

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 803/JP/2017
निर्धारण वर्ष/ Assessment Years : 2012-13

M/s Somya Priya Infrastructure, CC-2, Industrial Area, Phase-1, Behror, Alwar.	बनाम Vs.	The ITO, Ward- Behror. Alwar.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: ABQFS 5919 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri S. L. Poddar (Adv.)
राजस्व की ओर से / Revenue by : Shri Anup Singh (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 29/05/2018
उदघोषणा की तारीख / Date of Pronouncement : 06/07/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Alwar dated 16.08.2017 for Assessment Year 2012-13.

2. In the first ground of appeal, the assessee has challenged the addition of Rs. 81,66,124/- made by the Assessing Officer which has been confirmed by the Id. CIT(A) without providing any opportunity to the assessee to submit his representation and not considering the

written submission filed by the assessee during the course of remand proceedings.

3. Briefly, the facts of the case are that during the course of assessment proceedings, based on the information received from the Bank of Baroda by issuance of notice U/s 133(6) of the Act, the Assessing Officer held that a sum of Rs. 30,51,800/- being the difference between cash deposit and cash withdrawals and a sum of Rs. 51,14,324/- being the unexplained credit entries in bank accounts maintained by the assessee as undisclosed income of the assessee U/s 69/69A of the Act.

4. Being aggrieved, the assessee carried the matter in appeal before the Id CIT(A) and submitted certain additional evidence which were forwarded to the AO for examination and comments. The Id. CIT(A) observed that during the remand proceedings, the assessee did not cooperate with the AO in the examination of such evidences and given that the primary onus of proving the genuineness of the claim rest on the assessee which the assessee has failed to discharge both during the assessment proceedings and the remand proceedings, he confirmed the addition of Rs. 81,66,134/- in the hands of the assessee.

5. During the course of hearing, the Id. AR has submitted that the assessee has regularly attended the assessment proceeding however, nothing was made available to the assessee and no opportunity has been provided to provide specific explanation regarding the entries and the entries in the bank account remained unexplained. It was further

submitted that before the Id. CIT(A) the assessee presented documentary evidence which the assessee was unable to produce before the Assessing Officer, however, both the Assessing Officer as well as the Id. CIT(A) did not consider the evidences produced by the assessee during the remand proceedings. It was accordingly submitted that the matter may be set aside to the file of the Assessing Officer to examine the said evidences which has been duly submitted and taking on record by the Id. CIT(A).

6. During the course of hearing in order to verify the contention so raised by the Id. AR regarding non- grant of opportunity and not taking the additional evidence and the written submissions into consideration, the assessment records were called for and examined. It was noted that on 07.10.2016, a letter was issued by the Id. CIT(A) to the Assessing Officer seeking the remand report and thereafter, on couple of occasion, reminder letters were issued to the AO for furnishing the remand report and finally a remand report was received on 09.08.2017 which has been reproduced by the Id. CIT(A) in para 5.3 of his order. On perusal of the remand report, it is noted that the AO has stated that vide letter dated 13.06.2017, the assessee was asked to produce complete books of account along with supporting evidences however, no compliance was made and another opportunity was granted on 03.07.2017 fixing the case for hearing on 07.10.2016 but again no compliance was made. Based on the above, the AO in his remand report has stated that the assessee was provided ample opportunities to furnish certain details/ documents but the assessee has failed to do so. No bills/vouchers have been produced by the assessee despite ample

opportunity afforded to him. He further submitted that even during the course of assessment proceedings, ample opportunity were provided to the assessee but he did not comply with the same and the matter was completed U/s 144 of the Act. It was accordingly submitted that the details/documents furnished by the assessee before the Id. CIT(A) remain unexplained and the same cannot be accepted as genuineness of these documents remained unverified.

7. At the same time, it is also noted that the Assessing Officer in his remand report has referred to the Id. CIT(A) letter No. 686 dated 07.06.2017 calling for the remand report however, as we have noted earlier, initial letter which was issued by the Id. CIT(A) to the Assessing Officer seeking remand report was issued on 07.10.2016. However, we find that there is no mention thereof in the remand report or in the order sheet so submitted before us. At the same time, we find that the assessment records contains a letter dated 17.10.2016 addressed to the assessee calling for and furnishing of documents and books of account in pursuance to the letter received from the Id. CIT(A) vide letter no. 919 dated 07.10.2016. We further find that in response to the said letter dated 17.10.2016, the assessee vide its AR, M/s Sark Associates, Chartered Accountants has submitted written submissions dated 27.10.2016 which talks about production of books of account containing cash book, ledger, bank book, journal for verification of the Assessing Officer.

8. In light of above facts and circumstances of the case, it seems that the additional evidence submitted by the assessee during the

course of remand proceedings has not been examined by the Assessing Officer and therefore, in the interest of justice, we hereby remand this matter to the file of the Assessing Officer to examine the same afresh in light of the additional evidence so submitted by the assessee, after providing reasonable opportunity to the assessee. In the result, ground no. 1 is allowed for statistical purposes.

9. In the ground no. 2, the assessee has challenged the action of Id. CIT(A) in confirming the addition U/s 40(a)(ia) of the IT Act on account of non deduction of TDS on generator hiring charges and transportation expenses.

10. The first contention of the Id. AR is that these expenses were paid during the year and nothing was payable at the year end therefore, provisions of Section 40(a)(ia) of the Act are not applicable. The said contention cannot be accepted in light of the decision of the Hon'ble Supreme Court in case of Palam Gas service vs. CIT 394 ITR 300. Second contention of the Id. AR is that the TDS on generator hire charges of Rs. 4,74,847 has been deducted, however, nothing has been brought on record either during the assessment or the appellate proceedings that the TDS so deducted has been deposited before the due date of filing of return of income. In view of the same, the addition so made by the Assessing officer regarding DG hire charges is hereby confirmed.

11. Regarding non deduction of TDS on the transportation expenses, it has been contended by the Id. AR that no such payment aggregate of

which exceeds Rs. 75,000/- in a financial year or Rs. 30,000/- in a single payment was made to any person during the financial year. Hence, the assessee was under no obligation to deduct TDS on the transportation expenses. In this regard, we find that at the assessee's paper book, at page 55, payment of Rs. 1.50 lakhs, Rs. 1.90 lakhs and Rs. 4 lakhs has been made on respective dates and the amounts have been debited under the head "transportation expenses". Therefore, prima facie the contention so raised by the assessee cannot be accepted. Further, in absence of any documentary evidence in support of its contention, the addition so made by the Assessing Officer is hereby confirmed. In the result, ground no. 2 is dismissed.

12. In ground No. 3, the assessee has challenged the confirmation of addition of Rs. 4,74,000/- on account of interest on FDR not disclosed in the books of accounts. In this regard, the Id. AR has contended that the assessee has placed FDR with the Mining Department as security deposit and as a result, the assessee was not in a position to get actual FDR interest from the bank however, the authorities have presumed accrued interest @ 10% on FDR amount and has brought the same to tax. It was further submitted that the assessee has not charged any interest on unsecured loans of Rs. 1,06,87,273/- as existing on 01.04.2011 and as the AO has applied and added interest @ 10% on FDR, the assessee be given benefit of availing the credit of interest on unsecured loans as existing in the financial statements of the assessee against the FDR interest.

13. In this regard, the Id. CIT(A) has returned a finding that the appellant is maintaining the books of account on mercantile basis and therefore the accrued interest should have been accounted for on such FDR and should have been declared as income during the year. We do not see any infirmity in the said finding of the Id. CIT(A). However, as far as the quantum of interest is same, the Id. AR has contended that the AO has presumed accrued interest @ 10% on FDR. In light of the same, we hereby directed the Assessing Officer to apply the interest rate as applicable on the specified FDR amount as prevalent during the relevant period. Alternative plea of the Id. AR cannot be accepted as it would be a case of fresh claim and there is nothing on record in terms of any interest of secured loans which has been contractually agreed upon between the assessee and borrowers and which has not been debited in the P & L account. In the result, to the extent of determination of actual interest on FDR, the matter is remanded back to the file of the AO. The ground is thus partly allowed for statistical purposes.

14. In ground No. 4, the assessee has challenged the addition of Rs. 4,55,000/- on account of unexplained cash credit U/s 68 of the IT Act. In this regard, the Id. AR has submitted that the assessee has raised addition unsecured loan of Rs. 4,55,000/- from Tomar Construction Company during the year and besides that there was opening balance of Rs. 11,10,100/- which was brought forward during the previous year. It was submitted that the authorities have not provided any opportunity to provide the necessary explanation and given the fact that the owner of Tomar Construction Company was not

available, it was not possible for assessee to obtain confirmation before the tax authority. It was submitted that the assessee should be given an opportunity and the matter should be remanded back to the file of the assessee to provide reasonable opportunity to the assessee to submit necessary confirmation.

15. It is noted that regarding identity, creditworthiness and genuineness of the transaction, the AO has stated in the assessment order that the assessee was required to prove the identity, creditworthiness of the lender and genuineness of the transaction in the form of copy of return of income, computation of income and bank statement but the assessee has not furnished any details which can prove the same and in absence of the same, it has been held that the assessee has not discharged the onus cast upon him U/s 68 of the Act. The Id. CIT(A) has also returned a finding that the assessee has not discharged the onus of providing the requisite evidences to show the genuineness of loan amount received from M/s Tomar construction Company. Accordingly, we do not see any infirmity in the finding of the Id. CIT(A). Hence, the same is confirmed and the ground taken by the assessee is dismissed.

16. In ground No. 5, the assessee has challenged disallowance of interest of Rs. 32,88,78/- U/s 36(1)(iii) of the Act. Briefly the facts of the case are that the Assessing on perusal of the deposits/advances schedule in the audited financial statement of the assessee for the year under consideration observed that the assessee has made interest free advance of Rs. 90,00,000/- to M/s Ganpati Real Mart and Developers

Pvt. Ltd. in which assessee was also one of the Directors. It was also noted by the Assessing Officer that the assessee has paid interest of Rs. 3,28,878/- as interest on over draft account held with the Bank of Baroda. It was observed by the AO that one of the conditions required to be satisfied U/s 36(1)(iii) of the Act is that the capital borrowed should have been utilized for the purpose of business, however in the instant case, the funds of the business are diverted towards interest free loans and the assessee has failed to establish any commercial expediency and business nexus in connection with interest free advances made to M/s Ganpati Real Mart and Developers Pvt. Ltd. Accordingly, a sum of Rs. 3,28,878/- was disallowed and added to the income of the assessee. Being aggrieved the assessee carried the matter in appeal before the Id CIT(A) who has confirmed the said addition.

17. During the course of hearing, the Id. AR has submitted that during the financial year 2009-10, the assessee had made an advance of Rs. 90,00,000/- to M/s Ganpati Real Mart and Developers Pvt. Ltd. for purchase of shop in commercial complex situated at CC-2 RIICO Industrial Area Phase-1, Behror, Alwar and the same is regularly shown and disclosed by the assessee in the audited balance sheet under the head deposit/advances. It was further submitted that due to some reasons, the shop could not be registered in the name of M/s Somyapriya Infrastructure and the amount remained as advance in the books of the assessee. It was submitted that even though the shop is not registered in the name of the assessee but it is in the possession of the assessee and the same is evident as all the papers related to the

assessee which was produced before the AO were addressed at the same commercial complex situated at CC-2 RIICO Industrial Area Phase-1, Behror, Alwar. It was further submitted that the advance was given to M/s Ganpati Real Mart and Developers Pvt. Ltd. during the financial year 2009-10 relevant to assessment year 2010-11 and the assessment for the said year has been duly computed U/s 143(3) of the Act and no addition has been made by the AO in the said year. It was further submitted that the assessee has not paid any interest to the creditors from whom the assessee has taken loans. It was further submitted that total interest free loan given is only Rs 90,00,000 and the total interest free funds available with the assessee's amount to Rs. 123.44 lacs which includes Rs. 80.61 lacs interest free loans and Rs. 42.88 lacs of partners capital account. It was accordingly submitted that the disallowance made by the AO towards interest on the over draft account be deleted.

