



IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM
ITA No.902/Mum/2015
(Assessment Year :2010-11)

ITO 33(1)(1), R.NO.304, 3 rd Floor Bldg No.C-11, Pratyakshakar Bhawan BKC, Bandra (E) Mumbai - 400051	Vs.	Shri Arun Damji Gada 403, GOD Gift, A Wing Adarsh Nagar Adarsh Dugdhyala Lane Malad (E) Mumbai – 400 064
PAN/GIR No.		AABPG3923F
Appellant)	..	Respondent)

Revenue by	Shri V.Vidhyadhar
Assessee by	Shri Rajesh Sanghvi / Shri Subhash Chhajer
Date of Hearing	27/02/2018
Date of Pronouncement	19/03/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue against the order of CIT(A)-34, Mumbai dated 14/11/2014 for A.Y.2010-11 in the matter of order passed u/s. 143(3) of the IT Act.

2. Following grounds have been taken by the Revenue.

(i) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has grossly erred in taking into consideration the factual aspect that the impugned expenditure has been debited in P & L A/c. under the head of "Provision of Expenses", which were contingent expenses and not actual expenses.*

(ii) *Without prejudice - provision for expenses made by assessee in Vaishnavi Project of Divya Developments is Rs.85,00,000/- whereas as per Pg. 9 of CIT(A) - the appellant incurred only Rs.66,51,354/- in*

subsequent yers. The amount of provision of Rs.18,48,646/- was certainly excessive. Similarly against provision of expenses in Nova Space of Rs.18,00,000/-, Rs.18,48,646/- has been written back by assessee in A. Y. 2013-14. The provision of Rs.18,00,000/- in Nova Space was not called for.

(iii) Without prejudice - the CIT(A) has failed to appreciate that no TDS was deducted u/s.40(a)(ia) and the provision of expenses was therefore not allowable.

(iv) On the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate that in case of Universal Trading Co. and Pioneer Trading Co. the TIN No. by the Sales Tax deptt. Was cancelled in 2008 & 2009 respectively. In case of M/s. Shubh Enterprises, no payment was made during the year under consideration. At Page 14 of assessment order, the A.O. has clearly mentioned that the assessee did not furnish copies of purchase invoices and details of payments although assessee was specifically asked to furnish the same vide order sheet dt. 20/12/2012 & 08/01/2013. The appellant failed to discharge the onus to prove the genuineness of purchases when he was specifically informed that the suppliers were non-existent and suppliers were hawala operators as per information received from Sales Tax Department".

(v) "The appellant prays that the order of the Ld.CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."

(vi) "The appellant craves leave to amend or alter any ground or add a new ground.

3. Rival contentions have been heard and record perused.
4. Facts in brief are that assessee is in the business of Builders and Developers is a proprietor of 4 proprietary concerns viz. M/s. Divya Development, M/s Nova Space, M/s Nova Norman Nigam and M/s. Nova Estate, The Tax Audit reports along with Notes on Accounts and Profit and Loss Account and Balance sheet of all these concerns have been filed with the Assessing officer and also perused by the Assessing officer. The assessee filed complete details of provisions so made and also details of actual expenditure incurred in the subsequent

year. The submissions and contentions of the Assessee claiming these provisions for the expenses were dismissed by the Assessing officer.

5. By the impugned order, CIT(A) deleted the addition after observing as under:-

*2.3 I have carefully considered the Assessment Order and the Submission of the Ld. AR on the above stated Grounds of Appeal No.1 and 2 on the disallowance of Provisions for expenses of Rs. 85,00,000/- in M/s Divya Development and Rs. 18,00,000/- in M/s Nova Space. From the same I find that the basic issue that needs to be adjudicated here is whether these provisions are in the nature of contingent liabilities or unascertained expenditures and hence disallowable ? Acceptance of Book results by the Assessing officer and the undisputed and uncontroverted fact of subsequent spending out of the provisions for the expenses goes on to prove and establish that the provisions for these expenses are not in the nature of contingent liability. At the same time on account of peculiar nature of Business of the Assessee being the builders and Developers due to the Commercial and business compulsion, the Assessee may be required to part with the possession of the Buildings treating the entire project as complete for the purpose of taxation but certainly subject to some pending work line "Wall Compound, Play Ground, Drainage Work etc. The nature of the pending work is on account of contractual obligation to be performed as per the Agreement with the flat purchaser for which these expenses have been provided for by the Assessee in the books of accounts on the basis of reasonable estimates. The authenticity and genuineness of estimates and supporting evidences as submitted by the AR of the Appellant have not been disputed and doubted by the Assessing officer. As per submission of the Ld. AR entire Provision for the expenses have been gradually spent in the subsequent years in the case of M/s Divya Development i.e Rs. 38,48,253/- in F.Y. 2010-11 AND Rs. Rs. 3,79,886/- in FY 2011-12 and therefore it is the case of the Assessee that merely because the Assessee has not been able to spend the entire **provision** in the subsequent year it can not be said that the entire provision for the expenses is contingent and unascertainable. The Assessee further contends that since entire pending work was not completed till 31/3/2012, the balance provisions was still outstanding in the books of account as per the statement filed by the AR. However in the case of M/s Nova Space the assessee has spent Rs.20,68,129/- in F.Y. 2010-11 against the provision of Rs. 18,00,000/- . On perusal of the Assessment order it is observed that the Assessing officer has not provided any reasons for treating the aforesaid provisions as contingent liability or unascertained provisions. However the*

Accounting Standard referred to by the Ld. AR also supports the case of the Appellant that Provisions should be made for all the known liabilities and losses even though the amount cannot be determined with certainty and represents only the basis estimates in the light of available information. More particularly para 6 of AS-1 also substantiates the claim of the Assessee that all the anticipated liabilities and foreseeable losses have to be provided for and that is what the Assessee has exactly done the facts and circumstances of the matter. Even there is no whisper of challenge to the fact of pending work of the respective projects in the entire Assessment order by the Assessing officer. No evidence has been brought on record by the Assessing officer to prove beyond doubt that the provisions of Rs. 85,00,00/- in M/s Divya Development and Rs, 18,00,000/- are the bogus or false and created with the intention of reducing the taxable income more particularly keeping in mind the undisputed fact of subsequent spending against these provisions. Hon. Supreme Court in the case of Calcutta Co. Ltd, vs CIT (37 ITR 1) has held that a estimated liability arising out of the contract should be allowed as and when it arises and should not be postponed to a later date. Further Hon. ITAT Mumbai in the case of Jacobs Engineering India Pvt. Ltd vs DCIT in Appeal No. ITA No. 335 and 336/Mum/3Q7 has allowed the deduction of claim on account of foreseeable losses. The Hon. Supreme Court in the case of Realest Builders and Services Ltd. 2008 (307 ITR 202) has held that if the AO comes to the conclusion that there is under estimation of profits, he must give facts and figures in that regard and demonstrate to the court that the impugned method of accounting adopted by the Assessee results in under estimation of profits and is therefore rejected. Otherwise the presumption would be that the entire exercise is revenue neutral. In the case before me no such exercise has been undertaken by the Assessing officer and therefore in the absence of any allegation to indicate that the method of accounting followed by the Assessee results in under estimation of profit, Book results deserve to be accepted. In addition to the above, the facts of the Appellant's case are squarely covered by the decision of Hon. ITAT Mumbai in the case of M/s Manish Builders Vs. ITO (2012-TIOL 159 ITAT MUM) wherein it is categorically held that in a case where the project is regarded as complete and all the receipts from the project are considered for taxation, provision for expenses which are yet to be incurred need to be allowed as a deduction while computing the profits chargeable to tax. If the same are not allowed, the assessee will not be able to claim deduction in future when the expenses are actually incurred because in the said years the assessee will not have any receipts from the project to set them off against the expenditure.

In response to the enquiry calling for the information u/s 250(4) of the IT Act, the AR of the Appellant filed the complete details of the Subsequent spending of the Provisions for Expenses of Rs. 85,00,000/- in the subsequent financial years in the case of Divya Development. On perusal of the ?-s Retails it is observed that the Appellant has actually spent Rs. 66,51,354/- in subsequent years (Rs. 38,48,253/- in A.Y. 11-12,

Rs.3,79,886 in A.Y. 2012-13 AND Rs. 24,23,2157- in A.Y. 2013-14) out of the total provisions of Rs. 85,00,000/- and Rs, 18.48.646/- was written back and offered for taxation in the Assessment year 2013-14 in the project called "Vaishnavi Projecf in M/s Divya Development.

Besides, on the issue of disallowance of expenditure u/s 40(a)(ia), I find considerable merit in the Argument of The Ld. AR that since the payees were not identified at the time of making these provisions , the tax has not been deducted at source from these provisions at that point of time and therefore TDS mechanism can not operate in the absence of identification of the person in whose hands the said expenditure is taxable as income, These facts are squarely covered by the decisions of Hon. ITAT Mumbai in the case of Industrial Bank of India vs Income Tax Officer 2007(107 ITD 45)/293 ITR 267. However from the details or these expenses filed by the AR, it is observed that the entire provisions are not all liable for the tax deductions at source for the various reasons like below the prescribed limits and in the nature of purchase of Raw materials and in some case the required TDS has been deducted but at different point in time i.e either at the time of giving advance or at later point of time when the actual payee is identified. These facts have not been considered by the Assessing officer while disallowing the expenses u/s 40(a)(ia) . In such circumstance the balance of convenience as well as judicial Rulings cited by the Ld, AR in my considered opinion falls in favour of the Assessee. Therefore on account of these facts placed on record, I find that the AO is not justified in disallowing these provisions for expenses of Rs. 85.00.000/- in M/s Divya Development and Rs. 18,00,000/- in M/s Nova Space. The same therefore is directed to be deleted. Both the Grounds of Appeal i.e. No. 1 & 2 are therefore allowed.

6. AO has also made addition by disallowing the purchases of Rs.83,78,916/- being the non genuine purchases in the Assessee's proprietary concern M/s Divya Development.

7. By the impugned order, CIT(A) deleted the addition after observing as under:

4.3. I have carefully considered the findings and observations of the Assessing officer in the Assessment order and the submissions of the Ld. AR on this ground of Appeal. On perusal of the Assessment order it is observed that the Notices u/s 133(6) of the IT Act., issued to the suppliers remained unnerved and further from the paper book

submitted before me I find that the Assessee had submitted the copies of Tax Invoices, bank statements highlighting the payments to suppliers by Account payee cheques and the available confirmations. The Assessing officer while disallowing the purchases has vehemently relied on the appearance of the name of the suppliers on the list of suspicious dealers on the website of the Sales Tax Department of Maharashtra. Audited books of accounts and the Books results i.e Profit and Loss Account and Balance sheet of the Assessee have been accepted by the Assessing officer without pointing out any discrepancy or deficiency in the same. Facts of the case before me are squarely covered by the decision of Hon. Bombay High Court in the case of Babulal C. Borana VS. ITO (2006 Bombay High Court) 282 ITR 251 wherein it is categorically held that If the Assessee's sales are accepted there is no reason or legal basis to deny the corresponding purchases in re absence of rejection of books of accounts and book results. Further in the case of G.G. Diamond International Vs. DCIT(2006) 104 TTJ 809 (Mumbai Tribunal) the Hon. ITAT has observed that Once the sales are accepted purchases can not be doubted. In the Appeal before the Assessing officer has accepted the Books of account of the Assessee and the results thereof and therefore in my considered opinion the Assessing officer is not justified in disallowing the Appellants claim of Purchases and the same deserves to be allowed on this count. Appellant case also gets support from the latest decision of Hon. ITAT Mumbai in the case of DCIT 25(3) Mumbai vs Shri Rajeev G. Kalathil ITA No. 6727/Mum/2012 decided on 20/08/2014 wherein the Hon. Tribunal on the same facts have held that suspicion of the highest degree can not take the place of evidence and the Assessing officer could have called for the Bank Account of the Supplier to find out whether there was immediate cash withdrawals from their account. From the perusal of the Assessment order I find that no such exercise has been carried out by the Assessing officer and therefore it remains to be established and conclusively proved by the Assessing officer that the purchases claimed by the Assessee are bogus. Accordingly the I have no hesitation in accepting the claim of the purchases by the Appellant. Mere Non appearance of the vendors in response to the notices u/s 133(6) also can not lead to doubt the authenticity and genuineness of the purchases as held in the case of Rajesh P. Soni vs. ACIT(2006) 100 TTJ 892(Ahd. Tribunal) and CIT vs. Nangalia Fabrics Pvt. Ltd order dt. 22/04/2013 Tax Appeal No. 689 of 2010 Gujarat High Court. In view of the aforesaid judicial rulings on the same facts before me and decided in favour of the Assessee , this Ground of Appeal No. 4 is allowed and the Assessing officer is directed to allow the Appellants claim of purchases of Rs. 83,78,916/- in the Assessee's proprietary concern M/s Divya Development.)

8. Against the above order of CIT(A), Revenue is in further appeal before us.

9. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that in the proprietary concerns M/s Divya Development and M/s Nova Space the assessee had made the provision for expenses of Rs. 85,00,000/- and Rs. 18,00,000/- respectively and these provisions were made in respect of the expenses for the pending works such as Compound wall, carpentry work, fabrication work, PCC Work in the compound, Plumbing work, rain water harvesting system related to the project whose income is offered for taxation by the assessee in the respective proprietary concern. The relevant projects were Vaishnavei Project in M/s Divya Development and Divya Ambe Project in M/s Nova Space. From the record, we found that these provisions were based on various evidences and proof of actual expenditures in subsequent years were duly furnished to the Assessing officer during the course of hearing by the assessee vide his submissions dated 10/12/2012 and 20/12/2012. As against these provisions, the actual disbursement of expenses were to the tune of Rs. 38,48,253/- in F.Y. 2010-11 and Rs. 3,79,886/- in F.Y. 2011-12 in Vaishnavi Project in M/s Divya Development and Rs.20,68,120/- in Divya Ambe Project in M/s Nova Space. In both these projects formalities for obtaining occupation certificates from the Local Authorities were pending. Complete details of these provisions for expenses viz bills, vouchers, estimates for the expenditures for various pending works for both these projects in both the concerns viz. M/s Divya Development and

M/s Nova Space were submitted to the Assessing officer vide assessee's submissions dated 20/12/2012. Categorical finding has been recorded by the CIT(A) with regard to actual spending of amount made as a provision. The CIT(A) also observed that assessee has actually spent Rs.20,68,120/- in the F.Y.2010-11 as against provision of Rs.18,00,000/- made in the case of Nova Space. CIT(A) also observed that assessee has actually spent Rs.66,51,354/- in subsequent years (Rs.38,48,253/- in A.Y. 11-12, Rs.3,79,886 in A.Y. 2012-13 and Rs. 24,23,215/- in A.Y. 2013-14) out of the total provisions of Rs.85,00,000/- and Rs.18,48,646/- was written back and offered for taxation in the Assessment year 2013-14 in the project called "Vaishnavi Project in M/s Divya Development. We also found that balance amount of Rs. 18,48,646/- which was not spent in the case of Divya Development had also been incorporated by the assessee as its income in the A.Y.2013-14. In view of the detailed finding so recorded by CIT(A), we do not find any infirmity in the order of CIT(A) for deleting the addition made on account of provision of expenses. We also found that similar issue has been dealt with by the Tribunal in assessee's own case for immediately preceding year and decided in favour of the assessee.

10. With regard to invocation of provisions u/s. 40(a)(ia), CIT(A) observed that since it was a mere provision and parties were not identified, therefore, there is no question of deleting any tax at source. View taken by CIT(A) is covered by the decision of ITAT Mumbai in the case of Industrial Development Bank of India Ltd., 107 ITD 45. CIT(A) has also observed that entire provision so made was not liable for tax

deduction at source because the expenditure were below the prescribed limits and were in the nature of purchase of raw materials and in some cases required TDS has been deducted at a different point of time i.e., either at the time of giving advance or at later point of time when the actual payee is identified. Detailed finding of CIT(A) has not been controverted by Department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the order of CIT(A). Thus, we dismiss this ground of Revenue's appeal.

11. With regard to the purchases from the suspicion suppliers, the CIT(A) deleted the entire addition by observing that corresponding sales has not been declined by the AO. He further observed that books of accounts were also not rejected and the trading results were accepted by the AO. After considering the various judicial pronouncements, the CIT(A) has deleted the addition so made. Considering the observation so made by the AO vis-à-vis, finding so recorded by the CIT(A), we are of the opinion that some disallowance is required to be made. Accordingly, we modify the order of lower authorities and direct the AO to restrict addition to the extent of 2% of such purchases. We direct accordingly.

12. In the result appeal of the Revenue is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 19/03/2018

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 19/03/2018
Karuna Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai