

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH : KOLKATA

[Before Hon’ble Shri A T Varkey, JM, & Shri M.Balaganesh, AM]

I.T.A No. 2255/Kol/2016

Assessment Year : 2012-13

Prabhakar Mishra
[PAN: AEZPM 7452 B]
(Appellant)

-vs- DCIT, Circle-44, Kolkata
(Respondent)

For the Appellant : Shri Anil Kochar, Advocate

For the Respondent : Shri Sandeep Lakra, Addl. CIT Sr. DR

Date of Hearing : 25.09.2018

Date of Pronouncement : 24.10.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals)-13, Kolkata [in short the Id CIT(A)] in Appeal No. 1131/CIT(A)-13/Kol/Cir-44/2014-15 dated 08.08.2016 against the order passed by the DCIT, Circle-44, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 27.02.2015 for the Assessment Year 2012-13.

2. The first issue to be decided in this appeal is as to whether the Id CITA was justified in confirming the addition made in the sum of Rs 2,22,42,000/- towards unexplained deposits in bank account, in the facts and circumstances of the case.

2.1. The brief facts of this issue are that the assessee is an individual and had filed his return of income for the Asst Year 2012-13 on 29.9.2012 declaring total income of Rs 14,05,670/-. The assessee is engaged in the business of wholesale and retail business of iron and steel in the name of proprietary concern styled as M/s Universal Trading Corporation. The assessee furnished the Tax Audit Report before the Id AO wherein total sales of Rs 163,59,55,699/- ; gross profit of Rs 2,55,83,199/- during the year. In the immediately preceding year, the assessee had reported gross profit of Rs 1,02,43,110/- on total sales of Rs 108,06,60,762/-. The gross profit rate of this year was 1.56% as against 0.95 % in the preceding assessment year. The Id AO observed that bank statements, bills/vouchers and books of accounts were not produced despite several opportunities granted to the assessee. The assessee was specifically asked to explain the source of huge cash deposits in various banks as per Individual Transaction Statement (ITS) , a copy of which was given to the authorized representative of the assessee at the time of assessment proceedings. The Id AO observed that no explanation was offered regarding the source of cash deposits in bank accounts. The Id AO observed that assessee produced only details of purchase account, sale account, stacking expenses, loading & unloading expenses, carriage inward expenses together with some vouchers relating to the said expenses. The cash book, bank book. Ledger, stock registers were not furnished by the assessee during the assessment proceedings. The Id AO observed that assessee had made cash deposits in savings bank accounts maintained with Union Bank of India, Burra Buzar vide Account No. 416902010005887 and in Oriental Bank of Commerce, R.N.Mukherjee Road , Kolkata vide Account No. 11012151003928. The Id AO observed that the assessee had made deposits as under:-

	UBI	Oriental Bank of Commerce
Cash deposits	52,92,000	2,15,50,000
Cheque deposits	8,42,025	61,41,000

The assessee replied that Rs 19,00,000/- was withdrawn in cash from Union Bank of India and Rs 27,00,000/- from Oriental Bank of Commerce and the balance amount shown as withdrawn from Universal Trading Corporation . But no evidence of this amount shown as withdrawn from Universal Trading Corporation i.e. cash book., sale bills, detailed capital account, name and address of the parties with their complete correspondence address, PAN, copy of acknowledgement of income tax returns who have made payments to assessee in cash, were filed for verification. In the absence of any explanation from the assessee corroborated with books of accounts and supporting documents, the ld AO show caused the assessee as to why the assessment should not be framed u/s 144 of the Act by treating the unexplained deposits in bank accounts as income of the assessee, among other issues. The ld AO accordingly sought to accept the cheque deposits as genuine and part of business proceeds. He however proceeded to add the cash deposits in savings bank accounts to the tune of Rs 2,22,42,000/- (2,68,42,000 – 46,00,000) after giving credit for cash withdrawals of Rs 46,00,000/- .

2.2. Before the ld CITA, the assessee submitted that he had from time to time made withdrawals from the proprietary concern M/s Universal Trading Corporation which are duly recorded in the books of proprietary concern as withdrawals by the assessee and that the same were deposited in the personal savings bank accounts of the assessee. Thereafter cheques were issued by the assessee to a partnership firm M/s R.J.Mishra & Co. , where he is a partner. The assessee furnished the following documents before the ld CITA :-

- a) Details of cash withdrawals from the personal books stating date and amounts.
- b) Deposits made in bank accounts which are duly referable to the bank statements.

c) Withdrawals made from the bank accounts for depositing in assessee's capital account with M/s R.J.Mishra & Co. where the assessee is a partner.

2.3. The ld CITA called for a remand report from the ld AO. The ld CITA observed that the assessee had introduced capital in firm M/s R.J.Mishra & Co. to the extent of Rs 2,02,15,374/-. The income tax assessment of M/s R.J.Mishra & Co. was made and the source of capital introduced by assessee was examined and treated as unexplained and accordingly, addition was made in the hands of the firm. The ld CITA held that assessee could not properly explain the sources of cash deposits and accordingly confirmed the addition. Aggrieved, the assessee is in appeal before us.

2.4. We have heard the rival submissions. We find that the ld CITA had relied on the remand report furnished by the ld AO wherein the assessment framed in the hands of a partnership firm M/s R.J.Mishra & Co. regarding the capital contribution made therein by the assessee was discussed. The ld AR stated that no addition is required to be made in the instant case as the entire cash deposits are explainable by way of withdrawals from proprietary concern. He also pleaded that the entire transactions of assessee including its proprietary concern vis a vis the capital account of M/s R.J.Mishra & Co. are to be kept together and the issue before us is to be looked into. Accordingly he prayed for setting aside of this issue to the file of ld AO. The ld DR fairly agreed for the setting aside to the file of ld AO. Hence in the interest of justice and fairplay, we deem it fit and appropriate, to remand this issue to the file of ld AO for denovo adjudication of the issue and decide the same uninfluenced by earlier decision taken in this regard. Accordingly, the Grounds 3 & 4 raised by the assessee are allowed for statistical purposes.

3. The next issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the disallowance of interest in the sum of Rs 26,51,363/- in the facts and circumstances of the case.

3.1. The brief facts of this issue are that the Id AO observed that the assessee had paid interest on loans and claimed the same as deduction in the profit and loss account. On the other hand, he has advanced interest free loans and advances to various persons. Accordingly the Id AO disallowed interest u/s 36(1)(iii) of the Act on proportionate basis in the sum of Rs 26,51,363/- to the extent of amounts advanced to various persons free of interest. Before the Id CITA, the assessee pleaded it had sufficient interest free funds at its disposal and that interest free advances were given to various persons not out of interest bearing funds. Hence he pleaded that no disallowance of interest u/s 36(1)(iii) of the Act in the facts of the instant case. The details of interest free funds available with the assessee and interest free advances given to various parties are as under:-

Capital Account	- Rs	15,42,800
Advance from Customers	- Rs	30,29,75,034

Interest free advances given by assessee - Rs 17,48,29,409

The assessee also pleaded that both borrowed funds and own funds (interest free funds) are inextricably mixed in the same bank account and it would be difficult to identify whether the interest free advances were given by the assessee out of interest bearing funds or out of own funds. The Id CITA placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs Abhishek Industries Ltd reported in 286 ITR 1 (P&H HC) and Hon'ble Delhi High Court in the case of Punjab Stainless Steel Limited reported in 324 ITR 396 (Del) and upheld the action of the Id AO. Aggrieved, the assessee is in appeal before us.

3.2. We have heard the rival submissions. At the outset, we find that the assessee is having sufficient interest free funds at its kitty as is evident from the balance sheet of the assessee. Since the interest free funds available with the assessee is much more than interest free advances given by the assessee, there could be no disallowance of interest u/s 36(1)(iii) of the Act. Reliance in this regard has been rightly placed on the decision of Hon'ble Supreme Court in the case of Munjal Sales Corpn vs CIT reported in 298 ITR 298 (SC) ; S A Builders Ltd vs CIT reported in 288 ITR 1 (SC) ; Hon'ble Jurisdictional High Court in the case of CIT vs Britannia Industries Ltd reported in 280 ITR 525 (Cal) ; Hon'ble Bombay High Court in the case of CIT vs Reliance Utilities and Power Ltd reported in 313 ITR 340 (Bom) ; Hon'ble Gujarat High Court in the case of Principal CIT vs India Gelatine and Chemicals Ltd (2015) 376 ITR 553 (Guj) ; Hon'ble Andhrapradesh High Court in the case of CIT vs Gopalakrishna Muralidhar reported in 47 ITR 469 (AP) ; Hon'ble Jurisdictional High Court in the case of Woolcombers of India Ltd vs CIT reported in 134 ITR 219 (Cal) ; Hon'ble Madras High Court in the case of CIT vs Hotel Savera reported in 239 ITR 795 (Mad) and Hon'ble Gujarat High Court in the case of Shree Digvijay Cement Co. Ltd vs CIT reported in 138 ITR 45 (Guj), among others. Respectfully following the ratio laid down in the said judicial precedents, we direct the ld AO to delete the disallowance of interest u/s 36(1)(iii) of the Act in the sum of Rs 26,51,363/- . Accordingly, the Ground No. 5 raised by the assessee is allowed.

4. The next issue to be decided in this appeal is as to whether the ld CITA was justified in confirming the disallowance of Rs 41,36,742/- on estimated basis in the facts and circumstances of the case.

4.1. The brief facts of this issue are that the ld AO observed that during the course of assessment proceedings, the assessee filed certain vouchers in respect of carriage inward

expenses , loading and unloading expenses and stacking charges. The Id AO observed that those vouchers were prima facie defective as it appeared to have been prepared on a single day. The assessee had debited in its Trading and P&L Account , the following major expenses :-

Carriage inward	- Rs 1,19,85,006/-
Loading & Unloading expenses	- Rs 90,12,594/-
Stacking Charges	- Rs 2,03,69,825/-

The Id AO observed that :-

- a) The vouchers submitted by the assessee did not contain the address of the payees, their contact numbers etc.
- b) The vouchers did not contain any serial numbers. Moreover, these amounts were less than Rs 20,000/- on a single day to avoid the rigours of provisions of section 40A(3) of the Act.
- c) The vouchers do not contain any vehicle number etc.

All these factors prove that these expenses can never be verified by any authority. The Id AO observed that no reply was filed by the assessee in this regard and accordingly proceeded to disallow 10% of aforesaid expenditure in the sum of Rs 41,36,742/- in the assessment. This was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

4.2. We have heard the rival submissions. We find that the assessee had not furnished any documentary evidences to prove the genuineness of expenditure before the Id AO in the original assessment proceedings or in the remand proceedings. Even before us, no further documents were submitted by the assessee. We also find that the assessee had not furnished any books of accounts before the Id AO despite several opportunities. Accordingly, there is no question of rejection of any books of accounts. We find that the Id AO having found some defects in the vouchers submitted by the assessee in

respect of aforesaid expenditure partially, decided to estimate the disallowance at 10% of such expenditure which in our considered opinion, seems to be reasonable. Hence we hold that the Id CITA was justified in upholding the disallowance of 10% of such expenditure on an estimated basis in the peculiar facts of the instant case. Accordingly, the Ground No. 6 raised by the assessee is dismissed.

5. The last issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the disallowance u/s 40(a)(ia) of the Act in the sum of Rs 5,91,594/- for violation of provisions of section 194C of the Act in the facts and circumstances of the case.

5.1. The Id AO observed that the assessee paid stacking charges of Rs 5,91,594/- to Shri Arjun Yadav on various dates during the year. Since the total amount paid in aggregate exceeds the limit prescribed u/s 194C of the Act, the assessee is bound to deduct tax at source thereon, for violation of which, the Id AO disallowed the expenditure of Rs 5,91,594/- u/s 40(a)(ia) of the Act. Before the Id CITA, the assessee submitted that there is no contractual agreement in the matter which would give rise to the disallowance as made by the Id AO on account of non-deduction of TDS. Accordingly, it was pleaded that section 194C per se is not applicable to the facts of the instant case. This was rejected by the Id CITA as no evidence was submitted by the assessee to prove his contentions. Aggrieved, the assessee is in appeal before us.

5.2. We have heard the rival submissions. It is not in dispute that the assessee had not furnished any evidence to prove that there was no existence of any contract between him and Shri Arjun Yadav enabling payment of stacking charges. Before us, the Id AR argued that let this issue be restored back to the file of Id AO to verify the fact of inclusion of the subject mentioned receipts in the income of the payee (i.e Shri Arjun Yadav) and once it is done, the assessee should not be fastened with disallowance u/s

40(a)(ia) of the Act in the light of second proviso to section 40(a)(ia) read with section 201(1) of the Act which although was introduced by the Finance Act 2012 has been held to be retrospective in operation by the decision of *Hon'ble Jurisdictional High Court in the case of Principal CIT vs Tirupati Construction – GA No. 2146 of 2016 with ITAT No. 287 of 2016 dated 23.8.2016*. Hence in the interest of justice and fair play, we deem it fit and appropriate to remand this issue to the file of Id AO for de novo adjudication in the light of second proviso to section 40(a)(ia) read with section 201(1) of the Act. The assessee is also at liberty to furnish additional evidences , if any, in support of his contentions. Accordingly, the Ground No. 7 raised by the assessee is allowed for statistical purposes.

6. The Grounds 1 , 2 & 9 raised by the assessee are general in nature and does not require any specific adjudication.

7. The Ground No. 8 raised by the assessee regarding the disallowance u/s 40A(3) of the Act was stated to be not pressed by the Id AR at the time of hearing for which necessary endorsement was made in our file. The same is reckoned as a statement from the Bar and accordingly Ground No. 8 raised by the assessee is dismissed as not pressed.

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

Order pronounced in the Court on 24.10.2018

Sd/-
[A T Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 24.10.2018
SB, Sr. PS

Copy of the order forwarded to:

1. Prabhakar Mishra, C/o, S.L. Kochar, Advocate, 86, Canning Street, Kolkata-1.
2. DCIT, Circle-44, Kolkata, 3, Govt. Place West, Kolkata-700001.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches