

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER AND
SH. N.K.CHOUDHRY, JUDICIAL MEMBER

ITA No.38(Asr)/2013

Assessment Year:2009-10

M/s Continental Construction Co. Vs.
25/5A, Trikuta Nagar, Jammu,
(J&K)

Dy. CIT, (Hqrs),
Jammu (J&K)

PAN:AADFC 7299Q

(Appellant)

(Respondent)

ITA No.27(Asr)/2013

Assessment Year:2009-10

Dy. CIT,
Circle-1, Aayakar Bhawan,
Jammu

Vs. M/s Continental Contru-
ction Co. 25/5A, Trikuta
Nagar, Jammu, (J&K)

PAN:AADFC 7299Q

(Appellant)

(Respondent)

Cross Objection No.35(Asr)/2014

(Arising out of ITA No.27(Asr)/2013)

Assessment Year:2009-10

M/s Continental Construction Co. Vs.
25/5A, Trikuta Nagar, Jammu,
(J&K)

Dy. CIT,
Circle-1, Jammu (J&K)

PAN:AADFC 7299Q

(Appellant)

(Respondent)

Appellant by: Sh. R.L. Gupta (Ld. Adv.)

Respondent by: Sh. Charan Dass (Ld. DR)

Date of hearing: 15.01.2019

Date of pronouncement: 21.01.2019

ORDER

PER N.K.CHOUDHRY, JM:

The Assessee as well as the Revenue Department has preferred these appeals, on feeling aggrieved against the order dated 09.01.2012, passed by the Ld. CIT(A)-Jammu, u/s. 250(6) of the I.T. Act, 1961 (hereinafter called as 'the Act') for Asst. Year: 2009-10, wherein the Assessee has also preferred the Cross Objection as against the ITA No.27(Asr)/2013 filed by the Revenue Department.

2. The appeal of the assessee has been taken for adjudication first.

The briefly stated the facts of the case are that the Assessing Officer while relying upon the judgment passed by the Jurisdictional ITAT, Amritsar Bench in the case of Assessing Officer v. Pooja Construction Co. in ITA No. 750(Asr)/1992 (69 ITD 147) applied the gross profit rate @ 10%, considering the case of the assessee being a Civil Contractor. Further the Assessing Officer also made an addition u/s 40A(3) for Rs.4,77,187/- as well as u/s 40(a)(ia) for Rs.13,30,500/- respectively. Further, the Assessing Officer also made an addition of Rs.3,00,000/- and Rs.5,00,000/- on account of unsecured loan.

The assessment order was challenged before the Id. CIT(A) who partly allowed the appeal of the assessee by reducing the net profit rate from 10% to 8% on gross receipt and further deleted the amounts of Rs.3,00,000/- and 5,00,000/- which were added on account of unsecured land.

3. The Revenue Department preferred ITA No.27(Asr)/2013, on feeling aggrieved against the reduction of Gross Profit rate from 10% to 8% as well as deletion of addition of Rs.3,00,000/- + 5,00,000/- on account of unsecured loan, wherein the assessee also preferred the Cross Objection No.38(Asr)/ 2014 in addition to that the assessee has also challenged the order passed by the Id. CIT(A) on account of estimating the income of the

Gross Profit rate @ 8% as well as affirming the addition of Rs.4,77,187/- and Rs.13,30,500/- u/s 40A(3) and 40(a)(ia) of the Act respectively. Recently, the ITAT Amritsar Bench, at Amritsar, in the case of *ITO v. Nikhil Infra-Tech Ltd. in ITA No.272(Asr)/2017*, in the similar and identical circumstances estimated the Net profit rate @ 5% of the turn over and further affirmed the deletion of disallowance on account of depreciation u/s 32(1) and interest u/s 36(1)(iii) of the Act. The relevant part of the order is reproduced herein in below.

“In our considered view, a difficult terrain may not necessarily imply a lower profit. Rather, economic theory would suggest the profit to match the risk involved, so that a higher risk would entail a higher rate of profit. Further, again, the assessee as the person undertaking the work would, both in theory and in practice, be entitled to a larger share of the profit, i.e., even if the same is to be considered as in the range of 7% to 8%. Considering these facts, we modify the estimation of the assessee’s net profit rate to, even as conceded to by the Id. AR, the assessee’s counsel, during hearing, 5% of the turnover. The disallowance on account of depreciation (u/s. 32(1)) and interest (u s. 361 (iii)) shall not survive in view of the estimation of the net profit rate.

That leaves us with the addition u/s. 68 qua a secured loan s. Though the same could be made in principal, and we do not agree with the Id. CIT(A) that the same could not be in view of the assessee’s profit rate being estimated (CIT v. Devi Prasad Vishwanath Prasad [1969] 72 ITR 194 (SC)), we find no basis for the said addition in the facts and circumstances of the case. True, the burden of proof u/s. 68 is on the assessee, which has not furnished any material in the assessment proceedings. However, it is not clear if the AO had in any of the notices u/s. 142(1) required the assessee to support its’ claim qua the said loan with any material/ evidence. This does not appear to be the case as there is no reference thereto by him either in the assessment order or in the remand report. The addition under the circumstances could only be on the basis of some

adverse material brought on record by the Assessing Officer. The addition, in fact has not even been impugned by the Revenue.”

Considering the instant case, the estimation of net profit rate @ 5% on of the gross receipt would be reasonable because the assessee firm working as sub-contractor of M/s. Harish Chandra (India Ltd.), New Delhi, who had obtained contract from Economic Reconstruction Agency, J&K, Govt. of India. In terms of Memorandum of Understanding between the Assessee firm and Harish Chadra (India) Ltd. the latter was to retain 9% on gross value of receipts after deducting the statutory taxes at source. Being a sub-contractor, the assessee firm was supposed to work on terms and conditions where maximum part of the receipts was taken by the main contractor as the conditions of contract work vary from contract to contract as also the profitability changes depending upon such conditions. Moreover, depreciation and interest charges debited in the accounts never been considered by the Assessing Officer. It is undisputed fact that the working in the state of J&K is not congenial and all the time depends upon the natural calamities as well as terrorist activities, hence in the aforesaid circumstances, in our considered opinion the estimation of net profit rate @6% on the gross receipt would be quite reasonable and would meet the ends of the justice.

4. Now coming to the confirmation of the addition of Rs.13,30,500/- qua non-deduction of TDS u/s 40(a)(ia) and Rs.4,77,187/- qua payment made in cash in violation of Sec.40A(3), The issue under consideration dealt with by following Courts:-

- i) Andhra Pradesh High Court in the case of Maddi Sudharshanam Oil Mills Vs CIT {1959} 37 ITR 369(AP).
- ii) Andhra Pradesh High Court in Indwell Construction Vs CIT 232 ITR 776(A), followed the decision of High Court in Maddi Sudharshanam Oil Mills Vs CIT(supra)

- iii) ITAT Bench at Amritsar in the case of ACIT Vs J.S. Grover Construction {ITA no. 63/ASR/2016 decided on 26/08/2016} followed the decision of Maddi Sudharshanam Oil Mills Vs CIT {1959} 37 ITR 369(AP) and Indwell Construction Vs CIT 232 ITR 776(A)
- iv) ITAT Bench at Amritsar in the case of ACIT Vs Lakhwinder Singh {ITA no. 527 & 536/Asr/2015 and C.O. no. 31/Asr/2015 followed the decision of co-ordinate Bench in ACIT Vs J.S. Grover Construction {ITA no. 63/ASR/2016 decided on 26/08/2016}
- v) ITAT, Hyderabad Bench in the case of Teja Construction Versus Assistant Commissioner of Income Tax {ITA no. 308(HYD) of 2009, date of decision 23-10-2009 [2010 (39) SOT 13 (HYD)(URO) }

Concluding part of the decision in Indwell Construction Vs CIT, is reproduced herein for clarity, ready reference and convenience.

4. The pattern of assessment under the Income-tax Act is given by Section 29 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in Sections 30 to 43D. Section 40 provides for certain disallowances in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under Section 29 is to be made under section 145 on the basis of the books regularly maintained by the asses-see. If those books are not correct or complete, the Income-tax Officer may reject those books and estimate the income to the best of his judgment. When such an estimate is made it is in substitution of the income that is to be computed under Section 29. In other words, all the deductions which are referred to under Section 29 are deemed to have been taken into account while making such an estimate. This will also mean that the embargo placed in Section 40 is also taken into account.

5. No doubt there is a big difference between profit earned with own capital and profit earned with borrowed capital and such a difference could have been taken into account by the Income-tax Officer while making an estimate. If the Commissioner had set aside the estimate on the ground that the vital fact that the business was carried on with own capital and not with borrowed capital has been ignored by the Income-tax Officer, there may not have been any difficulty in upholding that order. But, when he proposes to add back an exact item in the profit and loss account, he was relying on the rejected books which he could not do as held by the Bench of this court in Maddi Sudarsanam Oil Mills Co. v. CIT [1959] 37 ITR 369. There is also a further difficulty if Section 40, as argued by learned counsel, is to be taken into account even after making an estimate. When there are certain other deductions which are to be disallowed such as

wealth-tax payment in Section 40, can it be said that after making an estimate, the wealth-tax charged in the profit and loss account should again be added back to the profit. This example illustrates how the contention of the Revenue, that Section 40(b) makes a difference in the situation, is untenable. In our considered opinion, the answer to the question has to be in the negative and in favour of the assessee.

6. The question is answered accordingly.

From the judicial decisions stated above, it is clear that once books of account are rejected u/s 145(3) of the Act and income is derived at certain %age of gross receipt then there is no further scope for any further disallowance including u/s 40(a)(ia) and 40A(3) of the Act as made in the instant case. Hence, we do not have any hesitation to delete the additions mentioned above as affirmed by the Id. CIT(A).

5. Now coming to the appeal in ITA No.27(Asr)/2013 filed by the Revenue Department.

The ground No.1 & 2 relates to the estimation of Net Profit rate @ 8% by the Id. CIT(A). In view of the observation and conclusion drawn in the appeal of the assessee, grounds Nos.1 and 2 stands dismissed.

Now coming to the ground Nos.3 to 6, all are connected with each other and we have gone through the order of the Id. CIT(A) again, whereby, the Id. CIT(A) while deleting the addition of Rs.3,00,000/- and Rs.5,00,000/- relied upon the enquiry independently held by the A.O. in which Sh. P.K. Zalpuri has confirmed the transactions and further Id. CIT(A) has observed that the partners have inducted this amount in the books of account of the appellant firm but there was a mistake on the part of the Accountant of the appellant firm who has shown these amounts as loan to the appellant firm from Sh. P.K. Zalpuri instead of showing them as induction of capital from partners. It was further observed by the Id. CIT(A) that it was stated by the appellant that mistake was subsequently rectified in the F.Y.2009-10. Finally, finding the explanation as reasonable and convincing and since the

identity, creditworthiness and genuineness of transactions from Sh. P.K. Zalpur has been established, the Id. CIT(A) deleted the said addition. As we do not find any contrary material or substance against the conclusion drawn by the Id. CIT(A), hence, the ground No.3 to 6 are also dismissed.

Ground No.7 is general in nature, therefore does not require any adjudication.

6. The Cross Objection is almost supportive of the order of the Id. CIT(A) and against the appeal of the Revenue Department, hence, in view of the conclusion of ITA No.38(Asr)/2013, the Cross Objection does not require any independent adjudication and stands disposed off.

7. In the result, the appeal filed by the assessee is allowed as well as the appeal filed the Revenue Department is dismissed and Cross Objection also stands disposed off.

Order pronounced in the open Court on 21.01.2019.

Sd/-
(SANJAY ARORA)
ACCOUNTANT MEMBER

Sd/-
(N.K.CHOUDHRY)
JUDICIAL MEMBER

Dated:21.01.2019

/PK/ Ps.

Copy of the order forwarded to:

- (1) Continental Construction Co. 25/5A, Trikuta Nagar, Jammu, (J&K)
- (2) The DCIT, (Hqrs), Jammu & DCIT, Central Circle-1, Jammu, (J&K)
- (3) The CIT(A)-5, Jammu
- (4) The CIT concerned
- (5) The SR DR, I.T.A.T., Amritsar

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