum of Rs.7,35,48,256/- as labour charges at the site of Bangalore project and Kolkata projects etc. Out of the aforesaid sum a sum of Rs.1,80,88,654/- was labour charges on which no tax has been deducted at source. According to the AO these labour charges were paid in cash through self made vouchers. The assessee produced self made vouchers and master sheet in support of the claim for payment of wages. The AO was of the view that the documents produced by the assessee do not have the addresses of the labourers and identity of the payee. The AO therefore disallowed 1% of the aforesaid labour charges resulting in disallowance of Rs.1,80,886/- on the ground that it was an attempt by the Assessee to inflated expenditure and reduce the income. On appeal by the assessee the CIT(A) restricted the disallowance to a sum of Rs.1,00,000/-. Aggrieved by the relief granted by CIT(A) the revenue has raised ground no.3 before the Tribunal. Aggrieved by the

order of CIT(A) sustaining of addition to the extent of Rs.1,00,000/-, the assessee has filed cross objection before the Tribunal.

31. We have heard the rival submissions.. The comparative charge of labour charges for the present and succeeding assessment years are as follows :-

	2009-10	2010-11	2011-12
Turnover	Rs.38,75,76,828	Rs.37,30,84,791	Rs.47,22,41,277
Labour Charges	Rs.8,93,60,108	Rs.7,35,48,257	Rs.10,91,10,172

32. From a perusal of the chart given above, it is evident that the charge of the AO that the assessee has inflated expenditure to reduce profit cannot be sustained in the light of the proportion of turn-over to the labour charges for the subsequent assessment years which is commensurate with the quantum of turnover. We therefore delete the addition sustained by CIT(A), taking into consideration the business exigencies where it is not possible to have addresses of migrant labourers. Thus ground of appeal by the revenue is dismissed while ground of cross objection of the assessee is party allowed.

33. In the result ITA NO.1594/Kol/2014 is partly allowed for statistical purposes and C.O.NO.113/Kol/2014 is allowed.

34. In the result ITA No.1598/Kol/2014 is partly allowed. ITA No.1594/Kol/2014 is partly allowed and C.O.No.113 is allowed.

**Order pronounced in the Court on 31.07.2017.**

Sd/-  
[Waseem Ahmed]  
Accountant Member

Sd/-  
[ N.V.Vasudevan ]  
Judicial Member

Dated : 31.07.2017.  
[RG PS]

Copy of the order forwarded to:

1. M/s. Mitra Guha Builders (India) Co., 8/2, Kiran Shankar Roy Road, Kolkata.

2.I.T.O., Ward-33(3)), Kolkata.

3. CIT(A)-XIX, Kolkata.      4. C.I.T.-XI, Kolkata.

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Sr.Private Secretary  
Head of Office/ D.D.O. ITAT Kolkata