

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'D', CHENNAI

श्री संजय अरोड़ा, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.26/Mds/2017

निर्धारण वर्ष / Assessment Year : 2012-13

Noble Consolidated Glazings Ltd.,
No.5, Second Link Street,
CIT Colony, Mylapore,
Chennai – 600 004.
[PAN: AACCN 5454A]

(अपीलार्थी /Appellant)

Dy. Commissioner of Income
Vs. Tax,
Corporate Circle-4(2),
Chennai.

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri A.S.Sriraman, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Nagendra Kumar, Dy. CIT
सुनवाई की तारीख/ Date of hearing : 22.06.2017
घोषणा की तारीख /Date of Pronouncement : 27.07.2017

आदेश /ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-8, Chennai ('CIT(A)' for short) dated 21.10.2016, partly allowing the assessee's appeal contesting its assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for assessment year (AY) 2012-13 vide order dated 06.03.2015.

2. The issue arising in the instant case is the validity in law and in the facts and circumstances of the case, of the disallowance of the assessee's claim for

exclusion of retention money, i.e., withheld by its customers, at ₹. 131.32 lacs. The larger issue, and what would therefore be required to be determined, is if the assessee's method of offering income to tax leads to the correct income being brought to tax, and if not, how is the same to be computed. The assessee is a company engaged in the business of designing, fabrication of cladding and providing structural/curtain wall glazing solutions. It, while recognizing revenue in its audited accounts on the bills raised on its' clients, claimed, consistent with its' past practice, the money retained by its' clients in the said revenue, subject to actual receipt, following, as stated, the decision in *CIT v. East Coast Constructions & Industries Ltd.* [2006] 283 ITR 297 (Mad), working the same to ₹. 1,31,32,011/-. While it pressed for the same in assessment proceedings, further citing decisions in *CIT v. Ignified Boilers (I) Ltd.* [2006] 283 ITR 395 (Mad) and *CIT v. P & C Constructions (P.) Ltd.* [2009] 318 ITR 113 (Mad), the Assessing Officer (AO) found the assessee's claim untenable in view of the fact that the retention money receivable account disclosed a receipt of ₹. 103.34 lacs during the year, as under, so that, on the contrary, the assessee ought to have included the said sum: (para 4 of the assessment order):

'31.03.2011	- Opening balance of Retention	Rs. 633.11 Lakhs
31.03.2012	- Retention retained by customers	Rs. 398.48 Lakhs
		Rs.1031.59 Lakhs
31.03.2012	- Closing balance of Retention	Rs. 928.26 Lakhs
		Rs.1,03,33,948/-'

He, accordingly, disallowed the assessee's claim. In appeal, the Id. CIT(A) found that the issue was not if the retention money is to be excluded, which shall be brought to tax on receipt basis, as clarified in *East Coast Constructions & Industries Ltd.* (supra), but *whether the amount excluded was consistent with the assessee's claim*, and which he found as not, so that the disallowance was confirmed; the operating part of his order reading as under:

'In the case of East Coast Constructions and Industries Ltd (supra), relied on heavily by the appellant, the jurisdictional High Court

observed that the moneys retained by a Contractee as a percentage of the bills raised to be paid after the contract was completed, were to be treated as income only when the moneys were actually received, even though the assessee was following a mercantile system of accounting. There is no dispute with regard to the fact that retention money will be considered as the income of an assessee in the year of receipt. However, in the case on hand that is not the issue in dispute. After considering the observation of the Assessing Officer in the assessment order and the submissions made by the appellant the following issues come to light:

1. The appellant adopted a complex formula to compute retention money instead of offering the actual retention money (received) to tax.
2. By their own complex computation the appellant arrived at a figure of Rs. 1,03,33,948/- whereas the appellant claimed Rs. 1,31,32,011/- as retention money to be deductible in the computation of income.
3. There is no evidence to show that the appellant admitted the actual retention money received from the customers.

The appellant failed to explain either during the assessment proceedings before the Assessing Officer or the appellate proceedings before me the actual retention money to be considered for the previous year relevant to the assessment year under consideration. In view of the above, I hold that the Assessing Officer has rightly disallowed the retention money of Rs.1,31,03,011/- claimed as deduction by the appellant. The appellant fails on this ground'.

Aggrieved, the assessee is in second appeal.

3. During hearing, the Id. Authorized Representative (AR) was inquired as to why, when the assessee was maintaining a retention receivable account in its books, did it not claim deduction on the basis of the net accretion to the said account? Or, conversely, increase its income in case of reduction in the outstanding balance in the said account as at the year-end, i.e., vis-a-vis as at the end of the immediately preceding year, while claiming a decrease in case of a net accretion. This was particularly so in view of the clear and definite findings by the Id. CIT(A), extracted above, to which he could not furnish any

satisfactory answer, claiming to be not prepared. This is unfortunate as the hearing was fixed for today instant only as per the convenience of the Id. AR. The Id. Departmental Representative (DR) would, on the other hand, place reliance on the orders by the Revenue authorities.

4. We have heard the parties, and perused the material on record.

The question of retention money has two aspects to it, i.e., in principle and, on quantum. There appears, as clarified by the Id. CIT(A) (refer para 4.2 / pg. 8 of his order), to be no dispute in principle. We may though clarify that the purview of a tax appeal is to determine the assessee's correct tax liability (*Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 199 ITR 351 (Bom) (FB)). There is no estoppel against law, with it being trite that it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (refer: *CIT v. C. Parakh & Co. (India) Ltd.* [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)). The issue *qua* retention money boils down to whether the right to receive the same has or has not arisen to the assessee during the relevant year – a matter of fact. The relevant agreement/s are not on record, so as to ascertain the basis or the reason for the retention, even as it appears that tax has been deducted at source by the clients thereon (refer Annexure-6 to the statement of taxable income (STI) / copy on record). That only implies that the relevant amounts are payable to the assessee. There is, we may further clarify, a difference between 'due' and 'payable'. An amount may be payable and yet not due for payment, i.e., is payable at a defined future date. It does not cease to be a liability for that reason. The word 'payable' denotes the nature of the amount, while the word 'due' emphasizes the time whereat the liability, as signified by the word 'payable', is to be discharged. Further, the very fact of it being payable, where so, on which basis only tax would stand to be deducted at source, implies that the right to receive, albeit at a later point in time, has inured to the corresponding party, so that the receipt would be at a

later date. Take a simple case of sale of goods on credit basis. Sale bill is raised on the buyer, which is accepted, taking delivery of the goods. The sale is complete, and the property in the goods stands transferred. The right to receive the sale value, the consideration for the transfer, vests in the seller. Payment terms stipulate a 60 day credit (say). Income has accrued in-as-much as the right to receive the payment - 60 day hence, has arisen to the seller. The right is legally enforceable, though could be exercised only after a 60 day credit period. There is no difference between the legal concept of accrual and the accounting concept thereof. The only impediment *qua* income disclosure or revenue recognition, i.e., speaking in the context of assessable income under the Act or its reflection in accounts respectively, is that there is reasonable certainty with regard to its ultimate realization. That is, it is not unreasonable to expect the realization. Why, where the ultimate realization is attended with uncertainty, even a debt *in praesenti*, i.e., due for payment, cannot be regarded as accrued. Reference in this context may be made to Accounting Standard (AS-I) issued u/s. 145(2) of the Act and AS-1 & AS-9 issued by the Institute of Chartered Accountants of India (ICAI), both, again, legally binding on the assessee u/s. 211 of the Companies Act, 1956. Nothing *per se* therefore turns on the non-receipt or withholding of the relevant amount by the assessee's customers, which could only be in terms of the contract and, therefore, only a debt *in futuro*, and the thing relevant is if there is any significant uncertainty with regard to its ultimate realization. This is as in that case income, to that extent, cannot be said to have accrued. *The matter is principally and primarily factual.* So, however, the very fact that revenue stands recognized in final accounts, prepared in consonance with the Accounting Standards, mandated by law, suggests – and strongly at that, that income has accrued. This gets further reinforced by the deduction of tax at source, so that the payee admits to the liability having accrued (refer: *CIT v. Excel Industries Ltd.* [2013] 358 ITR 295

(SC)). The issue at hand therefore boils down to, so that we refer to the question arising as, whether any adjustment is to be made to the revenue reckoned in the assessee's books *qua retention money in the facts and circumstances of its case?* As aforesaid, the relevant agreements are not before us. It may also be that some work is required to be performed or other obligation remains to be discharged, in which case the revenue recognition shall have to await the completion of the said work or discharge of the said obligation.

We are conscious of the assessee's reliance on the decision in *East Coast Constructions & Industries Ltd.* (supra), besides others based thereon. The same is even otherwise binding on us. Our reading of the said decision, which we have carefully perused (copy on record), is that in-as-much as the retention money is to be received after completion of the contract and inspection (certification) of work, which may entail deduction in the amount billed, the amount retained toward the same cannot be said to have accrued, so that the Tribunal was right in holding so. That is, is based on the factual finding of the corresponding sums having not accrued. We have, on the contrary, while clarifying that there is absence of any material to hold likewise, i.e., that any part of the work is to be performed or inspection made in the present case, have also clarified that, without doubt, where uncertainty exists, or any obligation under the contract is to be discharged by the assessee, for which the amount is withheld, the same shall accrue only be on the discharge of the said obligation. The matter of accrual of income would therefore turn on the facts of the case. That is, a mere withholding of the amount, admitted as liability, without anything more, will not amount to abeyance of accrual. An amount may be withheld to secure against any defect in the work undertaken that may be detected subsequently upon user, (say) within six months or a year. This is akin to warranty clauses that accompany product sales, for which, therefore, a suitable provision is allowed (refer: *Rotork Controls Indis (P.) Ltd. v. CIT*

[2009] 314 ITR 62 (SC)). What is the empirical data in this regard in the present case is not known. Does the defect liability, i.e., assuming so, extend only to the amount retained? The assessee has, as it appears, completed the work, admittedly as per the quality norms and, in any case, raised the bill only on the basis of the work completed. Then, again, the liability extends only to the said period (of six months/year), and cannot extend indefinitely. Why, in the present case we do not even know the purpose for which the amounts have been retained. We cannot help emphasize here that presence of any such incidents would have a bearing on income recognition in accounts, which are not qualified, so that they ostensibly satisfy the test of AS-I under the Act and AS-1 and AS-9 by ICAI, and which agrees with the legal concept of accrual, besides being admitted as a liability by the corresponding party. This underscores the dichotomy in the present case. *Why, for all we know, the corresponding parties may be seeking deduction of the amounts retained on the basis of the liability having accrued in favour of the assessee!* The matter, it cannot be over-emphasized, is purely factual and would accordingly require being restored to the file of the AO for fresh determination, issuing definite findings of fact.

While we decide so in principle, it would also be relevant for us to discuss the assessee's model, described as complex by the Id. CIT(A). The same, listing some sample entries, is as extracted from Annexure-5a to the STI / copy on record), with the final figures for the relevant year appearing at the bottom:

Retention Money Excluded

Job Code	Job Name	Revenue Reckoned as per Audited Accounts	Cumulative Retention Money	Cumulative Contract Receipt (Vide clients Ledger)	Revenue Less Retention	Revised Revenue
		A	B	C	D = (A-B)	E=Max (C) or (D)
TC080	NAVINS HARMONY TOWERS-2	12,241,137	252,653	9,982,124	11,988,484	11,988,484
TC081	HOMETEL – HARINAGAR, DELHI	1,702,952		609,952	1,702,952	1,702,952

TC083	THE WILLINGTON CHARITABLE TRUST	34,505,290	1,513,318	29,440,054	32,991,972	32,991,972
TC085	CROWN PLAZA COCHIN	55,118,971	1,930,986	20,523,864	53,187,985	53,187,985
TC134	NAVIN – TRIUMP-A	15,460		172,000	15,460	172,000
TC134	NAVIN – TRIUMP-B	16,695		172,000	16,695	172,000
	Grand total (CCCL+Non CCCL Jobs)	2,348,143,176	92,826,003	1,850,051,096	2,255,317,174	2,290,146,628

The working of the retention claim (by the assessee) is as under:

'Particulars	Col Ref In 5a	2012-2013
Actual Revenue as per books		
Closing RSV as on 31.03.2012	(A)	2,348,143,176
Revised Revenue excluding Retention (Refer Annexure 5a)	(E)	2,290,146,628
Revised Inc/Dec in WIP		57,996,548
Retention Amount Considered Earlier		(44,864,537)
Retention Allowable during A.Y. 2012-13		13,132,011'

(Annexure 5 to the STI)

We are unable to appreciate the same. Though the idea appears to be to exclude retention, except where and to the extent received, why, it is not understood, cumulative receipt is be deducted when the revenue reckoned is for the current year only. Again, if the whole purport is to exclude the retention not received, the balance in the retention receivable account, maintained separately in its accounts, should suffice. For example, for the current year the incremental retention is ₹. 295.15 lacs (i.e., ₹. 928.26 lacs – ₹.633.11 lacs), which needs to be excluded. Adopting the same as the basis would imply that, consistent with its accounts, ₹. 928.26 lacs has been excluded, in aggregate, over the years. The corresponding figure, as per the assessee's working, is ₹. 579.97 lacs (Annexure-5 (supra)). *What, one may ask, does this figure represent? The*

receipt of other than retention money, which clearly influences the said amount, is to our mind irrelevant for the purpose. In fact, unless the cumulative revenue is adopted in column 1 of the table (Annexure 5a revenue recognized on different jobs), it is not possible to say that the said figure matches with the assessee's accounts. Further, does it mean that out of the total amount receivable (₹. 928.26 lacs), ₹. 348.29 lacs, i.e., ₹. 928.26 lacs (-) ₹. 579.97 lacs stand, per the assessee's method, accrued? If so, on what basis? The assessee states of having followed this method regularly. *The same is not proved.* Even so, while it may well be, there is no finding of it having been accepted by the Revenue; it categorically rejecting the same for the current year, with the principle of *res judicata* being not applicable to the proceedings under the Act. Again, a wrong method, even if followed regularly, is not a valid ground for it being continued despite being not valid (refer: *CIT v. British Paints India Ltd.* [1981] 188 ITR 44 (SC)). We are, however, not inclined to dismiss the assessee's model in-as-much as there has been no discussion thereon in the orders by the authorities below or even a reference to having called for an explanation from the assessee, and to which it had failed to respond. It may therefore well be that the assessee may clarify the same to the AO, duly explaining the same or some aspects of the matter in the set aside proceedings. The AO's findings of fact would, therefore, include that *qua* the assessee's working as well.

The matter, accordingly, is to be restored back to the file of the AO for fresh adjudication in the matter. Needless to add, the assessee shall be allowed a reasonable opportunity to state and present its case before him, and shall do so per a speaking order. We may also clarify that our observations may not be regarded only as guide posts and not as final findings or we construed as having pre-decided the matter in any manner. Reference at this stage and in this context may be made to the decision in *Janatha Contract Co. v. CIT* [1976] 105 ITR 627 (Ker), wherein the Hon'ble Court, following decisions in *CIT v. Indian*

Molasses Co. (P.) Ltd. [1970] 78 ITR 474 (SC) and *CIT v. Greaves Cotton & Co. Ltd.* [1968] 68 ITR 200 (SC), restored back the matter to the file of the tribunal for factual determination as to accrual or otherwise of the amounts withheld.

In sum:

5. The moot question arising in the present case is whether there has been an accrual as income during the year of the sums retained by the assessee's customers to any extent. The same is in respect of completed jobs, and there is nothing to indicate continuing contracts, with, in any case, each job representing a separate contract, to be settled separately at agreed rates. The assessee's method accounting is admittedly accrual, which is even otherwise incumbent on it to follow (sec. 209 of the Companies Act, 1956). The legal concept of accrual, signifying the right to receive, even if at a later point of time, so that it includes a debt *in futuro*, is in complete agreement with the accounting concept thereof, since formalized by the Accounting Standards issued under the Act as well as by the accounting regulatory body (ICAI), to which the law accords due recognition and, further, prescribes adherence (s.211 of the Companies Act). The same thus assumes the status of law or, in the least, delegated legislation. There is, in the present case, no qualification of accounts by the Auditors, so that the same are law compliant. It would be ludicrous to suggest that while the amount/s retained has accrued as income to the assessee under the accounting principles or under company law, has not under the income-tax law. Equally, that while the liability (in respect of the sums retained) stands accrued to the assessee's customers, it has not accrued as income to the assessee. Unless, therefore, it is shown that there is no accrual, the revenue recognition in accounts, following accrual method, is to form the basis for reckoning revenue, i.e., the income accrued. The onus, therefore, is on the assessee, who is even otherwise obliged to prove its

return of income and claims preferred thereby (refer: *CIT v. Calcutta Agency Ltd.* [1951] 19 ITR 191 (SC); *CIT v. R. Venakataswamy Naidu* [1956] 29 ITR 529 (SC)), to show that, notwithstanding its unqualified accounts, to the extent retained, income has not accrued. *This onus remains completely un-discharged.* There is no explanation by the assessee for the amount/s retained. The relevant agreements are also not on record for us to ascertain the same, which thus remains unknown. Again, it is not a case, as it appears, of continuing contracts, so that the decision in *East Coast Constructions & Industries Ltd.* (supra) is distinguishable on facts. There is in fact no dispute on principle. The law in fact is abundantly clear, so that any (reasonable) uncertainty as to ultimate realization would operate to defer the accrual to the point of time of resolution of the same (uncertainty), and to that extent. This, however, cannot be equated with a contingent liability, but must represent an assessment based on facts, which could even vary from contract to contract. Past data may be elucidative where the retention is toward any defect clause therein. This is similar to, going back to the example of sale of goods, the buyer making a claim on the seller on quality considerations during the credit period. That does not imply that income had not accrued to the seller in the first place. The answer is a provision, based on empirical results, which shall be reviewed for its adequacy as at the end of each successive year, either providing for the deficiency or writing back the amount deemed surplus. The matter is essentially factual and, accordingly, restored to the file of the AO for factual determination by issuing definite findings of fact. The matter under similar circumstances was restored to the tribunal by the Hon'ble High Court in *Janatha Contract Co.* (supra). The assessee's method of computing the provision, i.e., the amount to be excluded in respect of amounts retained, following a formula, which does not agree with the amount retained, *so that the assessee itself considers a part thereof as accrued or, equivalently, accrual of the total amount retained, though subject to a*

provision extending to a part of that retained, is not understood. Consistency, even where so, would by itself be of little consequence where the method adopted does not result in deducing the income chargeable to tax under the Act, even as explained in *British Paints India Ltd.* (supra), clarifying that there is no estoppel in such matters, and which is to be decided with reference to the relevant material, applying the correct principles. It is open for the assessee to explain its' method while pleading its case in the set aside proceedings. Needless to add, the credit in respect of tax deducted at source shall be available only in relation to the income assessable for the year (s. 199). Further, the amount/s excluded for earlier years would stand to the subject to tax on receipt basis (s. 5(1) of the Act). We decide accordingly.

6. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced on July 27, 2017 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(Duvvuru RL Reddy)

न्यायिक सदस्य/Judicial Member

Sd/-

(संजय अरोड़ा)

(Sanjay Arora)

लेखा सदस्य/Accountant Member

न्नई/Chennai,

दिनांक/Dated, July 27, 2017

EDN

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF