

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C", KOLKATA
BEFORE SH. M.BALAGANESH, ACCOUNTANT MEMBER &
SH. S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.2154/KOL/2013
(ASSESSMENT YEAR-2006-07)

ITO, Ward-4(2), P-7, Chowringhee Square, Aayakar Bhavan, 8 th Floor, Kolkata-700001.	vs	M/s. Martin Burn Construction Pvt.Ltd., 1, R.N.Mukherjee Road, Kolkata-700001. PAN-AABCH2152C
(Appellant)		(Respondent)
Appellant by		Sh. Saurabh Kumar, Addl.CIT, Sr. DR
Respondent by		Sh. Arvind Agarwal, Advocate & Sh. Rajat Agarwal, ACA
Date of Hearing		18.09.2018
Date of Pronouncement		07.12.2018

ORDER

PER S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

This appeal filed by the Revenue against the order dated 16.04.2013 passed by CIT(A)-IV, Kolkata for AY 2006-07. There is a delay of 04 days in filing the appeal by the Revenue and it is condoned. It is noted that the appeal was filed with a delay of 04 days and after hearing both the parties, we find the reasons stated by the Ld.DR are bonafide, therefore, the delay of 04 days is condoned.

2. According to the AO, the assessee is a company and engaged in the business of Real estate construction.

3. Ground No.1 & 2 raised by the Revenue challenging the action of the CIT(A) in deleting the addition made on account of estimation by holding the books of accounts are correct.

4. Heard both parties and perused the material available on record. During the course of assessment proceedings, the AO found that no expenditure claimed in respect of construction activities regarding an

amount of Rs.1,40,90,883.66 which has been shown as under the head “substructure & superstructure” in work-in-progress. For not giving any satisfactory explanation, the AO rejected the books u/s 145(3) of the Act and estimated the profit at 5% and added an amount of Rs.36,75,000/- to the total income of the assessee.

5. In the impugned order, the CIT(A) observed that sale of commercial portion @ 826.75 per sq.ft., expenditure not claimed under the head “substructure & super superstructure” in profit & Loss account, AS-7, advance received for residential portion not included in sales consideration, discounts offered to parties for making full payments does not justify to reject the books of accounts and estimation of profits thereon, thereby, the CIT(A) held that books of accounts are completed as correct and deleted the addition. We find that the CIT(A) examined the record together with the two remand reports and come to the above conclusion in favour of the assessee. Further, it is observed that the CIT(A) placed reliance on the decision of Hon'ble Supreme Court in the case of *Realest Buildings & Services Ltd. reported in 307 ITR 202 (SC)*. The relevant portion of the order of CIT(A) is reproduced herein below:-

4.7. “In view of the above observation of A.O. and submissions made by the A.R. of the appellant by pursuing the materials on record the grounds Nos. 1 to 7 are decided as under: -

a) Discrepancy of square meter being the basis of apportionment of expenditure as noted by the Assessing officer in assessment order had been fully explained in paragraph 4.8 of the statement of facts duly supported by copy of Conveyance Deed, Architect Certificate, Municipal Completion Plan, Statutory Auditor's Certificate dated 2nd March, 2009 and Architect Clarification Certificate. The appellant company had apportioned the cost of sales at 45.19% of the construction cost as per Profit & Loss Account which is Rs.7,22,82,601.82. On the other hand, if the cost of sales would have been apportioned at 45.3% (as noted by the Assessing officer in the assessment order) the total cost would have been Rs.7,24,56,912.99. On these count I agree with the submissions of the appellant and consider the cost of sales to be apportioned @ 45.19% which has been taken in the Profit & Loss Account, based on which return has been declared by the appellant.

b) The observations of the Assessing officer based on which it was held by him that the completeness and correctness of the

accounts of the appellant were not satisfactory and the books of accounts were rejected have been responded by the appellant at paragraph - 4.10 of the Statement of Facts, which have been reproduced herein before. The sale price of the commercial portion was cost of proportionate land area, sanction plan and foundation work of construction. In other words, it does not include cost of structure, super structure and completion activity being part of construction cost. The Sale Deeds for right to construction of commercial portion clearly demonstrate that the purchaser company was required to incur expenditure for cost of construction towards structure, super-structure and finishing. Therefore, I do not find any discrepancy on this count in the books of accounts.

c) Observations made by the Assessing Officer regarding sale deed of commercial portion @ Rs.826.75 per Sq. ft., expenditure not claimed under the head "substructure & superstructure" in P&L a/c, AS-7, advance received for residential portion not included in sales consideration, discounts offered to parties for making full payments have been fully explained by the appellant. I have considered the observations of the Assessing officer and submissions of the appellant both and conclude that none of these factors contribute to under determination of profit of the appellant. And these reasons do not justify rejection of books of accounts & estimation of Profit in view of the appellants response at paragraph 4.10 of its submissions and statement of acts.

*d) Hon'ble Supreme Court had observed in *cn v. Realest Buildings and Services Ltd.* 307 HR 202 (SC) at para-7 (Pg.204):*

"If the assessing officer comes to the conclusion that there is under estimation of profits, he must give facts and figures in that regard and demonstrate to the court that the impugned method of accounting adopted by the assessee results in underestimation of profits and is therefore rejected. Otherwise, the presumption would be that the entire exercise is revenue neutral. In this case, that exercise has never been undertaken. The Assessing Officer was required to demonstrate both the methods, one adopted by the assessee and the other by the Department.

Observations of the A.O. don't provide the facts and figures in support of methods of accounting adopted by the appellant which had resulted in underestimation of profit for rejection of books of accounts. The A.O. had not demonstrated any method of accounts for correct determination of profit on income. Rather the A.O. had estimated the income based on a percentage of Sales considerations.

*(e) The AO had not identified any Accounting Standard notified u/s.145(2) of the Act which was not followed by the assessee. Hon'ble Supreme Court had observed in *CIT v Padamchand Ramgopal* 76 ITR 719 (Se) that minor mistakes cannot be a ground for rejection of books of accounts.*

(f) In view of the above and after consideration of A.O.'s Remand Report & appellant's comments thereon, it cannot be said that the completeness and correctness of the accounts of the assessee

are not satisfactory. And therefore, the books of accounts of the appellant cannot be rejected u/s. 145(3) of the IT. Act, 1961. Thus the contention of the appellant are found acceptable. The grounds of appeal succeeds. Accordingly, the addition of Rs.36,75,000/- as made by the Assessing officer is hereby deleted."

6. In view of the discussion made herein above and respectably following the decision of Hon'ble Supreme Court in the case of Realest Buildings & Services Ltd. (supra), we find no infirmity in the order of CIT(A) and it is justified. Then, Ground No.1 & 2 raised by the Revenue are dismissed.

7. Ground No.3 raised by the Revenue challenging the action of the CIT(A) in deleting the addition made on account of unexplained cash credit u/s 68 of the Act.

8. Heard both parties and perused the material available on record. The AO held that the assessee failed to prove the identity, creditworthiness and genuineness of the transaction in respect of four parties:- (i) Manak Chand Baid, HUF; (ii) Pashupati Merchandise Pvt.Ltd.; (iii) JSB Business Pvt.Ltd. And (iv) Hamsafar Vyapaar Pvt.Ltd.. The CIT(A) examined the record together with three remand reports and held that all the three ingredients identity, creditworthiness and genuineness of transaction were proved and the addition made thereon is deleted. The relevant portion at para 5.2 & 5.3 are reproduced herein below:-

5.2. "In the remand report the AO had not made any verification from the evidences and details submitted by the appellant through various annexures. On the other hand initially AO declined from making any observation in the remand report on the ground that the additional evidences were not admitted by the CIT (Appeals). However, after receipt of second remand report dated 24th July, 2011 a communication was sent to the AO stating therein that the additional evidences were admitted under Rule 46A. Thereafter the AO had submitted its third remand report dated 10th April, 2012 but again it appears from the remand report that he had not submitted any evidence wherefrom the existence of the share applicants could ever be doubted:. So far as genuinity of transaction is concerned entire transactions were through banking channel which was self-clarificatory from the respective annexures forming part of the

statement of fact. Therefore, the share application transaction appears to be genuine. Lastly, regarding capacity of the share applicants to deposit share application money with the appellant the balance sheet provides sufficient financial capacity of respective share applicants against which no cogent comments were provided by the AO in the remand report. Therefore, the claim of the appellant assessee company about the capacity of the share applicants to deposit share application money with the appellant are found acceptable.

5.3. The annexures to Statement of Facts being Annexures - "M", "N", "O", "P" & "Q" from pages 198 to 256 provide the evidences of the identity of the shareholders and their creditworthiness. On perusal of these documents the genuineness of transactions are also found established. Under these facts and circumstances since all the three factors requiring for share capital creditors have been established by the appellant, the addition of share capital amounting to Rs.32,00,000/- stands explained. Now, there is no need to discuss the applicability of case decisions cited by the appellant in support of its contentions i.e.

Sl.No.	Name	Citation
1.	<i>UT v. Value Capital Services Pvt.Ltd.</i>	<i>(2008) 307 ITR 334 (Del.)</i>
2.	<i>Sky High Properties Pvt. Ltd. v ITO</i>	<i>(2002) 258 HR (A.T.) 98 (ITAT, Delhi)</i>
3.	<i>Exoimp Resources (India) Ltd. v CIT(Cal.)</i>	<i>(2006) 276 MP 87 (C31.)</i>
4.	<i>CIT vs. Steller Investment Ltd.</i>	<i>(2001) 251 ITR 263 (S.C.)</i>

Thus the contentions of the appellant are found acceptable. The ground of appeal succeeds. Accordingly, the addition of Rs.32,00,000/- as made by the Assessing Officer is hereby deleted.

9. The Ld.DR did not bring on record contrary to the findings of CIT(A). Therefore, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground No.3 raised by the Revenue is dismissed.

10. Ground No.4 raised by the Revenue challenging the action of CIT(A) in deleting the addition made on account of bogus sundry creditor.

11. Heard both parties and perused the material available on record. The AO issued notice u/s 133(6) of the Act to M/s. Nivedita Enterprises and the notice was returned unserved with an endorsement "Not known". The AO held that an amount of Rs.9,70,426/- is bogus and added to the total income of the assessee. Before the CIT(A), the assessee submitted copy of trade license, profession tax enrollment

certificate and copy of PAN card relating to M/s. Nivedita Enterprises and the CIT(A) inturn sought remand report from AO. The CIT(A) considering the submissions of the assessee, and remand report deleted the addition made by the AO. The relevant portion of which reproduced herein below:-

6.2. "The appellant had submitted copy of Trade License, Profession tax Enrolment Certificate and copy of PAN Card to prove existence of the creditor M/s. Nivedita Enterprises vide Annexure-"S" to statement of facts in pages 258-261. The appellant had also submitted the copies of relevant Purchases Bills, ledger account, copy of bank statement and confirmation of account by the said creditor vide Annexure "T" to Statement of facts in pages 262-284. All these documents were forwarded to the assessing officer in the appeal proceeding."

12. In view of the above, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground No.4 raised by the Revenue is dismissed.

13. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 07.12.2018.

Sd/-

**(M.BALAGANESH)
ACCOUNTANT MEMBER**

Sd/-

**(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER**

Date:- 07.12.2018

Amit Kumar

Copy forwarded to:

1. Appellant- ITO, Ward-4(2), P-7, Chowringhee Square, Aayakar Bhavan, 8th Floor, Kolkata-700001.
2. Respondent- M/s. Martin Burn Construction Pvt.Ltd., 1, R.N.Mukherjee Road, Kolkata-700001.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT -Kolkata Benches

By order

AR/H.O.O
ITAT, KOLKATA