18. The Id. DR is heard who has relied on the orders of the lower authorities. It was submitted that there is nothing which has been brought on record in terms of any documentary evidences in support of the contention that the amount of Rs. 90 lacs was paid to M/s Ganpati Real Mart and Developers Pvt. Ltd. for purchase of shop and it is clearly in the nature of loans and advances which has been given interest free and the AO was justified in disallowing the interest on bank overdraft.

19. We have heard the rival contentions and perused the material available on record. It is the contention of the Id. AR that the advances to M/s Ganpati Real Mart and Developers Pvt. Ltd. was made in the

financial year 2009-10 relevant to assessment year 2010-11 and not in the year under consideration and in the assessment year 2010-11, the said fact has been accepted by the Revenue wherein the assessment has been completed U/s 143(3) of the Act. It has been further contended by the Id. AR that interest free funds available with the assessee are more than the interest free advance to M/s Ganpati Real Mart and Developers Pvt. Ltd. and therefore, it cannot be held that the borrowed funds from the over draft account have been diverted as advances to M/s Ganpati Real Mart and Developers Pvt. Ltd. It has further been contended that the said advance is for the purpose of purchase of shop which is in the possession of the assessee however, for some technical reasons the registry has not been made in the name of the assessee. In our view, all these contentions needs to be verified and we accordingly, set aside the matter to the file of the Assessing officer to examine the said contention so raised by the Id. AR after providing reasonable opportunity to the assessee. In the result, ground is allowed for statistical purposes.

20. In ground No. 6, the assessee has challenged the disallowance of 30% of the diesel and fuel expenses of Rs. 1,00,000/- and repairs and maintenance expenses of Rs. 1,85,307/-. It was submitted by the Id. AR that the expenses relating to diesel and fuel as well as repairs and maintenance have been incurred for the purpose of the assessee business and given that the assessee has shown business receipts of Rs. 29.47 lakhs on account of its business, the addition so made should be deleted.

21. On perusal of the assessment order, it is noted that the AO has asked the assessee to submit the necessary bills and vouchers in support of the expenses however, no bills and vouchers were submitted and the AO held that the expenses in the books of account cannot be ruled out. He, therefore, disallowed 30% of the expenses and brought the same to tax. Even during the appellate proceedings, no evidence has been brought on record to substantiate the expenses as having incurred for the purposes of the business. The Id. CIT(A) has returned the finding that in absence of discharging the primary onus proving that such expenses have been incurred or expended for the purpose of assessee's business, the AO is justified in disallowing such expenditure. We donot see any infirmity in the said findings of the Id CIT(A). Hence, the ground taken by the assessee is dismissed.

22. In ground No. 7, the assessee has challenged the confirmation of disallowance of depreciation of Rs. 12,075/- on fridge debited in the profit and loss account. During the assessment proceedings, the assessee was asked to furnish the documentary evidence in support of addition made in fixed asset however, in absence of any bills towards the purchase of the fridge, the claim of the depreciation was disallowed. During the appellate proceedings, the Id. CIT(A) has returned a finding that the assessee has not been able to discharge the onus of providing the details of putting to use the asset during the year, therefore he confirmed the disallowance of depreciation of Rs. 12,075/-. We do not see any infirmity in the finding of the Id. CIT(A). Hence, the ground taken by the assessee is dismissed.

In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 06/07/2018.

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 06/07/2018.

***Santosh**

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

1. अपीलार्थी / The Appellant- M/s Somya Priya Infrastructure, Behror.
2. प्रत्यर्थी / The Respondent- ITO, Ward, Behror.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 803/JP/2017 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar