

**आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI  
BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1624/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2013-14

M/s. G.M/ Bijlani Construction Pvt. Ltd. 103, A.N, Chambers, Turner Road, Bandra(W), Mumbai 400001.	<b>बनाम/</b>  v.	ACIT 12(2)(2) Aayakar Bhavan Mumbai 400020
स्थायी लेखा सं./ PAN : AAACG8649J		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Assessee by:		Shri. R.W. Raheja
Revenue by :		Shri T.A. Khan

सुनवाई की तारीख /**Date of Hearing** : 23.07.2018

घोषणा की तारीख /**Date of Pronouncement** : 23.07.2018

**आदेश / O R D E R**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 1624/Mum/2017, is directed against appellate order dated 04.11.2016 passed by learned Commissioner of Income Tax (Appeals)-20, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2013-14, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 29.12.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2013-14.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

*“1. The learned CIT (A) has erred in up holding the disallowance of expenditure incurred of Rs. 9,15,043/- paid to M/s K.G.N. Enterprises. The expenditure incurred is genuine and appellants had produced the necessary evidence available with them.*

*2. The appellants crave leave to add, to alter to amend or delete any of the grounds of appeal. If any, on or before the date of hearing.”*

3. The brief facts of the case are that the assessee is civil contractor . The assessee has during the year earned Revenue from operations of Rs.19,48,64,426/- and after claiming expenses, income declared was Rs. 1,25,44,260/- . The case was selected for scrutiny for framing assessment u/s 143(3) of the Act. The expenses claimed by the assessee stood allowed by the AO , except expenses to the tune of Rs. 99,680/- towards telephone charges, conveyance & Travelling expenses , Mess charges and Misc. Site expenses which expenses stood disallowed by the AO on ad-hoc basis owing to possibility of personal expenses . Further there was disallowance of expenditure to the tune of Rs. 9,15,043/- u/s 69C of the Income-tax Act,1961 with respect to the payments made by assessee to contractor M/s. K.G.N. Enterprises for plaster work done by this party for the assessee. During the course of assessment proceedings conducted by the AO u/s 143(3) r.w.s. 143(2) of the 1961 Act , the AO for verification purposes issued notices u/s. 133(6) to M/s K.G.N. Enterprises which returned un-served and the current details/whereabouts of this parties could not be furnished by the assessee and also the said party namely M/s K G N Enterprises could not be produced by the assessee before the AO. It was submitted by the assessee that this party did plaster work for assessee and the party left the work in between and the current whereabouts of these parties are not known. The assessee submitted that payments were made by crossed account payee cheques and income-tax was also deducted at source(TDS) as provided under the provisions of the 1961 Act from the payments made to this party. The details of Income-tax PAN of the said party, TDS certificates, ledger account of this party and bank statement was duly submitted but the AO was not satisfied and the additions were made by the AO to the income of the assessee by disallowing these expenses to the tune of Rs.9,15,043/- vide assessment order dated 29.12.2015 passed by the AO u/s 143(3) of the 1961 Act.

4. Aggrieved by the assessment order dated 29.12.2015 passed by the AO u/s 143(3) of the 1961 Act, the assessee filed first appeal before the learned CIT(A) but without success as learned CIT(A) rejected the contentions of the assessee and upheld the additions as were made by the AO, vide appellate order dated 04-11-2016 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 04-11-2016 passed by learned CIT(A) , the assessee has filed an second appeal with the tribunal . It is vehemently and strenuously argued by learned counsel for the assessee that the said contractor namely K G N Enterprises did plaster work for the assessee and amount of Rs. 9,15,043/- was paid by crossed account payee cheque and bank statements were furnished before the authorities below which are also enclosed in the paper book filed with the tribunal. It was submitted by learned counsel for the assessee before the tribunal that income-tax was also deducted at source by the assessee on the payments of Rs. 9,15,043/- made to the said party namely K G N Enterprises in accordance with the applicable provisions of the 1961 Act. TDS certificates in form no. 16A issued by the assessee to the said party are also enclosed in paper book filed with the tribunal. It is also submitted that the total payment for expenses exceeded an amount of Rs. 18 crores during the previous year relevant to the impugned assessment year which stood allowed in scrutiny proceedings by the AO vide assessment order dated 29-12-2015 passed u/s 143(3) and this payment of Rs. 9,15,043/- which was paid through crossed account payee cheque to contractor for carrying out the plaster work done was disallowed without any incriminating material on record. It is submitted by learned counsel for the assessee that the said party namely M/s K G N Enterprises left the painting work in between and the party is not traceable. Ledger accounts of the said party in the books of the assessee are enclosed along with bank statements and TDS certificates . It was submitted that the Income Tax Permanent Account number and addresses of the said party as per records with the assessee was duly supplied before the authorities below and the AO/learned CIT(A ) could have traced the said party by mining their IT data base as the said party is assessee with the IT Department. The reliance was placed on the decision of Hon'ble Supreme Court in the case of CIT v. Orissa Corporation Private Limited reported in (1986)159 ITR 78(SC). It was submitted by learned counsel for the assessee that apart from issuing

notice u/s 133(6) , no effort was made by Revenue to trace the said party despite having completed details on their records as even data mining from current data base with Revenue was not done to trace/locate the said party. It was submitted that in the preceding year also payments were made to the said party namely M/s K G N Enterprises which was allowed by the AO in assessment framed u/s. 143(3) of the Act , vide assessment order dated 11.02.2015 which is filed in the paper book filed with the tribunal. The copies of bank statements , TDS certificates for the preceding years are also enclosed in the paper book filed with the tribunal. Thus it was submitted that merely because the party could not be produced or notices u/s 133(6) returned un-served , the assessee cannot be penalised for no fault of it.

6. The Ld. DR on the other hand relied upon the order of the authorities below.

7. We have considered rival contentions and perused the material on record . We have observed that assessee is contractor. The assessee has earned Revenue from Operations to the tune of Rs. 19,48,64,426/- during the previous year relevant to the impugned assessment year and has declared income of Rs. 1,25,44,260/- in the return of income filed with the Revenue. The assessment has been framed by the AO u/s. 143(3) of the 1961 Act wherein ad-hoc disallowance have been made of expenses aggregating to Rs. Rs. 99,680/- towards Telephone charges, Conveyance and Travelling expenses, Mess charges and Miscellaneous Site Expenses. The assessee has not challenged this addition of Rs. 99,680/- as was made by the AO in appellate proceedings , which has now attained finality. The dispute between rival parties is with respect to disallowance of expenses of Rs. 9,15,043/- made by the AO which was later confirmed by learned CIT(A) with respect to payments made by the assessee to K.G.N. Enterprises claimed to be towards plaster expenses on the grounds that the said party is not traceable and notices issued u/s. 133(6) of the 1961 Act by the AO to the said party has returned un-served . It is pertinent to mention that expenses exceeding Rs. 18 crores as was claimed as deduction in the return of income filed with the Revenue stood allowed by the AO itself in scrutiny assessment framed u/s 143(3) of the 1961 Act. Coming back to the aforesaid disallowance of expenses to the tune of Rs. 9,15,043/-, the assessee could

not furnish the current details/addresses as well whereabouts of this party nor the assessee could produce the said party namely K G N Enterprises before the AO . The assessee has submitted that the said party left the plaster work in between and whereabouts of the said party are not known. The assessee has however submitted Income-tax PAN as well name of proprietor as well address of the said party as was existing in its records. The ledger account of the said party in the books of accounts of the said party was submitted and the payments were made by cheque for which copies of bank statements are filed to evidence the same. The income-tax was deducted by the assessee at source as per provisions of the 1961 Act and TDS certificates in form no 16A are filed. The payments were also made in the preceding year to the said party namely K G N Enterprises which stood allowed by the Revenue in assessment framed u/s 143(3) of the 1961 Act. The bank statements of preceding year as well TDS certificates in form no 16A along with assessment order framed by the AO u/s 143(3) is placed on record. There is no incriminating material on record with Revenue apart from the return of notices u/s 133(6) sent by the AO to the said party as well non production of the said party by the assessee before the authorities below. Apart from sending notices u/s 133(6), the authorities below have made no efforts to trace/locate the parties as no efforts to mine existing database with IT department was made by the AO/learned CIT(A), as the Income-tax PAN of the said party was duly furnished by the assessee and the said party is an existing assessee with IT department. The said party K G N Enterprises (Prop. Mansoorali Habeeb Ansari-PAN AOYPA4809D) is an income tax assessee with IT department as he is holding PAN allotted by Revenue. No such report of the AO/learned CIT(A) is on record showing the result of data mining done by them from their existing database which is now available electronically on the touch of computer button. The said data mining could have easily helped revenue in locating the said party. The decision of Hon'ble Supreme Court in the case of Orissa Corporation Private Limited(Supra) is relevant. We have observed that the assessee has earned revenue from operations of Rs. 19,48,64,426/- as per audited financial statements and income to the tune of Rs. 1,25,44,260/- was declared in the return of income filed with the Revenue. The expenses exceeding Rs. 18 crores as was claimed as deduction from income stood allowed by the AO in scrutiny assessment framed u/s 143(3). Keeping in view peculiar factual

matrix of the case and material on record and also keeping in view smallness of the amount involved on the touchstone of preponderance of probabilities , we are of the considered view that the assessee did discharged its burden by bringing on record all necessary details and no addition to the income of the assessee by way of disallowance of expenses to the tune of Rs. 9,15,043/- w.r.t. payments made to K G N Enterprises for plaster work is warranted merely based on suspicious and only ground that notices u/s. 133(6) returned unserved in the absence of other incriminating evidence in the possession of AO which could substantiate that this payments were bogus and merely accommodation entries were taken is not sufficient to discredit the version of the assessee . The payments were made to said party for plaster work which is directly related to business of the assessee and similar payments made to the said party in preceding year stood allowed by the AO itself in scrutiny assessment framed u/s 143(3) of the 1961 Act. Suspicion howsoever strong cannot take the place of proof is cardinal rule of jurisprudence. Thus, based on our above detailed discussions and reasoning, we are ordering for deletion of aforesaid additions to the tune of Rs.9,15,043/- as was made by the AO and later confirmed by learned CIT(A). The assessee succeeds in this appeal. We order accordingly.

8. In the result , appeal filed by the assessee is allowed.

order pronounced in the open court on 23.07.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.07.2018 को की गई ।

Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER

Sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 23 .07.2018

*Nishant Verma*  
*Sr. Private Secretary*

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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**BY ORDER**

**DY/ASSTT. REGISTRAR  
ITAT, MUMBAI**