

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2302/MUM/2017
Assessment Year: 2008-09**

K.S. Softnet Solutions NCC JV 57-58, Mhada Commercial Complex, New Link Road, Oshiwara, Jogeshwari (W), Mumbai-400102 PAN No. AAAAK6344C	Vs.	ACIT-24(1) Mumbai
Appellant		Respondent

Assessee by	:	Mr. Rohan Deshpande, AR
Revenue by	:	Mr. Manoj Kumar Singh, DR

Date of Hearing	:	30/07/2018
Date of pronouncement	:	08/08/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-42, [in short 'CIT(A)'] Mumbai and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal read as under:

1. In the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming the disallowance of Rs.44,38,520/- made by the AO.
2. The CIT(A) has failed to appreciate that the expenses were genuine.

3. The CIT(A) has failed to appreciate that the appellant has discharged its onus of proving the genuineness of the expenditure.

3. Briefly stated, the facts of the case are that the assessee/appellant filed its return of income for the assessment year (AY) 2008-09 on 30.09.2008 declaring total income of Rs.24,48,570/-. The appellant is an association of persons formed for executing the specific project of development of interstate border check post in the state of Madhya Pradesh.

During the course of assessment proceedings, the Assessing Officer (AO) issued notice u/s 133(6) to Shanti Infraways Pvt. Ltd. (SIPL) on the address given by the assessee, but the same was returned unserved by the postal department with a remark that 'no such firm/person in this address'. Thereafter, the AO issued a letter dated 08.10.2010 to the appellant communicating the above remark of the postal authorities and then asking him to file the correct current address of the concerned party or produce the party for verification. However, the assessee neither submitted the current new address nor produced the party for verification. The AO observed that the fresh address given by the assessee in the submission dated 18.10.2010 is same which was given earlier. In the submission filed before the AO, the assessee had filed copies of two bills which are just computer generated bills without any invoice number, service tax number etc. The AO did not agree with the contentions of the assessee that these are running bills and therefore, not required to have invoice number etc. The AO also noted that even in their submission dated 27.10.2010, the assessee has not

furnished the final bills of SIPL so as to prove the genuineness of the work done. The AO noted that the assessee failed to produce any written agreement for allotment of work and subsequent termination of the contract for verification.

In view of the above findings, the AO held that the bills produced by the assessee lack evidentiary value and cannot be accepted as such. As the assessee failed to discharge the onus cast on it, the AO made a disallowance of Rs.44,38,520/-.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) called for a remand report from the AO. After receipt of the said report from the AO, he furnished a copy of it to the assessee for its comment. The assessee filed a reply before him on 25.11.2016. The Ld. CIT(A) observed that (i) all the correspondence produced by the assessee is the one written by the assessee itself and there is no document from the side of SIPL, (ii) there is no contract available with the assessee containing the terms of the contract, the exact specifications of the project, the quality of the project, (iii) the assessee has produced only a letter of acceptance issued by it to SIPL, (iv) there is no details of the construction plans, the quality of the material to be used, the length of the roads to be constructed etc., (v) there is no mention of any bill of quantities (BOQ), which is a standard requirement in construction contracts, (vi) it is improbable that a price can be fixed for the contract without mentioning the specifications of the contract.

It was the contention of the assessee that the detailed project report (DPR) of the project along with the drawings and bill of quantity as well as the system requirement study has been made/prepared by M/s K.S. Softnet Solutions Pvt. Ltd., a partner of the assessee joint venture (JV). However, as mentioned by the Ld. CIT(A), no such evidence was placed before him.

Referring to the first running bill, the Ld. CIT(A) further observed that it mentions submission of quantity details to MPRDC, Bhopal, but the assessee failed to submit any document on it. There is no invoice number or GST/VAT number etc. and there is no indication that this bill has been vetted by any architect or engineer. The second running bill amounting to Rs.32,77,959/- is also similarly worded.

In view of the above short comings, omissions, inconsistencies and one sided claims of the assessee, the Ld. CIT(A) concluded that the so called check post work done by SIPL is unsubstantiated and unproved. Therefore, the Ld. CIT(A) confirmed the disallowance of Rs.44,38,520/- made by the AO.

5. Before us, Ld. counsel of the assessee files a Paper Book (P/B) containing (i) Work Order for construction of barrier complex received from Madhya Pradesh Government, (ii) Letter of Acceptance for civil construction works given to Shanti Infraways Pvt. Ltd., (iii) Running Bills received from M/s Shanti Infraways Pvt. Ltd., (iv) Cancellation of Civil Works Order given to M/s Shanti Infraways Pvt. Ltd., (v) Details of TDS paid for the financial year 2007-08, (vi) Work completion

certificate, (vii) Copy of Written submission before the ITO 31(2)(2) dt. (with Annexure).

Reliance is placed on the order of the ITAT 'F' Bench Mumbai in the case of *M/s Geolife Organics v. ACIT & Ors.* (ITA No. 3699/Mum/2016) for the AY 2009-10.

The Ld. counsel submits that the appellant is an association of persons, formed on 01.12.2005 for undertaking and executing construction contracts for development of interstate barrier check post complexes in the state of Madhya Pradesh. The association of person is consisting of two companies namely, K.S. Softnet Solutions Pvt. Ltd. and Nagarjuna Construction Company Ltd. There were two contracts awarded by Madhya Pradesh Road Development Corporation in the year 2006-07, one at Multai and another at Burhanpur. The work on the projects commenced during the financial year 2007-08 (AY 2008-09), thus this is the first year of assessment.

The Ld. counsel further submits regarding subcontract to SIPL that the same was awarded to them for carrying out certain works *vide* letter of acceptance dated 04.09.2006. They were given advances on various dates during FYs 2006-07 and 2007-08. A total sum of Rs.21,91,280/- was paid to them during the FY 2007-08. Whatever work they carried out till May-June 2007, they submitted two statements (running bills), one for Rs.15,70,356/- and another of Rs.38,12,342/-. These bills were approved for Rs.14,13,323/- and Rs.27,67,193/- on 05.04.2007 and 08.06.2007 respectively. Thus, while a sum of

Rs.53,82,698/- was claimed by the subcontractor as per his calculation of work in progress, the total amount approved was Rs.41,80,516/- only. However, as the work was going on, advances to the tune of Rs.43,91,280/- were given and a total sum of Rs.47,240/- was also paid by way of TDS. Meanwhile, disputes arose between the Quality Control Department of the appellant and the subcontractor, the work was found of substandard or not to the satisfaction of the set standards and also not in accordance with the terms of the contract. The dispute ultimately resulted in abrupt termination of subcontract. This resulted into no talks between the parties, no settlement of accounts and no co-operation, whatsoever. The Ld. counsel submits that in such circumstances, the party did not respond to the notices issued by AO u/s 133(6) of the Act.

Finally, the Ld. counsel submits that the appellant had furnished before the AO the complete address of SIPL, to whom payments were made during the relevant accounting period. All the payments were made by account payee cheques. Tax was deducted at source from such payments and deposited in the Government accounts. Thus it is submitted that the appellant had discharged his burden of proof.

Thus the Ld. counsel submits that the AO disallowed the expenditure on mere suspicion. The AO should have realized that the expenses incurred by the appellant were genuine business expenditure. It is stated by him that the Ld. CIT(A) failed to appreciate that the AO has not brought on record any material to show that the appellant's averments are untrue.

6. On the other hand, the Ld. DR submits that all the correspondence produced by the assessee is the one written by the assessee itself and there is no document from the side of SIPL. Also the appellant failed to produce before the Ld. CIT(A) the relevant contract containing the terms, specifications etc. The appellant could produce before him only a letter of acceptance issued by it to SIPL. The running bill does not mention any date and carries no signature. There is no invoice number or GST/VAT number etc. Further, the notices issued by the AO to SIPL u/s 133(6) were returned back by the postal authorities with the remark “no such firm/person on this address”. In response to a query raised by the AO during the course of assessment proceedings, the appellant failed to file the current new address of SIPL.

With the above submissions, the Ld. DR submits that the so called check post work done by SIPL is unsubstantiated and unproved. Thus it is submitted by him that the order of the Ld. CIT(A) confirming the disallowance of Rs.44,38,520/- made by the AO be confirmed.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *M/s Geolife Organics* (supra), relied on by the Ld. counsel, the Tribunal held that the disallowance made by estimating further profit of 12.5% earned by the assessee is not sustainable in law and facts and restricted the disallowance to 2% of such purchases.

In the instant case, the fact remains that the notice issued by the AO u/s 133(6) to SIPL on the address given by the assessee was

returned back by the postal authorities with a remark “no such firm/person in this address”. Thereafter, the AO *vide* letter dated 08.10.2011 informed the above matter to the assessee and asked to submit correct current address or produce the party for verification. However, the assessee neither submitted the new current address of SIPL nor produced the party for verification. As observed by the AO, the fresh address given by the assessee in its submission dated 18.10.2010 is the same which was given earlier. It is the finding of the AO that the assessee filed copies of two bills which are just computer generated bills without any invoice number, service tax number, GST/VAT No.

We find from the P/B filed by the appellant that the assessee had filed before the AO *vide* its letter dated 13.10.2016 during the course of remand proceedings the following documents

1. Copy of A/c of M/s Shanti Infraways Private Limited, in its books for the period 01-04-07 to 31-03-08.
2. Copy of bank statement (Bank of Maharashtra), in which the entries in respect of payments made to the sub-contractor are duly reflected.
3. Copy of Confirmation of Account from M/s Shanti Infraways Private Limited.
4. Copy of TDS ledger showing TDS deducted from time to time on payments made to sub-contractor.
5. Copy of Letter of Acceptance for work to be carried at Betul & Burhanpur from MPRDC, Bhopal.

6. Copy of first running bill of Rs.1570356/- (final amount 1413323) and second running bills of Rs. 3812342/- (final amount Rs.2767193/-) received from the sub-contractor.

Thus taking into account the facts and circumstances of the case, we direct the AO to restrict the disallowance to 10% of the sub-contract charges of Rs.44,38,520/- paid to SIPL.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 08/08/2018.

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

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 08/08/2018

Rahul Sharma. Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai