

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD**

**BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER**

ITA No.	Asst. Year	Appellant	Respondent
676/Hyd/16	2008-09	Sri Dhananjaya Naidu Golla, BANGALORE [PAN: AGYPG0183A]	Income Tax Officer, Ward-2, CHITTOOR
677/Hyd/16	2009-10		
678/Hyd/16	2010-11		
970/Hyd/16	2008-09	Income Tax Officer, Ward-2, CHITTOOR	Sri G. Dhananjaya Naidu, BANGALORE [PAN: AGYPG0183A]
971/Hyd/16	2009-10		
972/Hyd/16	2010-11		

For Assessee : Shri K.A. Sai Prasad, AR
For Revenue : Shri A.G.V. Prasad, DR

Date of Hearing : 07-06-2018
Date of Pronouncement : 29-06-2018

ORDER

PER BENCH :

These are appeals by Assessee and Revenue against the common order of the Commissioner of Income Tax (Appeals)-Tirupati, dated 12-04-2016. Both the parties, aggrieved on the order of CIT(A), raised respective grounds in their appeals.

2. Briefly stated, assessee, individual is a partner of the firm, M/s. Bhagyalakshmi Granites. Assessee filed return of income for the AY. 2007-08 but has not filed incomes for subsequent years. Assessing Officer (AO) has received information from the CIB that assessee has sold a property at Bangalore on 02-06-2008 for a consideration of Rs. 17 Lakhs. As assessee has not filed return for AY. 2008-09 and subsequent years, proceedings u/s. 147 of the Act were initiated and various notices have been issued. Assessee has declared only salary and interest incomes and has not disclosed income from development of property. AO has pursued the investigation diligently and came to know that assessee has purchased a site at Green Glen Layout, Bellandhur, Bangalore, constructed 12 flats and one pent-house, borrowed funds from State Financial Corporation and repaid the loans and also had different bank accounts in which sale proceeds have been deposited and expenditures have been incurred. After enquiry from the banks and from other officers at Bangalore, AO has completed the assessments in respective assessment years. In the course of assessment proceedings, assessee had admitted incomes on the turnover at about 17% in AYs. 2008-09, 2009-10 & AY. 2010-11. However, AO did not consider the profit earned method but completed the assessment on the basis of unexplained assets and expenditure. Accordingly in AY. 2008-09, AO has brought to tax an amount of Rs. 48,90,343/- by stating as under:

		Rs.
	Total loan from K.S.F.C (8/07)	49,50,000
Less:	Paid for purchase	29,45,316
		20,04,684
Less:	Re-paid during the year	34,37,180
	Re-paid without source	14,32,496
Add:	Bank Balance	29,65,297
		43,97,793
Add:	Bogus liability shown as advances in the balance sheet	3,42,550
		47,40,343
Add:	Amount stated to have been received from Victor Fernandez proved to be false	1,50,000
		48,90,343

2.1. Similarly in AY. 2009-10, AO followed the same method and brought to tax an amount of Rs.83,23,894 as under:

		Rs.
	Total Income Returned in original ROI filed	2,43,675
Add:	Unexplained assets/expenditure determined in the para above Rs. 1,11,59,591	81,94,294
	Less: Opening balances In bank accounts already taxed In AY. 2008-09 Rs. 29,65,297	
Add:	Disallowance u/s. 40(a)(ia)	1,29,600
	Assessed income	85,67,569

2.2. Similarly in AY. 2010-11, AO followed the same method and brought to tax an amount of Rs. 20,10,513/- as under:

		Rs.
	Income from M/s. Bhagyalakshmi Residency	20,06,999
Add:	Income from civil contract receipts	1,86,792
Add:	Interest on capital from M/s. Bhagyalakshmi Granites	1,18,943
Add:	Interest on capital & remuneration from M/s. Bhagyalakshmi Constructions	3,40,000
Add:	Income from other sources	36,047
	Total	26,88,781
Less:	Interest on current account of M/s. Bhagyalakshmi Granites & interest paid to others	6,78,268
	Income Assessed	20,10,513

Aggrieved on the above three orders, assessee preferred an appeal before the CIT(A) and raised various grounds.

3. It was the submission of assessee that he has estimated the profit at about 17% which should be accepted. He also raised certain contentions that the turnover adopted by AO in AY. 2008-09 and 2009-10 are not proper and the sale consideration arrived at in AY. 2008-09 at Rs. 90,78,000/- should be at Rs. 89,16,318/-. Like-wise in AY. 2009-10, it was the contention that the sales turnover should be at Rs. 1,87,76,650/- as against Rs. 1,90,78,000/-. Apart from that, assessee also contested the disallowance u/s. 40(a)(ia) in AY. 2009-10.

4. Ld.CIT(A) after considering the detailed submissions of assessee and perusing the orders of AO, was of the opinion that the method followed by AO in bringing to tax

unexplained assets is not proper and accordingly, he modified the orders, determining the profit at 20% of the sale consideration in all the three assessment years as against 17% adopted by assessee in the revised computations. While doing so, Ld.CIT(A), however, did not consider the objections on the sales turnover raised by assessee. Further, while directing the AO to adopt the rate of profit at 20%, Ld.CIT(A) also brought to tax an amount of Rs. 40 Lakhs stated to be certain cash credits, which was enquired by AO and but did not consider for addition in the assessment order. He also confirmed the disallowance u/s. 40(a)(ia) in AY. 2009-10. Assessee is aggrieved on the estimation of income at 20%, non-adjudication on sale consideration and disallowance u/s. 40(a)(ia) in the three impugned assessment years. Revenue is aggrieved on the change of method of assessment by the CIT(A) contending that the AO's method should be allowed.

5. We have heard Ld. Counsel for assessee, Ld.DR and perused the paper book placed on record. Their arguments are incorporated as and when required in this order.

Issue of estimation of profit:

6. Assessee even though did not disclose the entire business of construction of houses when AO has enquired and found various bank accounts and credits in the bank accounts, has re-casted the accounts reflecting all the sale

considerations and other transactions and offered income at about 17% i.e., amount of Rs. 15,15,774/- for the AY. 2008-09. Similarly, he has offered incomes around the same percentage in other two assessment years also. Since AO completed the assessment on the basis of unexplained assets/credits method, Ld.CIT(A) has considered assessee's submissions and decided the amount of profit as under:

“6. The above submissions are considered. The appellant although did not disclose; his assets, all the bank accounts, his true turn over etc., once the Assessing Officer unearthed them, irrespective of his stand that he did not maintain books of account etc, he re-casted his accounts. In the re-casted accounts, all the sale considerations and other transactions including the transactions unearthed by the AO are included and the appellant has very clearly explained each and every transactions on which the AO made additions, supra. In the re-casted accounts, all the receipts which are in the nature of income at Rs 90,78,000/- (except the cash credits of Rs 40 lakhs which would be dealt, separately/infra) have been admitted. The appellant requested to compute the income on an estimate basis as the books of account were not maintained by him. In this regard, appellant pleaded to direct the Assessing Officer to accept the revised computation made him at Rs. 15,15,774/- ie @ 17% profit on the entire sale consideration. This submission is considered. It is clear that the appellant is a real estate promoter and it is his first venture. Hence, there is no internal and external comparable data. Since the appellant's entire expenditure is not verifiable, it is considered that an estimation of profit @ 20% on the sale consideration of Rs.90,78,000/- ie an income of Rs.18,15,600/- from this business would meet the ends of justice and accordingly the AO is directed to assess the income from this business at Rs.18,15,600/-”.

6.1. It was the contention of Ld. Counsel that the rate of profit offered is much more than of the similarly placed real estate contractors are offering (at 12.5%) and the rate at 17% should be accepted.

6.2. After considering the rival contentions, we are of the opinion that Ld.CIT(A) is reasonable in estimating the profit at 20%. The fact that assessee himself has offered profit of 17% on the sale consideration indicates that he has earned substantial profits, more than similarly placed building contractors. Therefore, the contention raised that the determination of profit should be at 17% on the sale consideration cannot be accepted. Since there are many lapses on the part of assessee and AO had to enquire and find out various transactions of assessee, we are of the opinion that estimation of profit at 20% on the sale consideration is reasonable and accordingly, the estimation by Ld.CIT(A) is upheld. Grounds on this issue in all the three assessment years are rejected as assessee's main contention is only on the rate of profit. The rate of profit at 20% is confirmed.

Difference in sale consideration:

7. One of the contentions of assessee before the Ld.CIT(A) was that there was difference in sale consideration adopted by AO in the order. It was pointed out that actual sale consideration to be considered for the AY. 2008-09 was Rs. 89,16,318/- as against Rs. 90,78,000/-. Similarly in AY. 2009-10, the turnover should be at 1,87,76,650/- as against Rs. 1,90,78,000/-. Ld. Counsel brought to our notice the following reconciliation furnished:

AY 2008-09:

S. No	Name	As per sale deed	As per revised statements	Remarks
1	Navneet Joshi	17,00,000	29,66,318	a. Rs. 1,61,382 regd. Charges reduced from 31,28,000 as incurred by assessee and reflected in Bank statement. b. Addl. sale consideration credited to Andhra Bank A/c
2	Valli Mohan	17,00,000	31,00,000	a. Credited in Bank A/c b. Paid to KSFC
3	Bhanu Prakash	17,34,000	28,50,000	Credited to Bank a/c
		51,34,000	89,16,318	

AY. 2009-10:

	Rs.	Rs.
Sales:		
Flat No. 5 – Hemanth & Pallavi		38,71,050
Flat No. 10 – V. Rajasekharan	20,56,100	
Add: Advance FY 2007-08	12,50,000	33,06,100
Flat No. 4 – Manjeeth Singh Raana	25,15,000	
Add: Advance FY 07-08	7,00,000	32,15,000
Flat No. 6 – S. Eswaran		23,87,500
Flat No. 7 – A Srinivasa Varma		18,87,500
Flat No. 8 – P Joshi		18,92,500
Flat No. 9 – K V Mohan Reddy		22,17,000
	Total Sales:	1,87,76,650

Even though this issue was raised before the Ld.CIT(A), he has not considered the contentions at all.

7.1. After considering the rival contentions and perusing the order, we agree with the contentions of assessee that there occurred certain mistakes. As seen from the assessment order for AY 2008-09 in pg. 12 of the order the turnovers from Mr. Bhanu Prakash was taken at Rs. 22 Lakhs and Rs. 5 Lakhs and cash of Rs. 1,50,000/- which totals to Rs. 28,50,000/-, whereas the AO took it at Rs. 29,50,000/-. Thus, there is Rs. 1 Lakh extra sale consideration determined by the AO. Like-wise, the other one is taking the registration charges of buyer as part of turnover. We are *prima-facie* satisfied that there are certain mistakes in determining the sale consideration by AO in the order. Since the profit is estimated on the sale consideration in each year, it is necessary to arrive at correct sale consideration. Therefore, AO is directed to examine these amounts and determine the sale consideration correctly, after giving due opportunity to assessee. The grounds in this regard are considered allowed for statistical purposes.

Addition of Rs. 40 Lakhs:

8. This issue comes up for consideration in AY. 2008-09 in assessee appeal. In the course of enquiry, AO has found out various transactions of purchase and sale of property and construction and has accordingly issued show cause notice to

assessee to explain various transactions. Assessee has re-casted the accounts and prepared cash book and statements. An amount of Rs. 40 Lakhs was shown as advance received in the cash book so prepared and AO noticed without that Rs. 40 Lakhs, assessee's cash book shows negative balance from 05-05-2007 to 10-08-2007. Without mentioning how much the negative cash balance was, AO enquired about the receipt of Rs. 40 Lakhs introduced on 11-04-2007. Assessee has submitted an un-registered agreement dt. 11-04-2007 supposed to have been for selling property. Even though AO enquired and those parties have confirmed, AO noticed that the parties are relatives of assessee, the property was not disclosed in earlier years and assessee has furnished another document of similar nature and gave findings that assessee has furnished bogus documents in order to explain the cash receipt on that date. However, AO ultimately concluded that the cash book cannot be relied upon. The findings in para 28 on this issue are as under:

"It is pertinent to mention here that even though advance of Uttarhalli land is entered in the re-casted cash book for the AY. 2008-09. In view of the above detailed reasons, the submissions of the assessee the cash book is rejected".

8.1. Since the cash book is rejected, AO has not made any addition of this Rs. 40 Lakhs while completing the assessment. While adjudicating the issues of various additions, Ld.CIT(A) however, confirmed the addition of Rs. 40 Lakhs while estimating the profit at 20% on the sales turnover.

Ld.CIT(A) took up on himself to consider the amount of Rs. 40 Lakhs. Assessee made detailed submissions including confirmations filed before the AO to submit that assessee has genuinely received Rs. 40 Lakhs as those people have creditworthiness. This issue was discussed elaborately by the Ld.CIT(A) from pages 19 to 30. Finally confirmed the addition of Rs. 40 Lakhs in para 10 of the order, as under:

“10. The above submissions are considered. When the AO enquired the appellant's sources for the investments etc., first, the appellant claimed that it was a business carried on by one M/s Bhagyalakshmi Constructions with 10 partners that included him, his family members and relatives. The AO found that the deed produced in support of it was unregistered, the firm has not filed its return for the last six years and the PAN was obtained only on 05.12.2012. After examining them elaborately, the AO, inter alia, held that the appellant obtained this PAN during scrutiny proceedings to divert the hitherto unearthed receipts to a firm's hand. Thereafter, the appellant produced the cash book wherein the impugned Rs.40 lakhs cash introduction was found by the AO. The appellant produced a copy of the document dt 11.4.2007 by which he made an attempt to explain the sources from the impugned 5 persons, his close relatives or employee etc. Further, he produced another agreement dt 01.3.2007 from the same persons, for the receipt of same amount for the same property. Neither the appellant nor any of impugned persons could produce the original of those documents . The most important aspect is that the document dt. 11.4.2007 does not mention anything about the earlier agreement at all. The next aspect is about creditworthiness and genuineness of the impugned creditors. The amount claimed to have given by them was early as in April 2007 in the range of Rs. 7 to 9 lakhs per person. It is huge amount and none of the creditors could produce any documentary evidence to prove their creditworthiness. Out of the agreed sale consideration of Rs.45 lakhs, the impugned creditors have paid Rs.40 lakhs in 2007 itself and they are still awaiting for transfer of the impugned property. Then, the appellant submitted that there was some document problem and that's why the impugned property could not be transferred to the impugned creditors. However, he finds other persons, once again family members, in the year 2013 and proposes to sell it for Rs.60 lakhs, claimed to have obtained Rs. 35 lakhs and repaid all the

original creditors in the year 2013 without any interest or compensation. This defy the human probabilities. The original creditors were claimed to have paid Rs 40 lakhs in 2007, and just awaiting for the transfer of property just Rs.5 laks only. If this claim is true, then the advance made by them almost at the time when the real estate boom began, could have appreciated, conservatively, anything between 200 to 300 % in 2013. They would not have settled for anything less than the impugned property or its equivalent property. The AO has clearly pointed out various inconsistencies elaborately in her order and rejected the appellant's claim. On the overall facts and circumstance, it is clear that the appellant has failed to prove the creditworthiness of the impugned creditors and also failed to prove the genuineness of the impugned credits and its associated facts and circumstances. Hence, the sources of Rs. 40 lakhs cash credited on 11.4.2007 stands unexplained and the AO is directed to assess it u/s 68 of the Act. The grounds of appeal on this issue are treated as dismissed”.

8.2. It was the contention of Ld. Counsel that AO has not made any addition of the above amount as the cash book was rejected. Further, even the Ld.CIT(A) also rejected the books of account and estimated profits at 20% on the sales turnover. Accordingly, the deficit cash balance / receipt of advance is not material. Since the books of account are rejected, the addition of cash credit u/s. 68 of the Act does not survive. It was the contention that since AO has not made any addition and accepted the receipt of cash, the order of Ld.CIT(A) in bringing to tax the amount of Rs. 40 Lakhs is not correct.

8.3. Ld.DR, however, relied on the orders of the CIT(A).

8.4. We have considered the rival contentions and perused the orders of the authorities. It is true that assessee has re-casted his cash book and statements consequent to the

enquiries made by the AO. However, AO has not relied on the books of account and made assessments on assets and expenditure method (used this term in the absence of any proper nomenclature for the mixed method followed by AO). Even though AO has enquired about the receipt of cash of Rs. 40 Lakhs and gave findings that the documents are bogus, no such addition has been made by the AO in the assessment order. Since the books of account are rejected, the question of cash credits does not arise. These are prepared on the basis of the subsequent enquiries caused by the AO and has not originally maintained by assessee, further as seen from the order of the CIT(A), assessee has explained from whom the amounts were received and the creditworthiness of those people. This information was already before the AO who also made enquiries with those people who have advanced funds. However, there are discrepancies in the statements given by assessee and statements given by the so called creditors and furnishing of such agreements by the assessee which lead AO to hold that the documents are bogus. He rejected the books of account as such, as can be seen from the order of the AO. Since the income is based on estimation, the re-casted cash book need not be considered for the purpose of making addition u/s. 68 of the Act. It is true that law permits addition u/s. 68 of the Act even when books are rejected, but in the peculiar facts of the case, where assessee has prepared the cash book on the basis of the information received on enquiries caused by the AO, the so called cash credit of Rs. 40

Lakhs on 11-04-2007 need not be brought to tax separately as the income was declared at 20% on the sales turnover, rejecting statements prepared by assessee. In view of that, we are of the opinion that the addition by the CIT(A) of an amount which was not added by the AO is not warranted on the facts of the case and hence AO is directed to delete the same. The order of CIT(A) to that extent is modified. Grounds are allowed.

Addition of Rs. 1,29,600/- u/s. 40(a)(ia) :

9. This issue arises in AY. 2009-10. After rejecting the books of account and making assessment on the method followed by the AO, AO made an addition u/s. 40(a)(ia) on the interest payment reflected by assessee in the cash flow statement. AO brought this amount separately to tax as discussed in the computation of income extracted above. It was the contention of assessee before the Ld.CIT(A) that this amount was not claimed as an expenditure, hence disallowance *per se* does not arise. However, Ld.CIT(A) confirmed the same stating that the amount is to be disallowed as the provisions of Section 194A are attracted. Accordingly, assessee raised the ground.

9.1. After considering the rival contentions, we are of the opinion that the addition is not warranted. First of all, to invoke the provisions of Section 40(a)(ia) of the Act, amount has to be claimed as an expenditure. Since the amount was not claimed as expenditure by assessee in the computation of

income or in the prepared books of account, the question of disallowance u/s. 40(a)(ia) does not arise. There may be a situation that TDS has to be made as per Section 194A and assessee may have to deduct tax on that. For that, one has to examine the same under the provisions of Section 201. It is also not on record whether the interest payment is a single payment to one person or multiple payments which may not attract TDS. No details are forthcoming either in the assessment order or in the order of CIT(A). Since the fact is that this amount has not been claimed as expenditure, the disallowance u/s. 40(a)(ia) does not arise, as those provisions are applicable only on the amounts which are claimed as deduction in the P&L A/c. Since the amount is not claimed as a deduction, the question of disallowance cannot arise u/s. 40(a)(ia). In view of that, AO is directed to delete the same. Assessee's ground is allowed.

Method of assessment :

10. This issue arises in all the three appeals of Revenue. Revenue has raised the ground commonly in all the three assessment years, as under:

"2. The CIT(Appeals) erred in adopting percentage basis (20% on gross receipts) for estimating the income of the assessee as against the method of investments adopted by the AO.

3. The Learned CIT(Appeals) erred in accepting the re-casted books of account of the assessee and deleting the additions made by the AO after rejection of the re-casted accounts of the assessee".

Ground Nos. 1 & 4 are general in nature.

10.1. As briefly stated above, after making diligent enquiries on the transactions of assessee, AO surprisingly has taken a method of asset and expenditure method. This method is not a prescribed method under any of the provisions of the Act. When the books of account are not available, the assessments can be completed on the expenditure method if there are expenditures incurred and evidence available so as to arrive at the income or net asset method when there are large number of assets, the source of which are not available. The method followed by AO does not fall under any of the categories. In the course of assessment, assessee has submitted re-casted account/statements including the cash book to explain various transactions un-earthed by the AO. In that event, AO should have followed the cash flow method and determined the income on the basis of the re-casted cash book/statements. AO was not done that also. As seen from the orders, various additions have been made which assessee has explained before the CIT(A) in detail. Ld.CIT(A) considered all those additions and explanations and has ultimately resorted to estimation of income at 20% on the sales determined by the AO. Since the books of account are rejected, CIT(A) deleted all the additions made by the AO.

10.2. We have considered the rival contentions and perused the addition made by the AO, the explanations given by assessee before the CIT(A). Assessee has agreed with the rejection of books of account and estimation of income at 20%

was conformed in assessee's appeals. Consequent to that, we see no reason to consider the grounds of Revenue. We notice that AO has not followed any systematic method in bringing to tax various amounts in the order. While appreciating the efforts put in by the AO in unearthing the information and confronting of assessee, the ultimate assessment is not properly done and so, the only option is to estimate the income as was done by the Ld.CIT(A). In view of that, we find no merit in the grounds raised by Revenue. Accordingly the grounds raised by Revenue are rejected in all the three impugned assessment years.

11. In the result, all the three Revenue appeals are dismissed. Appeals of assessee in AYs. 2008-09 and 2009-10 are considered partly allowed and appeal of assessee in AY. 2010-11 is dismissed.

Order pronounced in the open court on 29th June, 2018

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(B. RAMAKOTIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 29th June, 2018

TNMM

Copy to :

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