

**IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH, PATNA**

Before Sh. N. K. Saini, AM and Sh. Sudhanshu Srivastava, JM

ITA No. 92/Pat./2016 : Asstt. Year : 2010-11

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| Deputy Commissioner of Income-tax, Circle-4, Patna | Vs | Sri Vimlesh Pd. Singh, 302, Awadh Kunj Apartment, Kachhi Talab, Gardanibagh, Patna-800001 |
| (APPELLANT) | | (RESPONDENT) |
| PAN No. AACFB4796L | | |

CO No. 01/Pat./2018 : Asstt. Year : 2010-11

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| Sri Vimlesh Pd. Singh, 302, Awadh Kunj Apartment, Kachhi Talab, Gardanibagh, Patna-800001 | Vs | Deputy Commissioner of Income-tax, Circle-4, Patna |
| (APPELLANT) | | (RESPONDENT) |
| PAN No. AACFB4796L | | |

Assessee by : Sh. K. N. Prasad, Adv.

Revenue by : Sh. Abhay Kumar, Sr. DR

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| Date of Hearing : 15.03.2018 | Date of Pronouncement : 16 .03.2018 |
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ORDER

Per N. K. Saini, AM:

The appeal by the department and the Cross Objection by the assessee are directed against the order dated 24.06.2016 of ld. CIT(A)-2, Patna.

2. The only effective ground raised by the department reads as under:

“1. The Hon’ble CIT(A) has erred in deleting addition of Rs.15,65,000/- under the head of unsecured loan. The Ld. CIT(A) has only upheld the disallowance of Rs.3,00,000/- only out of total disallowance of Rs.43,93,368/- made @ 15% of entire expenses, on the ground that the Assessing Officer had not given any finding about material purchase and its utilization in

execution of contract work which was also not borne from the appellate order.”

3. The assessee has raised the following grounds in his Cross Objection:

“1. For that the grounds of cross objection hereto are without prejudice to each other.

2. For that in the facts and circumstances of the case, the learned CIT(A) is not justified in sustaining the disallowance of Rs.3,00,000/- out of material purchase and expenses. The disallowance as sustained is arbitrary and justified and fit to be deleted.

3. For that the applicant reserves its right to file detailed submission at the time of hearing.

4. For that the applicant craves leave to urge, add or alter any other ground or grounds at the time of hearing.”

4. From the above grounds raised by the department and the assessee, it would be clear that common issue involved relates to the deletion/sustenance of the addition made by the AO out of the expenses.

5. Facts of the case in brief are that the assessee derived income from contract works and filed the return of income on 10.10.2010 declaring total income of Rs.8,88,720/-. Later on, the case was selected for scrutiny. As the assessee had not complied to the notices issued u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The AO framed the assessment u/s 144 of the Act and made the addition of Rs.15,65,000/- under the head unsecured loans by observing that the assessee failed to

establish the identity, genuineness and creditworthiness of the transaction of the persons extending the loans. The AO also disallowed 15% out of the expenses amounting to Rs.2,92,89,122/- debited by the assessee under the various head in the profit and loss account and made the addition of Rs.43,93,368/-.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted that the assessee had taken loan amounting to Rs.14,00,000/- from Sh. Sanjay Kumar and Rs.1,65,000/- from Sh. Birendra Kumar Roy through banking channels by way of account payee cheques and that the loan from Sh. Sanjay Kumar was cleared on 25.03.2010 vide cheque no. 46502 of Punjab National Bank, Patna and the loan was repaid to Sh. Birendra Kumar Roy vide cheque no. 200408 dated 23.03.2010 of PNB, Patna. Therefore, the addition made by the AO was arbitrary and unjustified. Since the assessment was framed by the AO *ex-parte*, the Id. CIT(A) on the submissions of the assessee asked the remand report from the AO who submitted as under:

“The assessee Sri Vimlesh Prasad Singh is a partnership firm and derives income from contract works. The assessee filed his return on 10.10.2010 declaring total income of Rs.8,88,720/-, over receipt of Rs.2,71,38,163/- from the contract works. The revised return of income for the A.Y. 2010-11 was filed on 21.08.2011. the case was selected for scrutiny under CASS ‘Computer Assisted Selection of Cases for Scrutiny’. Notice u/s 142(1) & 143(2) were issued to the assessee for positive requiring compliance well within the stipulated time. Assessment was completed in this case u/s 143(3) of the Income-tax Act, 1961 on 31.03.2013 as determining of total income of Rs.68,47,088/- after adding back as per disallowances in different heads to the returned income of the assessee.

With reference to your letter vide F.No. CIT/(A)-2/PAT/2016-17/489 dated 18th May, 2016 by which the undersigned is directed

to examine the issue of addition of loan of Rs.15,65,000/- u/s 68 of the Income-tax Act, 1961.

In order to compliance to that, a letter of being hear u/s 250(4) of the Income-tax Act, 1961 has been issued to the assessee vide this office order F.No. ACIT/C-4/PAT/u/s 250(4)/2016-17/246 dated 20th May, 2016.

In response to that assessee made a submission dated 24.05.2016 along with confirmation from creditors, their PAN Card and bank statement of creditors.

On perusal of the submission of the assessee as well as facts finding in the case record of the assessee, it has transpired that the loan from two creditors namely M/s Sanjay Kumar and Mr. Birendra Kumar Roy amounting to Rs. 14 lakh and 1.65 lakh respectively had been taken through banking channel by way of account payee cheque. From perusal of the bank account of M/s Sanjay Kumar, it is found that a loan amount of Rs. 14 lakh had been cleared on 25.03.2010 to the account of M/s Vimlesh Prasad Singh by Cheque No. 46502 of Punjab National bank, Exhibition Road, Patna, A/c No. 038000210002510. Similarly in the case of Mr. Birendra Kumar Roy from the perusal of his bank a/c, it is found that the loan has been taken through banking channel by way of account payee cheque. From perusal of the bank account of Mr. Birendra Kumar Roy, it is found that a loan amount of Rs.1.65 lakh had been cleared on 23.03.2010 to the account of M/s Vimlesh Prasad Singh by Cheque No. 200408 of Punjab National Bank, R.K. Avenue, Kadam Kuan, Patna, A/c No. 2921002100016206. It is pertinent to mention here that the loan amount of Rs. 14 lakh had been transferred from account of the creditors M/s Sanjay Kumar out of such amount credited in his account by way of bills payment on 24.03.2010 and 25.03.2010. Therefore, it is found that the assessee has been able to establish the identity and genuineness of transaction with respect of aforesaid two creditors and there is no question against him of creditworthiness.”

7. After considering the aforesaid remand report of the AO, the Id. CIT(A) deleted the said addition of Rs.15,65,000/-, for the reason that the AO himself had accepted the identity and creditworthiness of the depositors.

8. As regards to the disallowance out of the expenses, the assessee submitted as under:

“3.1 That the next dispute in this case is with regard to estimated disallowances of Rs.43,93,368/- being 15% out of total overhead expenses of Rs.2,92,89,122/-.

3.2 That it is pertinent to mention here that the total overhead expenses of Rs.2,92,89,122/- inter-alia includes the following:

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| (a) | Opening Work in progress | 8,56,930/- |
| (b) | BST Deduction | 5,76,242/- |
| (c) | Miscellaneous Deduction | 17023/- |
| (d) | Depreciation | 2104/- |

3.3 That it is further pertinent to mention here that the assessee has himself shown the net profit before remuneration and capital interest at Rs.21,75,256/- which works out to 8.02% and as such there is no question of any addition and disallowances in respect of contract work.

3.4 that it is respectfully submitted that in the Assessment Year 2008-09, the Hon'ble CIT(A) has restricted the estimated addition/disallowance of Rs.4,50,000/- (Rs.3,50,000/- out of material purchase and Rs.1,00,000/- out of labour payment) after estimated addition/disallowances the net profit works out to 5.25%.

3.5 that considering the above facts and circumstances of the case, it is respectfully submitted that the estimated disallowances of Rs.43,93,368/- being 15% out of total overhead expenses as aforesaid, debited in profit and loss account, is arbitrary, unjustified, void ab-initio and bad in law. In any case, the addition/disallowance as made are fit to be deleted.”

It was also stated that the jurisdictional ITAT in many cases had held that 6% of the net profit in the case of civil contractor was reasonable and the assessee had disclosed 8.02% of the profit, so there was no case of any estimated disallowance out of the expenses.

9. The Id. CIT(A) after considering the submissions of the assessee observed that the net profit shown by the assessee was 8.02% (before interest and salary to partners) as against 4.24% in the immediate preceding year. He further observed that the AO did not give any finding that the materials had not been purchased and had not been utilized in the execution of contract work and only observed in the assessment order that the expenses could not be verified in the absence of bills. According to the Id. CIT(A), in the line of the business of the assessee, it was not always possible to get external vouchers for all the materials. He, therefore, sustained the disallowance of Rs.3,00,000/- out of the disallowance made by the AO.

10. Now the department is in appeal against the deletion of addition of Rs.15,65,000/- and allowing the relief out of the disallowance of Rs.43,93,368/- made by the AO while the assessee had filed the Cross Objection for sustenance of disallowance of Rs.3,00,000/-.

11. The Id. Counsel for the assessee reiterated the submission made before the authorities below and further submitted that the net profit rate shown by the assessee for the year under consideration was better than the immediately three preceding year. He furnished a chart showing net profit rate for the assessment years 2007-08 to 2010-11. It was also submitted that neither the AO nor the Id. CIT(A) pointed out that any of the expenses incurred by the assessee was not related to the business. Therefore, the disallowance sustained by the Id. CIT(A)

was not justified. In his rival submissions, the ld. Sr. DR strongly supported the order passed by the AO.

12. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the AO passed the *ex-parte* order and made the addition of Rs.15,65,000/- u/s 68 of the Act on account of loans taken by the assessee. However, when the ld. CIT(A) directed the AO to furnish the remand report, he stated in the remand report that the assessee had been able to establish the identity and genuineness of the transaction with respect of the two creditors and there was no question against him of creditworthiness. From the remand report of the AO, it is crystal clear that he has accepted the loans as genuine after proper verification and examining the documents/information furnished by the assessee which is evident from the remand report reproduced in the former part of this order. We, therefore, on this issue do not see any merit in the appeal of the department.

13. The another issue agitated by both the parties relates to the deletion/sustenance of the disallowance made by the AO out of the expenses. In the present case, it is noticed that the AO made the disallowance only on estimate basis without pointing out any specific item, out of the expenses which was not related to the business of the assessee. It is also noticed that the ld. CIT(A) categorically stated that net profit shown by the assessee at 8.02% (before interest and salary to the partners) was better than the net profit of 4.24% in the immediately preceding year and that the AO had not given any finding that the material had not been purchased and had not been utilized in the execution of contract work. In our opinion, when the ld. CIT(A) was of the view that the material purchased by the assessee have been utilized for the

execution of the work and no specific item of the expenses was pointed out which was not incurred for the business purposes then the disallowance sustained by the Id. CIT(A) at Rs.3,00,000/- was not justified particularly when the net profit shown by the assessee was better than the preceding year. It is noticed from the comparative chart furnished by the Id. Counsel for the assessee that the assessee had disclosed the net profit rate of 4.10%, 4.05% and 4.24% for the assessment years 2007-08, 2008-09 and 2009-10 respectively, the AO had accepted the net profit rate for the assessment years 2007-08 and 2009-10. However, for the assessment year 2008-09, the AO made some estimated addition against which the assessee preferred an appeal before the Id. CIT(A) who sustained an addition of Rs.4,50,000/- only as such the net profit rate came to Rs.5.25%, against the said order of the Id. CIT(A), the department had not preferred any appeal. The aforesaid information furnished by the Id. Counsel for the assessee in the comparative chart was not rebutted. Therefore, by considering the totality of the facts as narrated hereinabove, we are of the confirmed view that the addition of Rs.3,00,000/- sustained by the Id. CIT(A) out of the disallowance of expenses was not justified. Accordingly, the same is deleted.

14. In the result, the appeal of the department is dismissed while the Cross Objection of the assessee is allowed.

(Order Pronounced in the Court on 16 /03/2018)

Sd/-

(Sudhanshu Srivastava)
JUDICIAL MEMBER

Sd/-

(N. K. Saini)
ACCOUNTANT MEMBER

Dated:16 /03/2018

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR