

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.2806 & 2807/Del./2016
Assessment Years 2009-2010 & 2010-2011

M/s. Dayanand Contractor V & PO Kharainti, Dist. Rohtak. PAN AADFD4239K (Appellant)	vs.	The Pr. CIT Aayakar Bhavan, Delhi Road, Rohtak – 124 001 Haryana. (Respondent)
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For Assessee :	S/Shri Gautam Jain, Piyush Kumar Kamal & Lalit Mohan, Advocates
For Revenue :	Ms. Rachna Singh, CIT-D.R.

Date of Hearing :	22.11.2017
Date of Pronouncement :	30.11.2017

ORDER

PER BHAVNESH SAINI, J.M.

Both the appeals by the assessee are directed against different orders of the Ld. Pr. CIT, Rohtak dated 30th March, 2016 for the A.Ys. 2009-2010 and 2010-2011, challenging the order under section 263 of the I.T. Act, 1961.

2. We have heard the Learned Representatives of both the parties and perused the material on record. Both the parties mainly

argued in A.Y. 2009-2010 and have stated that the issue is same in A.Y. 2010-2011. Therefore, for the purpose of disposal of both the appeals, we decide the appeal for the A.Y. 2009-2010 as under.

ITA.No.2806/Del./2016 – A.Y. 2009-2010 :

3. Briefly the facts of the case are that assessee is a firm. Return of income for the assessment year under appeal was not filed by the assessee as prescribed under section 139 of the I.T. Act. The A.O. recorded reasons under section 147 of the I.T. Act on 2nd November, 2012 and notice under section 148 was issued to the assessee-firm. In response to notice under section 148, assessee filed return of income on 11th March, 2013 declaring total income at Rs.2,15,986. The case was selected for scrutiny and A.O. issued questionnaire. The assessee furnished written reply. The A.O. found that assessee is deriving income from contractor-ship business. Various details as called for were filed. Books of account and bills/ vouchers were produced and test-checked by the A.O. The A.O. after disallowing certain expenses computed the income at Rs.3,66,860 vide order dated 21st February, 2014 under section 147/143(3) of the I.T. Act.

3.1. The Ld. Pr. CIT, Rohtak however, was not satisfied with the re-assessment order and issued show cause notice under section 263 of the I.T. Act, dated 28th January, 2016, copy of which is filed at page-47 of the paper book. The Ld. Pr. CIT, Rohtak on perusal of the record found that assessee is being assessed to tax since 2001-2002 onwards in the status of Individual as well as Firm, having PAN AJYPK7569F and AADFD4239K respectively. It was found that assessee-firm has not filed return of income on time. Therefore, notice under section 148 was issued and in response thereto, assessee filed return of income on 11th March, 2013 declaring income of Rs.2,15,986 in the status of Firm claiming refund of Rs.26,47,006. The A.O. passed the re-assessment order dated 21st February, 2014 on total income of Rs.3,66,860 by creating a total demand of Rs.46,618 after allowing TDS of Rs.66,741 as appearing on the system of PAN AADFD4239K and net payable demand was determined at Rs.62,331 for which demand notice was issued. The Ld. Pr. CIT also noted that the said demand is still outstanding. On perusal of record, it was revealed that assessee has filed an application requesting for refund of Rs.25,80,265 on account of total

TDS of Rs.26,47,006. The assessee enclosed Form 16A issued by various DDOs but the amount of TDS is not verifiable on the system of the Revenue Department. On perusal of the Form-16A reveals that PAN on these Form 16A is mentioned as AJYPK7569F which is PAN of individual, whereas assessment in this case was completed on the Firm having separate PAN AADFD4239K for which the case was reopened under section 148 of the I.T. Act, 1961. Thus, the payment of contract and TDS deducted on payment is not verifiable from the system. Assessee was required to prove the genuineness and reasonability of these amounts of difference with supporting documentary evidence. It was noted in the notice that the order passed by the A.O. is erroneous and prejudicial to the interests of the Revenue. The case was fixed for hearing on 9th February, 2016.

3.2. After issue of show cause notice under section 263 of the I.T. Act above, explanation of assessee was called for and the assessee filed explanation pointing-out certain mistakes in the notice which have been corrected by the Ld. Pr. CIT in the impugned order. The assessee submitted before Ld. Pr. CIT that assessment in the status of Firm on the income earned on contract allotted in the name

of Shri Dayanand, partner, was also framed since A.Y. 2006-2007 and the cases were decided even by the Appellate Authorities like CIT(A) and ITAT. The Ld. Pr. CIT, however, did not accept the contention of assessee and found that the Ld. CIT(A), Faridabad vide order dated 23rd February, 2016 for the A.Y. 2012-2013 has dismissed the claim of assessee. The Ld. Pr. CIT found that the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., 243 ITR 83 is distinguishable on facts. The Ld. Pr. CIT also found that in assessment year under appeal, assessee has disclosed net profit of Rs.2,15,986 but in subsequent year, the turnover has increased substantially but proper profit has not been shown. The Ld. Pr. CIT on perusal of 26AS also found that Shri Dayanand-Individual is having PAN AAGPN3895C and was having interest income from SBI amounting to Rs.1,87,488 on which TDS of Rs.19,322 has also been deducted by SBI. However, assessee-firm has claimed this amount against PAN of the Firm i.e., AADFD4239K. It was also noticed that Shri Dayanand-Individual filed return of income in his individual capacity but has not explained his interest income. The A.O. has failed to examine the transaction mentioned in

Form 26AS. The assessment order was therefore, found erroneous and prejudicial to the interests of the Revenue. The same was set aside and A.O. was directed to re-frame the assessment.

4. The assessee is in appeal challenging the order under section 263 of the I.T. Act. The Learned Counsel for the Assessee reiterated the submissions made before the authorities below. Learned Counsel for the Assessee submitted that assessee is a Firm engaged in the business of Civil Contract and one of the partner of the Firm Shri Dayanand had taken the contracts in his name and transferred the same to the Assessee-Firm. The contracts were transferred to the Firm by the partner in terms of clauses of the Partnership Deed. Since contracts were in the name of partner, the TDS was deducted in the name of partner but since the contracts were transferred to Firm, the TDS was also transferred to the Firm. However, since the TDS was not made in the name of the Firm, therefore, it did not reflected in Form No.26AS of the Firm. He has submitted that the A.O. reopened the assessment because of these reasons and assessed the income in the hands of the Firm. PB-3 is computation of income of the Assessee-Firm and PB-14 is Profit and

Loss Account showing the same facts in respect of assessment year under appeal. PB-97 is Partnership Deed dated 1st April, 2002. The contract was taken by one of the partner Shri Dayanand but entire work was executed by the Assessee-Firm. PB-5 is PAN of the individual Mr. Dayanand. In preceding assessment year also, similar income is earned in the hands of the Assessee-Firm and TDS benefit have been allowed. In assessment year under appeal also the income is assessed in the hands of the Firm. It is not in dispute that the entire contract was executed by the Firm. He has submitted that when income is assessed in the hands of the Firm, corresponding benefit of the TDS deducted should have been allowed in the hands of the Firm. He has submitted that in A.Y. 2012-2013, the Ld. CIT(A), Faridabad, vide order dated 23rd February, 2016 decided the issue against the assessee on the same facts by not allowing the TDS deduction in the hands of the Firm but the order has been set aside by the ITAT, Delhi Bench in the case of the same assessee in ITA.No.2027/Del./2016 vide order dated 16th October, 2017. Copies of the orders are filed at pages 109 and 129 of the Paper Book. Learned Counsel for the Assessee submitted that on Rule of

Consistency be applied and the order under section 263 is bad in law. The A.O. has taken a possible view in the matter to which the Ld. Pr. CIT Rohtak did not agree, would not give rise to initiate proceedings under section 263 of the I.T. Act and relied upon the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd., vs. CIT 243 ITR 83. Learned Counsel for the Assessee further submitted that the issue of enhancement of income on account of NP and interest was not subject matter of notice under section 263 of the I.T. Act as well as interest earned by the individual and TDS deducted by SBI is also not claimed by the Assessee-Firm in their computation of income filed at page-14 of the PB. He has submitted that show cause notice under section 263 was given only on TDS adjustment. Therefore, the other items taken-up in the impugned order would not survive under Law. He has therefore, submitted that assessment order passed by the A.O. is not erroneous in so far as prejudicial to the interests of the Revenue. He has relied upon the following decisions.

4.1. In the case of CIT vs. Nirav Modi 390 ITR 292 (Bom.) - which has been affirmed by the Hon'ble Supreme Court reported in (2017) 77 taxmann.com 15 (SC) - in which it has been held as under:

“Where Assessing Officer after making proper and detailed enquiries, took a view that amount received by assessee as gift from his relatives was a genuine transaction, impugned revisional order passed by Commissioner directing Assessing Officer to enquire into capacity of donors and to decide about genuineness of gift afresh, was not sustainable.”

4.2. In the case of Director of Income Tax vs. Jyoti Foundation (2013) 357 ITR 388 (Del.) in which it has been held as under :

“Where revisionary authority opined that further inquiry was required, such inquiry should have been conducted by revisionary authority himself to record finding that assessment order passed by Assessing Officer was erroneous and prejudicial to revenue.”

4.3. In the case of Income Tax Officer vs. D.G. Housing Projects Ltd., (2012) 343 ITR 329 (Del.), in which it has been held as under :

“Where Commissioner had doubts about valuation and sale consideration received in computation of capital loss but he had not examined said aspect himself, order of remit could not be passed by Commissioner asking Assessing Officer to decide whether order was erroneous.”

4.4. In the case of Commissioner of Income Tax vs. DLF Ltd., (2013) 350 ITR 555 (Del.), in which it has been held as under :

“Where disallowance of expenditure for exempted income was debatable and order of Assessing Officer could not be held as unsustainable, revisionary powers could not be exercised.”

5. On the other hand, the Ld. D.R. strongly relied upon the impugned order under section 263 of the I.T. Act and submitted that the assessment order is perfunctory and did not disclose the relevant facts. The A.O. is both Investigator and an Adjudicator. If the A.O. as an adjudicator decides a question or aspect and makes wrong assessment which is unsustainable in law, it can be corrected by the

Commissioner in exercise of Revisional Powers. The Ld. D.R. submitted that the A.O. in the questionnaire did not ask for verification of the TDS. The Ld. D.R. submitted that since the A.O. did not conduct enquiry on the aspect of the TDS matter and passed the order without applying mind, therefore, assessment order is erroneous in so far as prejudicial to the interests of the Revenue. The Ld. D.R. relied upon the following decisions :

- (i) CIT vs. Jawahar Bhattacharjee (2012) 341 ITR 434 (Gau.) (HC) (FB).
- (ii) Malabar Industrial co. Ltd., 243 ITR 83 (SC)
- (iii) Pratap Footwear vs. ACIT (2003) SOT 638 (Jabalpur) (Trib.)
- (iv) CIT vs. Nagesh Knitwear Private Ltd., (2012) 345 ITR 135 (Del.)
- (v) Gee Vee Enterprises vs. Addl. CIT, Delhi-1 (1975) 99 ITR 375.
- (vi) Rampyari Devi Saraogi vs. CIT (1968) 67 ITR 84 (SC)
- (vii) NIIT vs. CIT (Central) (2015) 60 taxmann.com 313.

5.1. The Ld. D.R. therefore, submitted that Ld. Pr. CIT correctly set aside the re-assessment order and directed the A.O. to frame assessment after due enquiry.

6. We have considered the rival contentions. The whole issue is revolving around the claim of TDS made by the assessee for claiming refund. According to the Revenue Department, the Individual Partner of the Assessee-Firm had taken a Contract which he has transferred to the Assessee-Firm. Once TDS certificate is issued in the name of the individual, then, refund is to be claimed by the individual against the TDS. The assessee however, claimed that the entire contract work was transferred to the Firm and entire work as per contract have been executed by the Firm. According to the assessee, the same system was accepted by the Revenue Department in earlier year as well as in subsequent year. Learned Counsel for the Assessee submitted that this issue was considered in detail in A.Y. 2012-2013 by Ld. CIT(A), Faridabad vide order dated 23rd February, 2016 but claim of the assessee has not been accepted because it was directed that refund, if any, as per TDS shall have to be claimed by the individual partner. However, the order of the Ld. CIT(A) dated 23rd November, 2016 for A.Y. 2012-2013 have been set aside by the ITAT, Delhi Bench in the case of assessee in ITA.No.2027/2016 dated 16th

October, 2017. The entire order of the Tribunal is reproduced as under :

**“IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI ‘SMC’ BENCH,
NEW DELHI**

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITA No. 2027/DEL/2016 [A.Y. 2012-13]

*Dayanand Contractor
C/o. N.C.Garg, CA
Mal Godam Road
Rohtak
PAN : AADFD4239K*

Vs.

*ITO
Ward-1
Rohtak*

[Appellant]

[Respondent]

*Date of Hearing : 10.10.2017
Date of Pronouncement : 16.10.2017*

Assessee by : Shri Gautam Jain, & Sh. Lalit Mohan, CA

Revenue by : Shri T. Vasanthan Sr. DR

ORDER

This appeal of the assessee arises from the order of the Id. CIT(A)-Faridabad vide order dated 23.02.2016 for assessment year 2012-13.

2. The assessee has raised following additional grounds of appeal:

1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in not directing the learned Assessing officer to include

the income from contract work declared by the appellant in the return of income furnished by the appellant for the instant assessment year.

2. That the learned commissioner of Income Tax (Appeals) has failed to appreciate that mere fact that allotment of contract does not bring about any liability to taxability the income from contract in the hands of entity executing the contract and on the contrary once a contract has been executed by partnership firm under the deed of partnership then such income has to be assessed in the hands of firm.

3. That the finding that "it is a case of sub-contract and whenever there is a sub-contract, the contractor giving the contracts has to once again deduct tax which has not been done by the partner of the firm Sh. Dayanand, when the contract in question have been transferred to the firm and as such the only course of action as per the law is to file the return of income of Sh. Dayanand and claimed the refund" is factually incorrect, legally misconceived and untenable."

3. Apart the above additional grounds, the assessee has raised following grounds of appeal:

"1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the denial of credit of TDS of Rs. 13,01,041/- on the income declared and assessed in the hands of the appellant firm on the basis that TDS has not been deducted in the name of appellant but in the individual capacity of the partner of the appellant.

1.1 That the reasoning the given by the learned Commissioner of Income Tax (Appeals) that 'if any refund is to be claimed by the appellant against this TDS, then only course of action as per law is to file the return of income Sh. Dayanand and claim the refund', is wholly erroneous, misconceived and untenable.

1.2 That various adverse findings recorded in the orders of authorities below are factually incorrect, legally misconceived, contrary to record and thus untenable."

4. In brief, the facts of the case are that the appellant is a firm engaged in the business of civil construction. It filed its return declaring income of Rs. 7,90,480/- on 26.09.2012 with a TDS of Rs. 13,01,041/-. The case was selected for scrutiny on the basis of the mismatch between the TDS shown in AS26 and in the return filed by the appellant. During the course of appellate proceedings the appellant was asked to reconcile these differences, in the return the appellant has shown a total income of Rs.7,90,480/- with the TDS of Rs.13,01,041/-, and no refund was claimed in the return. However in the computation of income subsequently filed by the appellant the appellant has claimed a refund of Rs.10,42,130/- on account of TDS. During the course of assessment proceedings, the appellant stated that the difference between Form No. 26AS and the business receipts (contractor payments) of Rs.7,99,45,009/- was on account of the fact that one of the partners in the firm (Dayanand) had taken the contracts in his name and transferred the same to the firm. The contracts were transferred to the firm by the partner in terms of clause 1 of the partnership deed. Since the contracts were in the name of the partner, the TDS was deducted in the name of the partners but since the contracts were transferred to the firm, the TDS was also transferred to the firm. However, since the TDS was not made in the name of the firm, therefore, it did not reflect in the form AS 26 of the firm. The AO in his order after seeking the directions of the Addl. Commissioner of Income Tax under section 144A has disallowed the credit of the TDS deducted in the name of the partner to the firm. The present appeal is against this action of the AO. Besides this the AO in his order has made an addition of Rs.2,41,563/- as the interest received by the

appellant on account of income tax refund, and not disclosed in the return of income which is also the subject matter of this appeal.

5. The ld. CIT(A) confirmed the action of the Assessing Officer.

6. I have considered the rival arguments made by both the sides, perused the orders of the A.O and the ld. CIT(A) and the paper book filed on behalf of the assessee. Ground 1 & 1.2 challenge the denial of credit of TDS of Rs.13,01,041/- on the income declared and assessed in the hands of the appellant firm on the basis that TDS has not been deducted in the name of the appellant but in the individual capacity of the partner of the appellant. Also, additional grounds have been raised to include the income declared from contract works in the return of income furnished by the appellant for the instant assessment year. At the outset contract has been assigned to the assessee firm by the partner, which fact is also accepted by the learned CIT (A) in his order at page 8, wherein he held as under:

“ii) Whenever a contract is given to another party, by the party which has obtained the contract (sub-contract), provisions of TDS kick in once again. That is to say that whenever there is a sub-contract, the contractor giving the contracts has to once again deduct tax. Apparently this has not been done by the partner of the firm Sh. Dayanand, when the contract in question have been transferred to the firm.”

7. After acceptance of the fact that Sh. Dayanand has transferred the contract to firm learned CIT (A) ought ,to have directed the assessment of the income in the hands of the firm and also allowed the credit of TDS. Further, the findings of the learned CIT(A) that whenever there is a sub-contract, the contractor giving the contracts has to once again deduct tax which is incorrect and against the principles of law as the appellant firm

cannot be considered as the sub-contractor of Sh. Dayanand. In the case of Hindustan Ratna JV vs. ITO reported in [2014] 42 taxmann.com 107 (Hyderabad-Trib.) (page 73-84 of paper book), it has been held as under:

“22. In view of the above discussion and considering the facts and circumstances of the case, we are of the view that the relationship created by the Partnership Deed dated 31st August, 2007 and partners cannot be considered as sub-contractors of the firm and they are jointly and severally liable towards the owners for the execution of the contract commitments in accordance with the contract conditions. Being so, the provisions of section 194C cannot be attracted so as to treat them as sub-contractors of the firm thereby invoking the provisions of section 40(a)(ia). In other words, we can safely conclude that there is no sub-contract between JV and the constituents and since the JV has been formed only to procure contract works from the Government and the contract is being executed by the constituents partners in their sharing ratio 60:40 as per the terms of the JV, it cannot be said that the JV is a contractor and its constituents are sub-contractors. Accordingly, we set aside the orders of the revenue authorities and delete the disallowance of Rs.1,11,09,23,018/- made by the Assessing Officer by invoking the provisions of Section 40(a)(ia) of the Act.

8. It was submitted by the ld. counsel for the assessee that once the contract is obtained in the name of individual but executed by partnership firm under the deed of partnership then such income has to be assessed in the hands of the firm. In the case of ITO vs. Manikarnika Devi Singh reported in 98 Taxman 32 (Jab)(Mag),(page 115 of paper book) it has been held as under:

“Once the revenue had itself accepted that the contract work was executed by the firm and the income was earned by the firm, the only question remained whether the firm be assessed as registered firm or unregistered firm. It was not in dispute that the assessee made all the necessary compliance required for getting the registration as per section 185. In K.D. Kamath & CO. v. CIT [1971] 82 ITR 680 the Supreme Court held that

the fact that the exclusive power and control, by agreement of the parties, is vested in one partner, and the further circumstances that only one partner can operate the bank accounts or borrow on behalf of the firm, is not destructive of the theory of partnership provided two essential conditions are satisfied, namely (i) that there should be an agreement to share profits and losses of the business of the firm, and (ii) that the business must be carried on by all the partners or any of them acting for all. The above decision was squarely applicable in the case of the assessee as in the instant case also there was an agreement to share the profit and loss of the business of the firm. The business was carried on by all the partners, though the contract work was in the name of one of the partners. Therefore, the Dy. Commissioner (Appeals) was fully justified in allowing registration to the assessee-firm"

9. Above findings are supported by the Circular No. 7/2016 issued by CBDT placed at page 96 -97 of the Paper Book. Denial of credit of TDS of Rs. 13,01,041/- is otherwise against the principle of consistency. In another identical case of M/s Ranbir Singh having PAN No. AAJFR9966M the learned Assessing Officer allowed and issued the refund in the status of the firm for the TDS/TCS deducted in the name of one of partner namely Sh. Ranbir Singh . A copy of the order of assessment dated 10.12.2010 in the case of M/s Ranbir Singh having PAN No. AAJFR9966M is placed at pages 45-47 of paper book alongwith copy of order of granting interest on said refund at pages 44 of paper book. The aforesaid position is accepted in preceding assessment years in assessee's own case. The Assessing Officer at last page of the order of assessment has held as under:

"i) As per back ground of the case, the assessee is being assessed to tax for the last 15 years in his individual status and since 2002 onwards in the status of firm also."

10. Reliance in support of the principle of consistency was placed on the following judgments:

- i) 358 ITR 295 (SC) CIT vs. Excel Industries Ltd.
- ii) 308 ITR 161 (SC) CIT vs. J. K. Charitable Trust
- iii) 266 ITR 99 (SC) CIT v. Berger Paints
- iv) 394 ITR 449 (SC) Godrej & Boyce Manufacturing company Ltd. vs. DCIT.

11. Reliance was also placed on the following:

That mere allotment of contract does not bring about any liability to tax the income from contract in the hands of entity in whose name contract is allotted and not executing the contract.

- i) ITA No. 7698/M/2010 A.Y. 2007-08 SMC Ambika JV v. ITO
(pages 58-65 of Paper Book)
- ii) 53 SOT 220 (Hyd) MEIL Sew Maytas BHEL (JV) v. ITO
(pages 66-72 of Paper Book)
- iii) ITA No.44/2013 (Bom) CIT v. SMSL-UANRCL (JV)
(pages 85-89 of Paper Book)
- iv) 374 ITR 35 (Del) CIT v. Oriental Structural Engineers (P)Ltd.
(pages 90-95 of Paper Book)
- v) 39 DTR 217 (Del) CIT vs. Oriental Structural Engineers(P) Ltd.
(pages 55-57 of Paper Book)
- vi) 166 TTJ 612 (Hyd.) M/s Hindustan Ratna JV vs. ITO
(pages 73-84 of Paper Book)

- vii) Circular No.7/2016 issued by CBDT 48 SOT 178 (Visakhapatnam)
ITO vs. UAN Raju Construction 31 DTR 49 (HP) CIT vs. Ambuja Daria
Kashlog Mangu Transport Coop Society
- vii) 48 DTR130(HP) CIT vs. Sirmour Truck Operators Union
- viii) 240 CTR 325 (P&H) CIT vs. Grewal Brothers
- ix) 248 ITR 339 (AAR) Van Oord ACZ BV
- x) 124 ITR 192 (Bom) CIT vs. British Drug Houses (India)P. Ltd
- xi) ITA No(s) 1280/PN/2006 (A.Y. 2003-04), 60/PN/2009 (A.Y. 2005-06), 177 and 178/PN/2008 (A.Y. 2002-03 and 2004-05 ITO vs. Rajdeep & PMCC Infrastructure,
- xii) ITA No. 65/PN/2011 (AY 2007-08) M/s Gammon Progressive-JV 55 DTR 417 (Cal) Panna Lai Kejriral vs. CIT
- xiii) 314 ITR 343 (AAR) Hyosung Corporation
- xiv) 210 Taxman 49 (Mad)(Mag) Chennai Port Trust v. ITO

12. Once income is required to be assessed, TDS credit has to be allowed irrespective of the fact that the TDS is deducted in the name of the another person.

- i) 357 ITR 396 (AP) CIT vs. Bhooratnam
- ii) ITA no. 2417/Kol/2013 Mr. Parmanand Tiwari vs. ITO of Paper Book)
- iii) ITA No. 99/Hyd/2010 ITO vs. M/s Limak Devi Singh

13. Any income could not be treated to be taxable just because tax at source has been deducted on it.

**i) 73 taxmann.com 166 (Mum) ABB Switzerland Ltd. Vs. ADIT(IT)
(page 116-127 of Paper Book)**

14. In any case, no addition can be made on the basis of Form 26 AS AIR information as has been held in the following judgments:

- i) ITA No. 4679/D/2012 Assessment Year 2009-10 dated 31.3.2015 ITO v. Sh. Basant Kumar.
- ii) ITA No. 253/Agra/2013 dated 27.6.2014 ITO v DevendraNath Dwivedi ITA No. 5125/Mum/2013 dated 10.4.2015 M/s Kroner Investments Ltd vs DCIT.
- iii) ITA No. 735/D/2015 dated 2.8.2016 Vikas Yadav v. ITO
- iv) 58 SOT 135 (Cut) (Uro) Gobindpada Bhanja Chowdhury v. ITO
- v) 36 taxmann.com 371 (Guj) Vaghibhai v. Bishnoi v. ITO
- vi) 352 ITR 273 (Del) Court on its Own Motion v. CIT
- vii) 365 ITR 143 (All) Rakes Kumar Gupta v. UOI
- viii) ITANo. 1331/D/2015 Praveen Kumar Jain v ITO dated 22.1.2015
- ix) ITA No. 3534/D/2014(Del Tri) Munni Devi vs ITO68 STO 197 (Del) Bir Bahadur Singh Sijawali
- x) 57 ITR 532 (SC) Parimisetti Setharamamma vs. CIT
- xi) 159 ITD 329 (Asr) Sh. Amrik Singh vs ITO
- xii) 108 ITD 115(Agra) Saraf Gramodyog Sansthan vs ITO
- xiii) ITANo. 3873/D/2016
- xiv) Assessment Year 2009-10 dated 23.01.2017 Zahid Hassan

15 *In view of the above, the additional ground that the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in not directing the learned Assessing officer to include the income from*

contract work declared by the appellant in the return of income furnished, by the appellant for the instant assessment year is directed to be allowed and TDS is also directed to be allowed. Thus the grounds of the assessee are allowed.

16. In the result, the appeal of the assessee is allowed.”

6.1. The above order of the Tribunal clearly show that the issue is identical in the case of the assessee in the present proceedings under section 263 of the Act which have already been decided by the Tribunal in favour of the assessee. The Tribunal in this year has also mentioned that in comparable cases of Shri Ranbir Singh, the A.O. allowed TDS benefit on identical facts. It was also noted that the same position has been accepted by the Revenue Department in preceding assessment years. Therefore, the issue is covered in favour of the assessee by the order of the ITAT, Delhi Bench dated 16th October, 2017. Copy of the assessment order in the comparable case of Shri Ranbir Singh is also filed in the paper book. The above facts clearly show that the issue of claim of refund of TDS granted in the name of the individual have also been decided in favour of the assessee in the case of the assessee. It may also be noted at the cost of the repetition that there is no dispute that income is assessable/taxable in the

hands of the Assessee-Firm. It is also not in dispute that the Assessee-Firm executed the entire contract taken by the individual partner. Once the income is taxable in the hands of the Assessee-Firm of the contract taken in the name of individual, there is no question of denying the benefit of TDS deduction to the Assessee-Firm which was granted in the name of Shri Dayanand-individual. TDS is deducted on payment which is receipt of Assessee-Firm which is taxable in the hands of Firm. It cannot be excluded. The A.O. in this case has initiated the re-assessment proceedings under section 147 of the I.T. Act solely on the reason that the assessee did not file the return of income on time in the name of the Firm. The A.O. after examining the books of account and details produced before him and as per history of the assessee, assessed the income in the hands of the Assessee-Firm. The Ld. Pr. CIT in the show cause notice under section 263 of the Act as well as in the impugned order did not dispute this fact that income is assessable in the hands of the assessee for the contract which has taken in the name of the individual. The dispute is only of the refund claimed by the assessee. Therefore, in such circumstances, when entire income is assessed in

the hands of the Assessee-Firm and have not been disputed in the impugned order, assessee has rightly made claim for refund of the amount deducted as TDS in the name of the individual. The Rule of Consistency, therefore, clearly apply in the case of the assessee and there should not have been any reason for the Pr. CIT to invoke jurisdiction under section 263 of the I.T. Act. We rely upon the decision of the Hon'ble Supreme Court in the case of Radha Swamy Satsung vs. CIT (1992) 93 ITR 321. The Hon'ble Supreme Court in the case of Malabar Industrial Co., Ltd., vs. CIT (2000) 243 ITR 83 held that *where two views are possible and A.O. has taken one view with which the Commissioner does not agree, the said order cannot be treated as an erroneous order, prejudicial to the interests of the Revenue, unless view taken by the A.O. is unsustainable in law.* In the case of the assessee, in preceding assessment years as well as in subsequent years, similar claim of assessee has been allowed and even the Tribunal allowed the claim of assessee for A.Y. 2012-2013. The A.O. in a comparable case of Shri Ranbir Singh (supra), has accepted the similar claim of the assessee. Therefore, if the A.O. in the present assessment order accepted the claim of assessee for

refund of the tax based on TDS Certificate issued in the name of the individual, the order of the A.O. is clearly sustainable in law. The Ld. D.R. however, contended that A.O. did not apply his mind to the facts of the case as well as passed a perfunctory order. The A.O. being an Investigator and Adjudicator, should have decide the issue in the light of material on record. We do not agree with the contention of the Ld. D.R. because it is not in dispute that income earned on execution of contract taken in the name of the individual is assessable in the hands of the Assessee-Firm. There is no question of the A.O. to go in detail of the income earned by the Assessee-Firm because the Pr. CIT in the show cause notice under section 263 as well as impugned order did not dispute the fact that the income earned out of the contract business shall have to be assessed in the hands of the Assessee-Firm. Therefore, even if no specific question is asked for by the A.O. at re-assessment stage, but the A.O. has correctly assessed the income in the hands of the Assessee-Firm and the assessment was reopened only on the reason that Assessee-Firm did not file return of income as prescribed under section 139 of the I.T. Act. Therefore, the contention of the Ld. D.R. is not acceptable and

accordingly, rejected. The decisions relied upon by the Ld. D.R. therefore, do not apply to the facts and circumstances of the case.

6.2. It may also be noted here that the Ld. Pr. CIT, apart from issue of refund claimed by the assessee and mismatch of the income and the tax refund as per system of the Department, did not raise the issue of understated income as per gross receipts and net profit and interest from SBI in the show cause notice. Therefore, on such items the Pr. CIT is not permitted to invoke the jurisdiction under section 263 of the I.T. Act or to pass order. It may be noted here that the Pr. CIT without giving notice to the assessee has found that there is understated income disclosed by the assessee. It is well settled Law that assessment cannot be revised on ground which is not mentioned in the show cause notice. We rely upon the decisions of the Hon'ble Delhi High Court in the case of Krishak Bharati Cooperative Ltd., 395 ITR 572 and CIT vs. Contimeters Electricals (P.) Ltd., (2009) 317 ITR 249. Further, when explanation of assessee has not been called for, there is no question of taking any adverse view against the assessee. Further, if Pr. CIT was of the view that contract income is understated, then, he himself should have conducted the enquiry

into the matter at the revisional stage and should have called for the explanation of assessee and should have gone into the details and then pass some order. In such circumstances, he should not have restore the matter back to the file of the A.O. The decision relied upon by the Learned Counsel for the Assessee clearly support the submissions of the assessee.

7. As regards the interest earned of Rs.1,87,488 and TDS deducted by SBI, the Pr. CIT was of the view that this claim has been made against PAN of the Assessee-Firm. However, Learned Counsel for the Assessee referred to PB-14 which is Profit and Loss Account for assessment year under appeal, in which assessee did not make any such claim. Further, such issue was not raised in the show cause notice under section 263 of the I.T. Act. Therefore, such issue cannot be taken in adverse against the assessee in the impugned order under section 263 of the I.T. Act.

8. Considering the totality of the facts and circumstances in the light of above discussion, we are of the view that the assessment order passed by the A.O. is in accordance with Law in which no infirmity have been pointed-out so as to invoke jurisdiction under

section 263 of the I.T. Act. The assessment order is therefore, not erroneous in so far as prejudicial to the interests of the Revenue. We, accordingly, set aside the impugned order of Ld. Pr. CIT passed under section 263 of the I.T. Act and quash the same. In the result, original re-assessment order dated 21st February, 2014 is restored.

9. In the result, ITA.No.2806/Del./2016 for the A.Y. 2009-2010 of the assessee is allowed.

ITA.No.2807/Del./2016 – A.Y. 2010-2011 :

10. The Learned Representatives of both the Parties submitted that the issue is same in this year as has been considered in preceding A.Y. 2009-2010. We, following the reasons for decision for A.Y. 2009-2010, set aside the impugned order of the Ld. Pr. CIT, Rohtak, passed under section 263 of the I.T. Act and quash the same. Resultantly, the original assessment order passed under section 143(3)/147 is restored.

11. In the result, ITA.No.2807/Del./2016 for the A.Y. 2010-2011 of the assessee is allowed.

12. To sum-up, both the appeals of the assessee are allowed.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 30th November, 2017

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'B' Bench, Delhi
6.	Guard File.

//By Order //

Asst. Registrar, ITAT, Delhi Benches
Delhi.