



**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM**

**ITA No.3953/Mum/2016
(Assessment Year :2002-03)**

ITO 29 (2)(4) Building No.C-10, R.No.205 IT Office, Pratyakshkar Bhavana BKC, Bandra (E) Mumbai – 400 011	Vs.	M/s.Nathpa Jhakari Joint Venture Hincon House, LBS Marg Vikhroli (W) Mumbai – 400 083
PAN/GIR No.		AAAAN1127C
Appellant)	..	Respondent)

Revenue by	Shri K.S.Rajendra Kumar
Assessee by	Shri H.P. Mahajani
Date of Hearing	17/04/2018
Date of Pronouncement	31/05/2018

आदेश / ORDER

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

This is an appeal filed by the Revenue against the order of CIT(A)-40, dated 03/03/2016 for A.Y.2002-03 in the matter of order passed u/s.143(3) r.w.s. 254 of the IT Act.

2. Grievance of revenue relates to CIT(A)'s action deleting the addition made on account of disputed claim / retention money.
3. Rival contentions have been heard and record perused. Facts in brief are that the assessee, Nathpa Jhakri Joint Venture, is an Association of Persons (AOP) formed between Hindustan Construction Company

Limited (HCC) & Impregilo Spa, Italy. The Joint venture was formed for the purpose of executing the contract for civil works of Nathpa Jhakri Hydroelectric Project for client Satluj Jal Vidyut Nigam Limited (SJVNL) formerly known as Nathpa Jhakri Power Corporation. The facts in this regard are that the assessee joint venture filed return of income on 31.10.2002 along with its computation of income outlining certain notes to the computation wherein exclusion for Disputed Claims and Retention Moneys offered to tax in the return, were made. During the course of assessment the Assessing Officer made certain additions while also rejecting these claims raised via the notes to computation of income. The major issues for agitation were the claim for exclusion of "Disputed Claims" and the claim for exclusion of "Retention Money". Aggrieved by this, the assessee joint venture preferred an appeal before the learned CIT(A) who vide his order dated 29/03/2006 held in favor of the assessee and the matter was then taken up before the ITAT by the Department. It so happened that several years passed since the filing of return for AY 2002-03 and in the interim the assessee joint venture and its client entered into settlement agreements in FY 2009-10 & FY 2010-11 wherein the underlying cause of the Retention Money and the Disputed Claims were settled bringing finality to the issue. On learning of this, the ITAT disposed the appeal with a direction to the Learned AO to consider both the settlement agreements while deciding the year of taxability of the impugned amounts. The AO while passing the order in compliance to the

direction of the ITAT, has taxed both the retention moneys and the disputed claims in AY 2002-03.

4. By the impugned order, CIT(A) deleted the additions after observing as under in para 7.1.4 to 7.1.11.

"7.1.4 The following facts emerge from the various documents that are presented

a) The Appellant was in receipt of a total of Rs. 53.86 Crores and the same had been credited in its profit and loss account prepared for the A Y 2002-03

b) Tax thereon had been paid by the Appellant prior to filing its return. However, the same were claimed as an exclusion in the computation of income and in the course of Assessment proceedings, which was rejected by the A O.

c) The Claim for exclusion was based on the fact, that each of the items forming part of the disputed claims, were in fact in Dispute with the client and this fact has not been controverted by the Assessing Officer in his orders

d) The Appellant settled these disputes over the space of two years i.e. AY 2010-11 & AY 2011-12 by virtue of the Settlement Agreements.

e) In this regard it may be noted that out of the total of Rs. 53.86 Crores, Dispute pertaining to Extension of Time (EOT) was settled vide agreement dated 11.11.2009. Clause 8 of the said Agreement clearly states that the settlement relates only to Claim for Extension of Time as decided by the Arbitral Tribunal and shall not in any manner extinguish, diminish, or waive any of the other claims of the Parties which are pending for adjudication or may otherwise be available. Hence the Appellant offered Rs. 35.98 Crores in A Y 2010-11 as evidenced on the face of the computation of income for the said year.

f) Thereafter Disputes pertaining to the other items amounting to Rs. 17.88 Crores were settled vide Settlement Agreement dated 10.11.2010. Annexure A to the said agreement details the additional payments to be made to the client over and above that which was already paid & disputed. Crucially Para 4 of the said agreement states "Upon signing of this agreement, all the disputes/issues between the parties shall stand fully and finally settled. However, SJVN shall be liable to pay amounts as above. All amounts paid earlier by SJVN to NJJV in respect of all such pending disputes shall be retained by NJJV and nothing is refundable to

SJVN." Hence Rs. 17.88 Crores was offered to tax in AY 2011-12 as evidenced on the face of the computation for the said year

g) Both the Assessment Years 2010-11 & AY 201 J-12, have undergone Scrutiny Assessment wherein the Income Tax Department has based on the computation provided by the Assessee taxed the incomes so offered in the Assessments.

7.1.5 Therefore, the picture that emerges is that in A Y 2002-03, the amounts paid to the Appellant joint venture were wholly disputed by the client. These disputes were only subsequently settled in AY 2010-1 f & AY 20/1-12 as is evidenced by the signing of agreements. The intervening period from A Y 2002-03 to A Y 2010-11 was rife with litigation between the SJVN and Appellant with certain matters pending before Arbitrators and others pending before Courts. The issue before me is restricted to the year of taxability of the amounts in question. The Assessing Officer has stated that the Assessee has treated the same as Work Bill Receipts & Credited the same to the P&L Account and that treatment given in the books of accounts of the contractee i.e. the client, does not affect taxability of the assessee. He further observed that there is nothing contrary in the said agreements that any payment is subject to recovery from the Assessee.

7.1.6 In my view these arguments do not by itself mean that the income is to be taxed in AY 2002-03. The factual matrix pertaining to the disputed claims has to be viewed in its entirety. The Assessee treating the amounts in question as work bill receipts does not mean that it gains the character of income especially since the Assessee has been able to demonstrate the existence of disputes with the client in connection with these very amounts. I find that the judgments relied on by the Appellant, which have been considered by my predecessor, are squarely applicable to the facts of the case. The Appellant must have an unfettered right to the amount in question for it to be characterized as income in its hands. The mere accounting of an item as "income" by itself does not make it an income that is taxable in the hands of the appellant. The Apex Court in its decision rendered in the case of Sulej Cotton Mills Ltd 116 ITR 1 (SC) has laid down the law that the matter of taxability of a receipt cannot be determined on the basis of entries made in the books of accounts. The taxability is to be determined in accordance with the provisions of law.

7.1.7 The fact that the Client SJVN has disputed the sums is an important factor in determining its taxability as held by the landmark judgment of the Apex Court in ED Sasoon (26 ITR 27) which asserts that unless and until there is created in favour of the

assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that any income has accrued to him. In the instant case, the existence of dispute goes clearly to show that there is no debt considered due and in fact the payment made were only ad-hoc in nature.

7.1.8 The ratio of the Supreme Court's decision in the case of CIT vs Hindustan Housing & Land Development & Housing Trust Ltd. reported in 161 ITR 524 would also go to show that no taxable income had accrued to the assessee on account of awards/decrees passed by the DRB, Arbitrator in view of the undisputed fact that the Client had not accepted the decisions by them or the claims made by the appellant in toto right from the very initial stages of institution of the proceedings for the claims preferred. The recent decision of the Honourable Supreme Court in the case of Excel Industries Ltd vs JCIT as reported in 2013-TIOL-52-SC-IT-LB also holds that "income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee "

7.1.9 Similar conclusion was drawn by the Apex Court in the decision of Lanco Kondapalli Power Pvt. Ltd (TS-37-SC-2014) wherein the sum and substance of the decision is that there when amount is disputed by the client, then it is not income as there is no crystallization and quantification of amount due by the debtor. It has affirmed decision of the Andhra Pradesh High Court that the amount cannot be said to be accrued even in Mercantile System of accounting when the disputed amounts are pending adjudication in arbitration.

7.1.10 Lastly, the AO has made a statement that there is nothing contrary in the agreement that any payment is subject to recovery from the Assessee. This argument of the AO is fallacious to the extent that the agreements being referred to are the settlement agreements. The Appellant has stated that these agreements have been entered into to bring to an end various disputes pending. Hence, there cannot be any clause that calls for recovery of payments being made under the Settlement agreement. The dispute has occurred in AY 2002-03 and not in AY 2010-11 I/AY 2011-12, when in fact these disputes were settled. In the original agreement there was a clause describing procedure, in case of a dispute, as dispute was contemplated and in fact the issue at hand is on account of such dispute. In the settlement agreements

referred to above there would not such clause, since the agreements were made to settle the disputes. Hence this argument of the AO also fails.

7.1.11 Hence in view of the facts of the case, the legal principles consistently laid down by various courts on the subject of taxability of disputed claims, considering the settlement agreement as per the direction of the Hon'ble IT AT and also following the order of my predecessor dated 29.03.2006 in appellants own case for this A.Y., I hold the Ground No. 1 in favour of the Appellant. The AO is directed to delete the addition of Disputed Claims of Rs. 53.86 Crores from the Total Income of the Appellant for AY 2002-03. Therefore Ground No, 1 is allowed, as above.

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

6. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that detailed finding has been recorded by CIT(A) to the effect that subject claims were totally disputed and the dispute was settled only upon signing of the settlement agreements. He has held that the assessee has been able to demonstrate the disputes with the client and that mere accounting of income in the books does not make an income. He applied the ratio of the decisions of the Supreme Court in the cases of Sulej Cotton Mills Ltd (116 ITR 1), E.D.Sassoon (26 ITR 27), Hindustan Housing & Land Development Trust Ltd. (161 ITR 524) and Excel

Industries Ltd. He has also noted that fact that the assessee had offered to tax disputed claims in the AY 2010-11 & 2011-12 on the basis of the two settlement agreements and that the department had accepted the said offer in assessment orders passed u/s 143(3). The detailed finding so recorded by CIT(A) are as per material on record. In view of the finding so recorded by CIT(A) there were disputes between SJVN and the assessee. Although the contract was substantially completed in July 2002 the disputes came to be resolved only in the years 2009 & 2010 vide the two settlement agreements. These disputes were under litigation at various forum such as arbitration, High Court etc., Moreover the department has accepted the decision of the Tribunal in the case of Hindustan Construction by not filing an appeal to the High Court wherein the accounting treatment was also similar. It is also seen that the assessee has offered the disputed to claims to tax in AY 2010-11 and 2011-12 and the same have been accepted by the AO and thus there is no loss to Revenue. Income representing the disputed claims was taxable in the year of settlement of disputes and not in the year under appeal. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for deleting the addition during the year under consideration.

7. Next grievance of Revenue relates to deleting addition made on account of retention money. The facts in this regard are similar to the facts regarding the first ground of appeal. This issue was also decided in favor of the assessee in the first round of litigation, the Tribunal restored

the issue to the file of the AO to decide the issue in the light of the agreement dated 11.11.2009. In the second round of litigation the AO has once again held the retention money to be taxable in the year under appeal and the CIT(A) has held the same to be taxable in AY 2010-11.

8. By the impugned order, CIT(A) deleted the addition after having a detailed observation at para 9.3 to 9.7 which reads as under:-

"The facts at the time of issue of the aforementioned order remain unchanged, except of course the signing of the Settlement Agreement with the client which were referred to by the /TAT while remanding the matter back to the file of the AO noting as under:-

"We have heard the rival submissions and perused the material before us. We find that the disputed amount has direct nexus with the agreement entered between the assessee and the contractee, that at the time of passing of the assessment order the AO the agreement was not in existence. We are of the opinion that without considering the same, the proper taxability of the assessee cannot be determined. Therefore in the interest of justice, the matter is being restored back to the file of the AO for deciding the issue in the light of the agreement dated 11.11.2009. He is directed to afford a reasonable opportunity of hearing to the assessee before deciding the assessment year in which the income has to be taxed. "

The ITA T has not made any adverse finding against the order of the CIT (A) dated 29.03.2006, which was disputed by the Revenue, instead it has only directed that the year of taxability should be determined based on the settlement agreements entered into with the client SJVNL, since these were not in existence at the time of passing of the Assessment Order and CIT (A) Order.

9.4 The A O while giving effect to the ITA T order has taxed the amount in A Y 2002-03 essentially because the moneys were released to the Assessee by the project authorities and had been taken into account and offered to taxation. The AO has also stated that the sum should be taxed in A Y 2002-03 as per the method of accounting followed by the assessee. The AO has also made a remark stating that nothing contrary in the said agreements that any payment is subject to recovery from the assessee.

9.5 Each of these reasons provided by the AO have already been considered in the order of the CIT(A) dated 29.03.2006 where these issues were considered at length. The facts are that the Retention Money is as per the contract entered into with the client at clauses 60 (iv)(a), (b) & (c). Sub Clause (c) has been referred to in the earlier CIT(A) order as well and this clause makes it abundantly clear that the money is released to the Appellant only against the issue of Bank Guarantees.

9. 6 The Appellant has also produced a letter to the effect that the Guarantees amounting to approximately Rs. 88 Crores was released in FY 2009-10 by virtue of the Settlement Agreement. This can also be verified from Clause 3 of the said agreement which clearly states that "Parties have agreed that SJVN shall return the Retention Money Guarantees which are lying with them". Therefore the conclusion that can be drawn in this regard is that the payment of Retention Moneys that were made against these Bank Guarantees remained contingent until the release of the Bank Guarantees.

9.7 The Appellant has fairly admitted before me and also before the AO that the Retention Moneys were not offered to tax pending the disposal of appeal for A Y 2002-03. The limited issue before me is the year of taxability and I hold that based on the facts and circumstances of the case, the various judgments rendered on the issue of taxability of the Retention Money, considering the settlement agreement as per the direction of the Hon'ble IT AT and also following the order of my predecessor dated 29.03.2006 in appellants own case for this A Y., I hold the said Retention Money of Rs. 71.40 Crores is to be taxed in A Y 2010-11 being the year in which the Retention Money Guarantees were finally released. The AO. is therefore directed to delete the addition of Rs. 71.40 Crores in A. Y. 2002-03 and take necessary steps and tax the same in A. Y. 2010-11. This Ground No, 3 is therefore allowed in favor of the appellant, as above. "

9. We have considered rival contentions and found from record that it is not in dispute that the contractual obligations of the assessee came to an end only upon issuance by SJVN of the Maintenance Certificate on 18/3/2011 and hence the assessee would have been entitled to contend

that retention money was taxable only in AY 2011-12. However the assessee has agreed to have the retention money taxed in AY 2010-11 since the retention performance bank guarantees were returned by SJVN on 13/11/2009 pursuant to settlement agreement dated 11/11/2009 which the Tribunal had directed the AO to take into account while deciding the issue in the first round of litigation. In view of the decision of the Jurisdictional High Court in case of Associated Cables Ltd., 286 ITR 596 that retention money is taxable in the year of settlement of contractual obligations.

10. Moreover, the detailed finding so recorded by CIT(A) at para 9.3 to 9.7 are as per material on record which do not required any interference on our part. Accordingly, we do not find any infirmity in the order of CIT(A). In the light of the above in our opinion the CIT(A) was right in directing the AO to bring the retention money to tax in AY 2010-11 and the AO has also passed an order u/s 154 in AY 2010-11 bringing the said sum to tax.

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

Order pronounced in the open court on this 31/05/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai; Dated 31/05/2018
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