

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'B' KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Dr.A.L.Saini, AM]

ITA No.1009/Kol/2015
Assessment Year : 2010-11

I.T.O., Ward-33(2)
Kolkata

-versus-

M/s. Jay Bharat Construction
Kolkata

(PAN: AADFJ 7557 J)

(Appellant)

(Respondent)

For the Appellant: Shri Goulen Hangshing, CIT, DR

For the Respondent: Shri M.D.Shah, AR

Date of Hearing : 30.07..2018.

Date of Pronouncement : 24.08.2018.

ORDER

PER S.S.GODARA, JM:

This Revenue's appeal for A.Y.2010-11 arises against the CIT(A)-9, Kolkata's order dated 12.03.2015 passed in Appeal No.64/CIT(A)-9/Cir-33/2014-15/Kol, involving proceedings u/s 143(3) of the Income Tax Act, 1961 (Act).

Heard both the parties. Case file perused.

2. The Revenue has raised three substantive grounds in the instant appeal in inter alia pleading the CIT(A) has erred in directing the Assessing Officer to restrict the addition of Rs.7,84,28,827/- to Rs.13,60,158/- thereby estimating the tax payer's profit @ 12% and in further concluding that section 40(a)(ia) of the Act does not apply in the given facts of the case; respectively. Learned Representatives take us to the CIT(A)'s detailed common discussion qua these three issues reading as under :-

“ 6- Ground no. (ii) to (iv) relate to the contention of the appellant against disallowance of Rs.7,82,12,027/- which was claimed on account of transport expenses. The fact of the case is that the AO observed that the appellant made partial compliance and did not produce books of account during the assessment proceedings, he found that the appellant was engaged as a civil contractor and had also shown income of Rs 8,75,71,214/- from transport business and against this income they claimed an expenditure of Rs.7,84,28,827/-. The AO observed that the appellant had claimed expenditure of 89.56% to the income shown. The

partnership deed did not mention Transport as one of its business, the appellant had never in the past done transport business, and they failed to produce any details, regarding transport expenses and in view of such circumstances the AO held that the expenses could not be accepted as genuine and held that there was all possibility that the transport expenditure was accommodation entry to nullify the transport income. He also found that the firm had no infrastructure to provide transport service and therefore he concluded that the transport expenditure was bogus. He also observed that the transport expenditure was liable to TDS and hence the same was to be disallowed u/s 40(a)(ia) of the IT Act 1961. However, the appellant submitted that as it was a fact on record that it did not have trucks to execute the work and if the transaction was to be held genuine then the appellant had to take trucks on hire otherwise it would be impossible to render the transport services. The appellant also submitted that it had shown a net income of Rs. 91,42,387/- (Rs 8,75,71,214 – Rs.7,84,28,827) which worked out to 10.44% of gross margin on transport and such margin was more than reasonable in the line of business. They further submitted that as the bills, vouchers and details of the transport expenses were not produced and the AO had held the expenditure to be bogus then the question of disallowance u/s 40(a)(ia) of the Act could not apply. The appellant also submitted that under the Income Tax Act only real income could be assessed and hence the income from transport business if held genuine then the real income should be estimated and if the transport business was held to be bogus then the income and expenditure be excluded. After going through the facts and circumstances of the case, :submission of the appellant and perusal of the assessment order, I find that the appellant had disclosed a net income of Rs.91,42,387/- (Rs. 87571214- Rs 78428827) which worked out to 10.44% of the gross receipts. I also find that once the AO has held the transport expenditure to be bogus then there cannot be any basis to make disallowance u/s 40(a)(ia) of the Act. This is because in order to disallow expenditure u/s 40 (a)(ia) the expenditure should first be allowable u/s 30-38 of the IT Act 1961. When the AO himself found that the appellant did not produce books/details and he rejected the details given by the appellant related to the impugned expenditure by holding the same to be nongenuine. In such circumstances, the disallowance u/s 40(a)(ia) was not applicable in the facts of this case as the expenses were not held to be genuine with regards to the transport business. There is merit in the argument of the appellant that when they did not have their own trucks then it was not possible to conduct the transport business and achieve a turnover of Rs.8,75,71,214/-. The AO has in fact treated the entire receipts from transport business as income. He failed to appreciate that the tax is to be determined on income and not turnover. In order to provide transport service the appellant would have to hire trucks from third parties. However, in absence of books of account and supporting bills/vouchers and records the income from the transport business had to be estimated. The appellant has disclosed a profit of 10.44% with respect to the transport business. After careful consideration of the facts and circumstances of the case, I am of the view that when books of account are not found to reliable and all the expenses were found to be non genuine then

disallowance u/s.40(a)(ia) is not called for. In that situation it would be proper to reject books of account and estimate the profit as provided u/s.144 of the I.T. Act. In this case, since, the entire transport business was claimed to have been carried out through hired trucks and not through own trucks, therefore, it would be reasonable in the interest of natural-justice that the profit is estimated at 12% as against the addition made by the AO of the entire turnover, thereby, the AO is directed to make addition of Rs.13,60,158/- (Rs.1,05,08,545 - Rs.91,42,387) and the balance addition is directed to be deleted. This ground is partly allowed. “

3. .Learned Departmental Representative vehemently contends that the Assessing Officer had rightly disallowed assessee's expenditure claim of Rs.7,84,28,827/- and correctly applied section 40(a)(ia) of the Act. We find no merit in either of these submissions. The fact remains that the Assessing Officer had himself accepted and assessed assessee's total turnover of Rs.8,75,71,214/- to have been derived from transport business. He thereafter disallowed its corresponding transport expenditure amounting to Rs.7,84,28,827/- to be not proved as genuine. Learned Departmental Representative fails to dispute the clinching fact that this assessee is in transport commission agent business rather than owning vehicles of its own. That being the case, it was very much necessary for the tax payer to engage other lorries for transportation of goods. This is therefore a case of accepting correctness of the entire receipts as income and disallowing the entire expenditure claim which is not permissible in our considered opinion. The CIT(A) has estimated assessee's profit @12% these peculiar circumstances only by exercising his co-terminus powers as well as to that of the Assessing Officer the first appellate jurisdiction as well. Needless to say, the assessee's books admittedly stood rejected. The CIT(A) has correctly appreciated the entire facts thereafter in holding that section 40(a)(ia) pre-supposes genuine business expenditure which cannot go side by side to an instance involving rejection of books. We thus affirm CIT(A)'s well reasoned findings. The Revenue fails in all of its three folded grounds.

4. This Revenue's appeal is dismissed.

Order pronounced in the Court on 24.08.2018.

Sd/-
[Dr.A.L.Saini]
Accountant Member

Sd/-
[S.S.Godara]
Judicial Member

Dated : 24.08.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1.M/s Jay Bharat Construction, 11, Clive Row, Kolkata-700001.

2. I.T.O., Ward-33(2), Kolkata.

3. C.I.T.(A)-9, Kolkata 4. C.I.T-11, Kolkata

5. CIT(DR), Kolkata Benches, Kolkata.
True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O, ITAT Kolkata Benches