

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'SMC' BENCH, AHMEDABAD
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS MADHUMITA ROY, JUDICIAL MEMBER
आयकर अपील सं./ITA No.95/AHD/2017
अाधायण वष/Asstt. Year: 2013-2014

M/s Yash Corporation, 410-411, Vrajbhumi Complex, B/h, Shilp Building, C.G. Road, Ahmedabad PAN: AAIFY7520M	Vs.	ITO, Ward-5(2)(4), Ahmedabad.
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(Applicant)	(Respondent)
Assessee by :	Shri Parimal Parmar, AR
Revenue by :	Shri Mudit Nagpal, Sr.DR

सुनवाई का ताराख/Date of Hearing : 05/12/2018
घोषणा का ताराख /Date of Pronouncement: 01/01/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)- 5, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-5/ITO.Wd.5(2)(4)/409/2015-1615, dated 18/11/2016 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 29/02/2011 relevant to Assessment Year (AY) 2013-14.

2. The assessee has raised the following grounds of appeal.

1. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in making an addition of Rs, 19,06,739/- as undisclosed contract receipt and in not appreciating that the said amount did not accrue to the appellant.*
2. *Alternatively and without prejudice to the above, Rs. 19,06,739/- were Liquidated Damages for belated execution of the contract and should be allowed as an expense from the alleged contract receipt of Rs.8,23,11,478/-.*
3. *Both the lower authorities have erred in not appreciating that addition cannot be made merely because tax was deducted at source on the gross amount.*
4. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in disallowing expenses amounting to Rs.20,38,708/-*
5. *Both the lower authorities have erred in law and on facts of the case in disallowing expenses for mere non-service or non-reply of notice u/s.33(6)of the Act.*
6. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
7. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s.234A/B/C of the Act.*
8. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s.271(l)(c) of the Act.*

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. The 1st issue raised by the assessee in ground No. 1 to 3 is that learned CIT (A) erred in confirming the order of the AO by sustaining the addition of 19,06,739/- as undisclosed receipts.

4. Briefly stated facts are that the assessee is a partnership firm and engaged in the business of building construction. The assessee in its profit and

loss account has shown gross receipts of 8,04,04,739/- only. This receipt was consisting of gross income from construction activity and interest income.

4.1 However, the AO was of the view that as per form 26AS the gross receipt from construction activity and interest income should be of 8,23,11,478/- only. Thus a difference of 19,06,739/- was noticed. On the question, the assessee explained that the said difference is representing the amount deducted by the Gujarat Council of primary education from the payment of the assessee on account of liquidated damages. Gujarat Council of primary education made the deduction due to late execution of work by the assessee. Accordingly, the assessee claimed that it had shown gross receipts after reducing this amount in its profit and loss account. The assessee in support of his contention has enclosed the copies of the bill showing the amount of deduction made by the Gujarat Council of primary education on account of delay in the execution of the work.

4.2 However, the AO disagreed with the submission of the assessee by observing as under:

1. The assessee failed to furnish the copy of the contract with the Gujarat Council of primary education showing the clause of liquidated damage.
2. The assessee has claimed the deduction of full TDS amount as shown in form 26AS. If there is lower income accrued to the assessee than it should have claimed the TDS credit proportionate to the income accrued to it.

3. The liquidated damage deducted by the Gujarat Council of primary education is the subject matter of the dispute which is akin to retention money. Thus the same is recoverable in future like retention money. But the same has accrued in the current year. Therefore, the assessee is liable to offer the same to tax in the year under consideration as it is following a mercantile system of accounting.

4. There was also nothing mentioned in the tax audit report regarding the liquidated damages as discussed above.

4.3 Because of the above, the AO treated the difference of ₹ 19,06,739/- as discussed above as undisclosed income and accordingly added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to learned CIT (A). The assessee before the learned CIT (A) submitted as under:

1. It has not taken any action for the recovery of the liquidated damages deducted by the Gujarat Council of primary education in the subsequent years. As such the amount approved by the Gujarat Council of primary education was final, and the assessee was not entitled to recover anything over and above the amount approved.

2. The form 26AS is used to provide information about the deduction of TDS and corresponding income. But the same cannot be treated as sacrosanct for determining the income of the assessee. Had there been less deduction of TDS by the party corresponding to the income declared by the assessee in its financial statement, then the Revenue

shall not rely upon/refer the form 26AS to determine the actual income of the assessee.

3. In fact, the amount of TDS deducted by the party is representing the money of the assessee which has been deposited by the party on its behalf. Therefore, the assessee is very much entitled to claim the credit of such amount.
4. Without prejudice to the above, if the income shown in form 26AS is treated the gross income of the assessee, then it is entitled to a deduction on account of liquidated damages deducted by the Gujarat Council of primary education.
6. However, the learned CIT (A) rejected the contention of the assessee and confirmed the order of the AO by observing as under:

''3.5. The facts of the case and the submissions are considered. The main contention of the appellant is that this income has not been received by the appellant and this has not been accrued to the appellant during the year. On the other hand the view of the AO is I that the appellant has claimed entire TDS whereas he has not shown income to the extent of Rs.19,06,739/-. The AO has given detailed reasons in the assessment order before making this addition. It is the fact that the appellant has claimed entire TDS as shown in the form No.26AS whereas he has shown contract receipt less to the extent of Rs.19,06,739/-. Further, he has not shown this income in any other year. Considering this the finding of the AO is found to be justified and the addition made by the AO is confirmed.''

7. Being aggrieved by the order of learned CIT (A) assessee is in appeal before us.
8. The learned AR before us submitted that during the year under consideration, the assessee was assigned construction work by "Gujarat Council of Primary Education" (i.e., the principal). Since there was a *delay in*

the execution of such work, "the principal deducted following amounts towards "liquidated damages " from the concerned two bills as follows:

Bill No.SSAM/ACR/V AD/420 : Rs.10,29,374/-

Bill No.DIR/ACR/AND/427 : Rs.8,74,428/-

8.1 The Ld.AR further submitted that after deducting above stated "liquidated damages" as well as retention money, TDS, cess, etc., "*net amount payable* " to the assessee towards above referred bills was worked out as follows, and as a matter of fact, merely such "*net amount*" (*i.e. the amount after deduct: on of "liquidated damages"*) *has been received* by the assessee as is evident from assessee's *bank statement*:

Bill No.SSAM/ACR/V AD/420 : Rs.24,02,863/-

Bill No.DIR/ACR/AND/427 : Rs.20,69,038/-

8.2 Thus, the following aspects become crystal clear according to the Ld.AR:

- i) There was delay in execution of work assigned to the assessee.
- ii) The principal deducted "liquidated charges " from the bill amount.
- iii) Assessee has received merely "net amount" (*i.e. after deduction of liquidated damages*) from the principal;

8.3 The Ld.AR, before us submitted that since assessee never had any right to claim such sum from the principal, only the *net receipts* were credited to the P&L. Under such circumstances, such sum could not have been taxed as undisclosed "contract receipts".

8.4 As regards AO's observation Ld.AR submitted that assessee has not furnished copy of contract entered into with the principal, it is submitted that the mere fact that there was no written contract cannot be a ground to make the impugned addition. In construction work, there is always an arrangement for deduction of liquidated damages if the work is not completed within stipulated time period so as to ensure that efforts are made to finish work in time.

8.5 Ld.AR further submitted that AO observed that assessee is following mercantile system, it is submitted that the underlying sum never accrued to the assessee since it never had any right to claim such sum at any point of time in future. Hence, such cum could not have been accounted for even as per mercantile system.

8.6 The Ld.AR submitted that AO observed that liquidated damages was a matter of dispute and assessee may get such sum after completion of work, it is submitted that liquidated damages were for "*delay in completing work*" and not for "*non-completion of work*". Since there was a delay in completing the work, liquidated damages were deducted and there was no scope of receiving such sum later. As a matter of fact, such sum has not been received later on.

8.7 The Ld.AR, before us submitted that as regards to AO's observation payer has deducted tax at source on gross *amount*, it is submitted that assessee has no hold over the payer. Further, merely because payer deducts tax on wrong amount, assessee cannot be taxed with higher sum which is not its income at all.

8.8 Further Ld.AR submitted that as regards to AO's observation auditors have not given any remarks as to deduction of liquidated damages from gross receipts, since only net receipts were credited to P&L a/c, there was no such remark by the auditors.

8.9 In view of the above, the payer has admittedly deducted liquidated damages from the bill amount and as a matter of fact, only "net sum" has been received by the assessee. Hence, the Department could not have made the impugned addition.

8.10 Alternatively Ld.AR submitted that since only "net receipts" have been credited to P&L a/c, assessee did not debit P&L a/c separately with "liquidated damages". Hence, if the addition of alleged "contract receipts" of Rs.19,06,739/- is sustained, then assessee must be allowed deduction of "liquidated damages" of Rs.19,06,739/- since such sum has been deducted by the payer from the bill amounts and has never been received by the assessee at all. If that is done, there would still be no impact on the profit of the assessee. Reliance is placed on "**PCIT vs. Mazda Ltd. - (2017) 86 taxmann.com 27 (Guj.)**" (**Annexure "A"**) wherein it has been held that "liquidated damages" in the nature of penalty imposed for late completion of terms and conditions of order is a business expense.

9. On the other hand the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the difference observed by the AO between the income declared by the assessee and income represented

in form 26AS. The AO found a difference of 19,06,739/- which was treated as undisclosed income of the assessee. The view taken by the AO was subsequently confirmed by the learned CIT (A).

10.1 From the preceding discussion we note that the difference is arising on account of liquidated damages deducted by the Gujarat Council of primary education. The assessee raised bills to Gujarat Council of primary education amounting to Rs. 37,71,684/- and 32,35,027/-.

10.2 However, the Gujarat Council of primary education approved such bills for an amount of Rs. 24,02,863/- and Rs. 20,69,038/- respectively after making certain deductions including the liquidated damages of Rs. 10,29,374/- and Rs. 8,74,428/- respectively. The copies of the bills showing the deduction on account of liquidated damages are placed on pages 37 to 38 of the paper book.

10.3 On perusal of these copies of the bills, there remains no doubt that the difference above is representing the liquidated damages deducted by the Gujarat Council of primary education.

10.4 We also note that the AO was very much aware of the address of Gujarat Council of primary education. In case of any doubt, it was the duty of the AO to take the confirmation from the Gujarat Council of primary education. But we note that none of the authorities below has used the powers given under section 133(6) and 131 of the Act to verify the contention of the assessee.

10.5 In addition to the above we also referred the bank statement of the assessee and found that the exact amount of payment received as approved in the bills was reflecting therein. Thus it is clear that there was nothing received by the assessee over and above the bills approved by the Gujarat Council of primary education.

10.6 We also note that there was no allegation of the Revenue that the assessee has received the amount of difference as discussed above outside the books of accounts.

10.7 The books of accounts of the assessee during the relevant period were audited, and no defect of whatsoever was pointed out by the auditor of the assessee. Therefore, we are of the view that there cannot be any addition merely on account of the difference between the income shown by the assessee in its financial statements and income shown in the form 26AS. In holding so, we find support and guidance from the order of ITAT Jabalpur in case of Ravindra Pratap Thareja vs. Income-tax Officer, Ward-1(60 taxmann.com 304) wherein it was as under:

“8. In our considered view, merely because a payment is reflected in AS-26 and is shown to have been made to the assessee, it cannot be brought to tax in his hands when the said money is not received by the assessee.”

10.8 Without prejudice to the above, we also note that even if the said difference is treated as the income of the assessee, then also it is entitled to claim the same amount of liquidated damage as expenses under section 37(1) resulting no tax liability in the hands of the assessee.

10.9 In holding so, we find support and guidance from the judgment of Honøble Gujarat high court in case of Principal CIT vs. Mazda Ltd (250 taxman 510) wherein it was held as under:

“11. As noted, the expenditure in question was purely in relation to the assessee's normal business activity and was inherent part of its business transactions. The expenditure was certainly not incurred for any purpose which is an offence or which is prohibited by law. The Tribunal therefore was perfectly justified in granting such expenditure.”

10.11 Accordingly, we are inclined to reverse the order of lower authorities and direct the AO to delete the addition made by him for Rs. 19,06,739/-. Hence the ground of appeal of the assessee is allowed.

11. The 2nd issue raised by the assessee in the ground no. 4 to 6 is that learned CIT (A) erred in confirming the order of the AO by sustaining the disallowance of Rs. 20,38,708/- on account of the payment made to the subcontractor.

12. The assessee during the year has made certain payments to the subcontractors for the execution of the work assigned to it by Gujarat Council of primary education amounting to Rs. 20,38,708/- only. The details of the parties stand as under:

Sr.No.	Name	Amount in Rs.
1.	Mahmmad Husen Saiyed	9,85,623/-
2.	Nimesh Builders	9,92,235/-
3.	R C G Transport	90,850

12.1 The AO during the assessment proceedings to verify the genuineness of the payments above issued notices under section 133(6) to all the parties. But

in two cases the notices were not served whereas in one case the notice was served, but the party namely Nimesh Builders made no compliance.

12.2 On a question by the AO the assessee made the reply vide letter dated 29th February 2016 as under:

- i. It does not have regular dealing with the subcontractors described above. As such some work was assigned to them on a sub-contract basis in the year under consideration. After completion of the contract work, there was no contact with these parties.
- ii. It has provided the refund status of all these subcontractors downloaded from the income tax department website.
- iii. It has supplied PAN of all the subcontractors.
- iv. In the case of one subcontractor namely Mahmmmed Husen Syed it has furnished the front page of the bank passbook, form 16A and computation of income.
- v. The assessee in the case of subcontractor namely Nimesh builders proprietor Shri Nimesh mystery submitted that he was on the bed rest as a result of an accident. The assessee in support of his contention filed the copies of the medical bills and discharge report.

12.3 However, the AO disagreed with the submission of the assessee by observing that the refund status of the subcontractors cannot be the basis of holding that the payment to the subcontractors is genuine.

12.4 The primary onus lies on the assessee to justify the expenses claimed by it by producing necessary supporting pieces of evidence.

12.5 The AO during the assessment proceedings observed certain facts in respect of all the parties as discussed below:

RCB Transaport

- i. The notice under section 133(6) of the Act was issued two times but remained unserved both the times.
- ii. The assessee has not furnished contra confirmation from the parties about the payment made to it.

Mahmmed Husen Syed

- i. The assessee failed to file the complete bank statement of the subcontractor. The assessee filed only front-page of the bank passbook which is not sufficient enough to prove the genuineness of the payment made to it.
- ii. The computation of income filed by the assessee is incomplete if it is not accompanied with the return of income. As such the assessee has failed to file the return of income of the subcontractor.

Nimesh Builders

- i. The assessee was in a position to collect the details such as medical reports and discharge summary. Thus it can be inferred that the assessee could have taken the necessary details regarding the payment made to it along with confirmation. But the assessee failed to do so.
- ii. The proprietor was hospitalized only for one day as per the medical report furnished by the assessee.

12.5 In view of the above, the AO concluded that the assessee failed to prove the genuineness of the payment made to the subcontractor for Rs. 20,38,708.00 only. Accordingly, the AO disallowed the same and added to the total income of the assessee

13. Aggrieved, assessee preferred an appeal to learned CIT (A). The assessee in the case of Mahammed Husen Syed & Nimesh Builders before the learned CIT (A) submitted that these parties were located in the district of Baroda and Anand. As such these parties were based in the remote area and there was not any regular dealing with the assessee. Therefore it was not possible for the assessee to get in touch with them and obtained the necessary required information. It has submitted all the information which it had obtained at the time of subcontract assigned to them.

13.1 The addresses of these parties were supplied to the AO on the basis of the invoices issued by them.

13.2 It has supplied the PAN of all the parties along with the jurisdiction of CPC. All these parties are income tax assessee and filing their income tax returns.

13.3 It has also provided the copies of the bank statement where the payment made to the parties were reflecting.

13.4 It has also supplied the confirmation to the AO during the assessment proceedings.

13.5 The assessee concerning the party namely RCG transport filed the PAN along with the jurisdiction to the AO during the assessment proceedings.

13.6 However, the learned CIT (A) disregarded the contention of the assessee by observing as under:

''4.5 The facts of the case and the submissions are considered. The AO has discussed the matter in detail in the assessment order and on the basis of inquiries made he has disallowed the expenses claimed by the assessee. The AO has also discussed all the documents submitted by the assessee during the assessment proceedings and clearly stated why these documents are not capable to prove the genuineness of these expenses. Considering these facts, the disallowance made by the AO is found to be justified and the addition made by the AO is confirmed.''

14. Being aggrieved by the order of learned CIT (A) assessee is in appeal before us.

15. The learned AR before us submitted that assessee had availed services of the above parties in the course of carrying out construction work of schools at various sites during AY 13-14. The AO called upon the assessee to prove the genuineness of such expenses and hence, assessee furnished documentary pieces of evidence to prove the genuineness of such expenses.

15.1 The Ld.AR further submitted that substantial documentary pieces of evidence had been placed on record to prove the genuineness of such expenses. The mere fact that notices u/s 133(6) remained unserved on Mahammad Saiyed and RCG Transport and no reply was received from Nimesh Builders cannot be a ground to disallow the expenses after brushing aside all the documentary evidences placed on record which amply proves that the concerned parties are genuine and are also assessed to tax. The Ld.AR, also submitted that AO had not found any fault with the work that has been carried out through the concerned persons which show that the "work" has admittedly been carried out and "corresponding income" has been duly offered to tax.

15.2 The Ld.AR before us submitted that when AO is not disputing "completion of underlying work" as well as "corresponding income ", AO could not have doubted "expenses" incurred for carrying out such work since without incurring such expenses, assessee would not have been in a position to carry out such work and earn income. Thus, AO is not justified in disallowing whole of such expenses.

16. On the other hand, the learned DR vehemently supported the order of authorities below.

16.1 We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has made payment to subcontractors which was not allowed by the AO on the ground that the notices issued under section 133(6) of the Act were not either served to them or there was no compliance. Accordingly, the AO held that the payment made

by the assessee was not representing the genuine transactions. Thus the AO disallowed the same. The learned CIT (A) subsequently confirmed the view of the AO.

16.2 From the preceding discussion we note that the assessee has furnished the copies of the PAN of all the parties along with the jurisdiction. Thus we are of the view that the AO before holding that the payment made by the assessee is not genuine, he should have verified from the respective AO having jurisdiction over the assessee. But the AO failed to do so.

16.3 We also note that the assessee has filed the copies of income tax return acknowledgment along with the computation of income in the case of Shri Mahammed Husen Syed which is placed on pages 64 to 69 of the paper book.

16.4 We also note that the assessee has made payment to Nimesh builders and Mahammed Husen Syed after deduction of the TDS. The assessee in respect of these parties has also filed the confirmation which is placed on pages 31-32 of the paper book.

16.5 We also note that the addition was made by the AO on the ground that notices under section 133(6) of the Act were either not served or served, but no compliance was made. However, in this regard, we note that the AO was in possession of the PAN of all the parties along with the jurisdiction then before making any disallowance it was the duty of the AO to verify the same from the AOs having jurisdiction over the assessee. In this regard we find support and guidance from the judgment of ITAT Mumbai in case of Fancy Wear vs. Income-tax Officer, Ward- 24 (3) (1), Mumbai (87 taxmann.com 183) wherein it was held as under:

“5.7 It appears that the only thing that has tilted the scale against it is returning back of notices, issued by the AO, u/s. 133(6) of the Act. But, this itself is not sufficient to hold that purchases made by it were bogus. In the case of Nikunj Exim Export, the Hon'ble Bombay High Court has held that non service of notice does not conclusively prove the non genuineness of a transaction. By producing various documents the assessee had proved that balance of convenience was in its favour.”

16.6 We also note that the AO did not doubt the reasonableness of the expenses. Thus in our considered view, the other details filed by the assessee cannot be just brushed aside without any cogent reasons to conclude that the expenses claimed by the assessee are not genuine. In view of the above, we reverse the order of authorities below. Accordingly, we set aside the order of learned CIT (A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 01/01/2019 at Ahmedabad.

**-Sd-
(MS MADHUMITA ROY)
JUDICIAL MEMBER**

(True Copy)
Ahmedabad; Dated 01/01/2019
manish

**-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

आदेश क० त० ल० म० षत/Copy of the Order forwarded to :

1. अपीलार्थ / The Appellant
2. प्रत्यर्थ / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. त्रभागीय त्रज्ज, आयकर अपीलार्थ आधिकरण / DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)