

0आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.57/CTK/2015

(निर्धारण वर्ष / Assessment Year :2010-2011)

ACIT, Circle-2(1), Bhubaneswar	Vs.	M/s Classic Super Construction, 131 Rajarani Tankapani Road, Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFC 3803 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.180/CTK/2017

(निर्धारण वर्ष / Assessment Year :2009-2010)

M/s Classic Super Construction, 131 Rajarani Nagar, Tankapani Road, Bhubaneswar	Vs.	ACIT, Circle-2(1), Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFC 3803 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by

: Shri A.Tigga, Sr. DR

निर्धारिती की ओर से /Assessee by

: Shri Dillip Kumar Mohanty, AR

सुनवाई की तारीख / Date of Hearing :

09/04/2018

घोषणा की तारीख/Date of Pronouncement

11/04/2018

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

These are the appeals filed by the Revenue and assessee against the separate order of the CIT(A)-1, Bhubaneswar, passed in IT Appeal No.0133/13-14 & 0429/14-15, dated 7.11.2014 & 15.9.2016 for the assessment years 2010-2011 & 2009-2010.

2. Since issues in both the appeals are common, they are heard together and disposed of by this common order. First, we take up the

appeal of Revenue i.e ITA No.57/CTK/2015 (AY : 2010-2011) and the facts narrated therein, wherein the Revenue has raised the following grounds :-

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in directing to estimate the net profit @8% of the gross contract receipts.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in deleting the addition made by the AO amounting to Rs.1,88,00,000/- and Rs.20,00,439/- under the Sundry creditors & other liabilities respectively on the ground that no separate addition on account of sundry creditors can be made nor can any expenditure appearing in the P & L A/C be disallowed, once books of accounts are rejected.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in not accepting the examination of findings made by the AO on the issues*
4. *Other grounds, if any, shall be pressed at the time of hearing.*

3. In ground no.1, the Revenue has agitated that the CIT(A) erred in directing the AO to estimate the net profit @8% of the gross contract receipts, however, at the time of hearing before us, the Id. DR did not press this ground. Accordingly, we dismiss this ground of Revenue as not pressed.

4. Ground No.2 is that the CIT(A) erred in deleting the addition of Rs.1,88,00,000/- & Rs.20,00,439/- under the sundry creditors & other liabilities.

5. Brief facts of the case are that the assessee is a partnership firm deriving income from execution of civil contract works under different authorities of the Govt. of Odisha and filed its return of income

electronically on 01.10.2010 for the assessment year 2010-2011 declaring total income at Rs.43,77,960/-. Subsequently, the case was selected for scrutiny under CASS and notice u/s.143(2) & 142(1) were issued. The AO found that the assessee did not appear even after providing adequate opportunities, therefore, the AO constrained to complete the assessment proceedings ex-parte u/s.144 of the Act determining total income of the assessee at Rs.3,31,30,910/- and made various additions.

6. Against the additions made by the AO, the assessee filed an appeal before the CIT(A). In the appellate proceedings the assessee reiterated the submissions made before the AO and filed detailed written submissions. The CIT(A) after considering the submissions of the assessee and findings of AO, restricted the estimation of net profit to 8% as against 12% made by the AO and deleted the additions made under the heads sundry creditors and other liabilities and partly allowed the appeal of the assessee.

7. Aggrieved by the order of CIT(A), the Revenue is in appeal before the Tribunal.

8. Ld. DR relied on the order of AO and submitted that the assessee could not furnish any details regarding the sundry creditors, nor even the name and address of such creditors for which genuineness of such creditors could not be verified. With regard to other liabilities Id. DR submitted that assessee could not prove the genuineness of such liability, therefore, the AO made the above additions and the CIT(A) has erred in

deleting the above additions and prayed for allowing the appeal of Revenue.

9. Contra, Id. AR relied on the order of CIT(A).

10. We have heard the submissions of both the parties and perused the materials on record. The contention of Id. DR is that where the income is estimated, no addition can be made in respect of other expenses but addition can be made under unsecured loans and cash credits. The Id. AR submitted that having rejected the books of accounts there can be no further addition and assessee having accepted the same, the addition made by the AO is in violation of the provisions and the CIT(A) has rightly deleted the addition. Ld.AR relied on the judicial decision of Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Dulla Ram, Labour Contractor, Kotkapura, ITA No.122 of 1999, dated 22.10.2013, wherein the Hon'ble High Court has held at page 5 which reads as under :-

"We have heard counsel for the parties, perused the impugned orders and are of the firm opinion that there is no illegality or infirmity in the findings recorded by the Tribunal.

An Assessing Officer may, while considering a return of income, inspect the account books and, if satisfied, that account books do not reflect the true income of an assessee, reject the same. Account books once rejected, are ruled out of consideration and cannot be pressed into service whether by the assessee or the revenue. Thus, when account books are rejected, it would follow, as a necessary corollary, that entries in the account books whether suspicious or not cannot be relied by the revenue or the assessee. To hold otherwise, would, in essence, render account books valid for certain purposes and invalid for others, a course impermissible in law. The Assessing Officer rejected the account books in their entirety and thereafter proceeded to assess income by applying a flat rate of profit of 10%. After applying a flat rate of profit of 10%, the Assessing Officer added Rs.1,98,298/- to the income of the assessee on the basis of certain 'entries' deemed to be suspicious. The Commissioner of

Income Tax (Appeals) as Yag Dutt 2013.11.13 13:54 I attest to the accuracy and integrity of this document well as the Tribunal have rightly held that as books of accounts were rejected in their entirety, the Assessing Officer could not rely upon any entry in the books of accounts for making an addition of Rs.1,98,298/-. A bare reading of Section 68 of the Act would reveal that it would not apply to a situation where account books have not been rejected.

We find no reason to differ from the opinion recorded by the Tribunal and, therefore, answer the questions of law against the revenue and in favour of the assessee. The appeal is, consequently, dismissed.”

11. Ld. AR further relied on the decision of Hon'ble Rajasthan High Court in the case of CIT Vs. G.K.Contractor, I.T.Appeal No.13 of 2009, dated 28.01.2009, wherein the Hon'ble High Court held as under :-

“7. Admittedly, the said amount of Rs.38,28,086 was shown by the assessee in the books of account as "market outstanding". According to the assessee, the payment was outstanding against the labour and goods supplied. It is true that on being asked, the assessee was not able to explain these entries by producing the adequate proof to the satisfaction of the AO. However, in our considered opinion, even if the assessee has failed to discharge his onus of proof in explaining the cash credits shown in the books of account as "market outstanding", the AO having estimated the higher profit rate on total contract receipts after rejection of the books of account invoking the provisions of s. 145(3), no separate additions can be made on account of unexplained cash credit under s. 68 of the Act of 1961. We are in complete agreement with the view taken by the CIT(A), confirmed by the Tribunal. Thus, no substantial question of law arises for consideration of this Court in this appeal.”

12. Considering the facts and circumstances and the ratio of decision of Hon'ble High Court, we are of the opinion that the CIT(A) has considered the submissions vis-a-vis explanation of the assessee and passed the order and we are not inclined to interfere with the order and uphold the same and dismiss the ground of appeal of the Revenue.

13. In the result, appeal of Revenue is dismissed.

ITA No.180/CTK/2017 (AY : 2009-2010) (Assessee's Appeal)

14. As per the office note, there is a delay of 83 days in filing the present appeal. The assessee has filed an application for condonation of delay explaining the reasons for delay. Considering the application of assessee and looking to the facts and circumstances of the case and Id. DR has no serious objection and we allow the application and condone the delay of 83 days in filing the present appeal and the appeal is heard.

15. The sole issue involved in the appeal of the assessee is that the CIT(A) erred in confirming the disallowance of Rs.8,22,000/- made by the AO.

16. Brief facts of the case are that the assessee is a partnership firm deriving income from execution of civil contract works under different authorities of the Govt. of Odisha and filed its return of income electronically on 30.09.2009 for the assessment year 2009-2010 declaring total income at Rs.61,43,750/-. Subsequently a revised return was filed on 11.6.2010 showing total income at Rs.42,45,330/-. The case was selected for scrutiny under CASS and notice u/s.143(2) & 142(1) were issued and the assessment was completed u/s.143(3) of the Act with total income of Rs.94,16,680/- after making addition of Rs.31,72,934/- u/s.68 of the Act. On appeal, the CIT(A) deleted the addition. On second appeal by the Revenue to the Tribunal, the findings of the CIT(A) were upheld and appeal of the Revenue was dismissed. Subsequently the AO initiated proceeding u/s.147 and passed re-assessment order with disallowance of

partners' salary and determined total income of Rs.69,65,750/- vide order u/s.147/143(3) of the Act, dated 28.8.2014.

17. Against the re-assessment order of AO, the assessee preferred appeal before the CIT(A) and the CIT(A) confirmed the disallowance made by the AO and dismissed the appeal of the assessee.

18. Now, the assessee is in further appeal before the Tribunal against the order of CIT(A).

19. Before us, the Id. AR submitted that the AO failed to appreciate that before issue of notice u/s.148 of the Act the partners of the firm have filed their income tax returns including the remuneration and interest received from the partnership firm business. Further, the Id. AR submitted that disallowance made by the AO and confirmed by the CIT(A) in respect of partners' remuneration and interest has already been subject to tax in the individual hands of the partners. Hence, the appeal of the assessee be allowed.

20. Contra, Id. DR relied on the orders of the authorities below.

21. We have considered rival submissions of both the parties and perused the materials on record. The Id. AR's submission that the AO has disallowed the remuneration to the partners without considering the facts that partners salary has been determined by the partnership deed which is not in dispute and also a special resolution was passed in respect of payment of salary which is approved in the meeting and was brought to the knowledge of the AO whereas the Id. DR submitted that the AO was deprived to verify these facts and no documents were filed as envisaged

by the Id. AR before the Tribunal. Ld. AR supported his arguments with the judicial decisions of Hon'ble High Court and Tribunal, which the Id. DR could not controvert. We find in the case of Durga Dass Devki Nandan Vs. ITO, Income Tax Appeal No.4 of 2005, dated 11.03.2011, the Hon'ble Himachal Pradesh High Court has held as under :-

"8. It has been urged by Shri Vinay Kuthiala, learned counsel for the respondent that as per the CBDT circular the partnership deed should specify the amount of remuneration or should give a specific method of quantifying such remuneration, otherwise deduction cannot be allowed. We are unable to accept such contention. The circular has to be read along with section 40(b)(v) and has to be made subject to section 40(b)(v). This section does not lay-down any condition of fixing the remuneration or the method of remuneration in the partnership deed. All that the section provides is that in case the payment of remuneration made to any working partner is in accordance with the terms of the partnership deed and does not exceed the aggregate amount as laid down in the subsequent portion of the section the deduction is permissible. Therefore, if in the partnership deed it was clearly mentioned that the partners would get remuneration calculated as per the provisions of the Income-tax Act which means that this would not exceed the maximum amount provided under the Act.

9. In ITA 9 of 2005 decided on 2.9.2009 titled as Commissioner of Income Tax, Shimla v. Anil Hardware Store, Manali, this Court was dealing with a partnership deed where the provisions of the Income-tax Act itself had been incorporated in the partnership deed. This Court held that this itself provides a method of computation. In that case we had not gone into the validity of the CBDT circular. The CBDT circular can only be held to be valid if it is in terms of the main section. As held above, the section 40(b)(v) only lays down that either the working partner should be paid an amount specified in the partnership deed or it should not exceed the amount laid down in the section. In the present case the partners have been paid their remuneration/salary strictly in accordance with the terms of the partnership deed and this amount paid to the partners does not exceed the maximum permissible amount and therefore, the assessee is entitled to the deduction.

10. In view of the above discussion, the appeal is allowed and the substantial questions of law are decided in favour of the assessee and against the revenue. No costs."

22. Further the ITAT Jaipur Bench of the Tribunal in the case of ACIT Vs. Associated Engineers & Allied Products, in ITA No.680/JP/2014, dated 13.06.2016 has held as under :-

“2.6 We have heard the rival contentions and perused the materials available on record. We find that the assessee computed the remuneration as per Section 40(b) of the Act and credited 50% each to both the partners. The AO did not dispute the fact that remuneration was paid to the partners. Secondly, this amount was taxable in the hands of partners and if the same is disallowed in the hands of assessee firm then it would be result in double taxation. In view of the above facts and circumstances of the case and the case laws cited by the Id. AR of the assessee, we feel that the Id. CIT (A) has rightly directed the AO to delete the addition. Hence, we find no infirmity in the order of the Id. CIT (A) which is sustained. Thus Ground No. 1 of the Revenue is dismissed.”

23. We respectfully follow and rely on the above judicial decisions applicable to the present case and direct the AO to delete the addition and allow the grounds of appeal of the assessee.

24. In the result, appeal of the Revenue i.e. ITA No.57/CTK/2015 is dismissed and appeal of the assessee i.e. ITA No.180/CTK/2017 is allowed.

Order pronounced in the open court on this 11/04/2018.

Sd/-

(N. S. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 11/04/2018

प्र.कु.मि/PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. Appellant-
2. Respondent
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack