

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1155 to 1161/PUN/2011
निर्धारण वर्ष / Assessment Years : 2002-03 to 2008-09

The Income Tax Officer,
(Central), Aurangabad

.....अपीलार्थी / Appellant

बनाम / V/s.

Yog Industries Ltd.,
10, Shriniketan Colony,
Jalna Road, Aurangabad

PAN : AAACY1238P

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.997 to 1000/PUN/2011
निर्धारण वर्ष / Assessment Years : 2005-06 to 2008-09

Yog Industries Ltd.,
10, Shriniketan Colony,
Jalna Road, Aurangabad

PAN : AAACY1238P

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
(Central), Aurangabad

.....प्रत्यर्थी / Respondent

Assessee by : N O N E
Revenue by : Shri S.B. Prasad

सुनवाई की तारीख / Date of Hearing : 26-02-2019

घोषणा की तारीख / Date of Pronouncement : 27-02-2019

आदेश / ORDER**PER BENCH :**

These are very old bunch of appeals. Initially, the assessee was represented by Shri V.L. Jain. Shri V.L. Jain informed the Bench that insolvency proceedings are initiated against assessee company, hence, he is not getting any assistance from the company to defend the appeals. Shri V.L. Jain placed on record the copy of order dated 22-08-2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai (in short NCLT) in C.P. No. 82/I&BCP/NCLT/MB/MAH/2017 titled M/s. ASMI ENTERPRISES Vs. Yog Industries Limited. Shri V.L. Jain on 02-11-2017 withdrew his Power of Attorney. Thereafter, fresh notice was issued to the assessee for 23-01-2018. Acknowledgment of notice available on record reveal that the notice was duly served, however, none appeared on behalf of the assessee. Again fresh notice was issued to the assessee for 12-04-2018 on the address mentioned in Form No. 36. The said notice was also served on assessee as is evident from the acknowledgment available on file. However, despite service of notice none was present to represent the assessee on the said date. Thereafter, appeals were adjourned to 21-06-2018. Since, the Bench did not function on the said date the appeals were adjourned to 17-09-2018. On the said date again none appeared to represent the assessee. Fresh notice was issued to the assessee as well as Interim Resolution Professional (IRP) appointed by NCLT. The notice was issued to IRP through RPAD on the address mentioned on communication from IRP to the Managing Director of assessee company. Despite repeated notices neither the assessee nor any representative of assessee or IRP is present in the Court to defend the appeals. Under such circumstances, we are constrained to decide these

bunch of old appeals on the basis of material available on record and the assistance of ld. DR.

2. ITA Nos. 1155 to 1161/PUN/2011 have been filed by the Revenue against the order of Commissioner of Income Tax (Appeals), Aurangabad for the assessment years 2002-03 to 2008-09, respectively. The assessee has assailed the order of Commissioner of Income Tax (Appeals), Aurangabad in ITA Nos. 997 to 1000/PUN/2011 for assessment years 2005-06 to 2008-09, respectively. The Commissioner of Income Tax (Appeals), Aurangabad has disposed of the appeals of assessee for assessment years 2002-03 to 2008-09 vide single order dated 24-06-2011. Since, the issues in the present appeals/cross appeals are arising from same set of facts and identical grounds have been raised in all the impugned assessment years by the respective appellants, these appeals are taken up together for adjudication and are decided vide this common order.

3. The facts of the case in brief as emanating from records are : The assessee company is engaged in the business of manufacturing of craft paper and allied products. A search and seizure action was conducted on Yog Group of cases on 21-02-2008. The details of income returned by the assessee in original return of income, income returned consequent to notice issued u/s. 153A, additions made thereon and total income assessed in the impugned assessment years are as under :

Asstt. Year	Original Income returned Rs.	Income returned u/s. 153A Rs.	Additions made Rs.	Income assessed Rs.
2002-03	46,82,420/-	43,42,262/-	17,02,400/-	60,44,662/-
2003-04	(-)16,44,124/-	(-)16,77,394/-	12,92,600/-	(-)3,84,794/-
2004-05	21,56,870/-	21,30,384/-	14,69,800/-	52,77,578/-
2005-06	88,87,380/-	90,97,000/-	13,86,200/-	1,04,83,200/-
2006-07	2,02,77,760/-	3,29,74,930/-	43,45,500/-	3,73,20,430/-
2007-08	4,68,70,038/-	3,05,21,570/-	5,25,63,342/-	8,30,84,912/-
2008-09	4,33,70,594/-	84,09,110/-	6,03,87,245/-	6,87,96,355/-

3.1 The additions made by Assessing Officer in assessment proceedings u/s. 143(3) r.w.s. 153A are as under :

A.Y.	Additions @ 4.5% of gross contract receipts by rejecting books of accounts u/s. 145(3)	Non-genuine payments to sub-contractors being higher than profit @ 4.5% of contract receipts	Disallowance of claim of revenue expenditure in revised return	Disallowance u/s. 40(a)(ia)/** cash deficit	Total addition Rs.
2002-03	17,02,400	--	--	--	17,02,400
2003-04	12,92,600	--	--	--	12,92,600
2004-05	14,69,800	--	--	--	14,69,800
2005-06	13,86,200	--	--	--	13,86,200
2006-07	43,45,500	--	--	--	43,45,500
2007-08	--	1,00,00,000	1,67,28,932	2,58,34,410	5,25,63,342
2008-09	--	1,69,00,000	4,05,24,448	28,08,260 **1,54,537	6,03,87,245

3.2 Against the additions made by the Assessing Officer, the assessee filed appeals before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) in First Appellate proceedings deleted entire additions made in assessment years 2002-03, 2003-04 and 2004-05 on the ground that there was no incriminating material and there were no pending assessments on the date of search. For assessment years 2005-06 to 2008-09 the Commissioner of Income Tax (Appeals) restricted the additions on account of non-genuine payments to sub-contractors to 3% of the total contract receipts. With respect to addition made by Assessing Officer on account of rejecting assessee's claim of revenue expenditure and treating the same to be on capital account. The Commissioner of Income Tax (Appeals) partly allowed the appeal of assessee by holding the part of expenditure on revenue account. The relief allowed by Commissioner of Income Tax (Appeals) is as under :

A.Y.	Addition made by AO	Amount confirmed by CIT(A)	Amount deleted by CIT(A) holding it to be on Revenue account
2007-08	Rs.1,67,28,932/-	Rs.32,87,962/-	Rs.1,34,40,970/-
2008-09	Rs.4,05,24,448/-	Rs.2,74,04,063/-	Rs.1,31,20,385/-

Against the findings of Commissioner of Income Tax (Appeals), the Revenue and the assessee are in appeal before the Tribunal.

4. For the sake of convenience in deciding these appeals we will first take up the appeals of Revenue in seriatim.

ITA Nos. 1155 to 1157/PUN/2011 (A.Ys. 2002-03 to 2004-05)

5. The Revenue has assailed the findings of Commissioner of Income Tax (Appeals) in assessment year 2002-03 on following grounds :

- “1. *On the facts and in the circumstances of the case, the learned CIT(A), Aurangabad erred in deleting the addition of Rs.17,02,400/- being estimated profit @ 4.5% on account of the books of account being unreliable, this fact is accepted by the Learned Commissioner of Income Tax(A).*
2. *On the facts and in the circumstances of the case, the learned CIT(A) Aurangabad erred in applying the ratio laid down in the case of Sinhgad Technical Education Society Vs ACIT Central Circle 2(2), Pune, even though the facts of the assessee's case are distinguishable in as much as the books of account of the assessee are unreliable.*
3. *On the facts and in the circumstances of the case, the learned CIT(A), Aurangabad failed to appreciate that the assessee did not disclose his income in accordance with the declaration u/s 132(4) of the Act and hence the ratio of Sinhgad Technical Education Society Vs ACIT Central Circle 2(2), Pune, is not applicable in assessee's case.*
4. *Appellant craves, leave of the Hon'ble Tribunal to add, amend/alter or delete any of the aforesaid grounds herein if directed so.*
5. *Any other ground that may be urged at the time of hearing.”*

Barring the amount of addition, identical grounds have been raised for assessment years 2003-04 and 2004-05 by the Department.

6. A perusal of impugned order shows that the Commissioner of Income Tax (Appeals) has deleted entire addition for the assessment years 2002-03, 2003-04 and 2004-05 on the ground that no incriminating

material was found during search action qua the aforesaid assessment years. A perusal of assessment orders for the assessment years 2002-03, 2003-04 and 2004-05 reveal that there is no reference of any incriminating material for making addition. The Assessing Officer has made addition of 4.5% of the total contract receipts on the basis of material seized for the subsequent assessment years. The ld. DR has not disputed that on the date of search there were no pending assessment for assessment years 2002-03, 2003-04 and 2004-05. It is a well settled law that no additions can be made in respect of assessments where no incriminating material is found during search and there is no pending assessments for those assessment years. [Commissioner of Income Tax Vs. Continental Warehousing Corporation, 374 ITR 645 (Bom)]. Thus, in view of undisputed facts for assessment years 2002-03, 2003-04 and 2004-05 and the law laid down by Hon'ble Bombay High Court, we do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in deleting the additions. Accordingly, the same is upheld and the appeals of Revenue for assessment years 2002-03, 2003-04 and 2004-05 are dismissed being devoid of any merits.

ITA Nos.1158 to 1161/PUN/2011 (A.Ys. 2005-06 to 2008-09) (By Revenue)

ITA Nos.997 to 1000/PUN/2011 (A.Ys. 2005-06 to 2008-09) (By Assessee)

7. The common grounds raised by the Revenue in appeals for assessment years 2005-06, 2006-07, 2007-08 and 2008-09 are against restricting the addition of inflated expenditure by Commissioner of Income Tax (Appeals) from 4.5% to 3% of contract receipts credited to the profit and loss accounts. The assessee has filed cross appeals for assessment years 2005-06, 2006-07, 2007-08 and 2008-09 assailing the addition of

3% of the inflated expenditure confirmed by the Commissioner of Income Tax (Appeals).

8. The facts germane to the issue are that along with the search action u/s. 132 on the assessee, simultaneous action u/s. 132/133A was carried out on sub-contractors of the assessee i.e. M/s. Marathe Builders & Developers Pvt. Ltd., M/s. Shivsai Construction Pvt. Ltd., Shri Vilas C. Autade, Infrastructure Pvt. Ltd., etc. Shri Arun S. Marathe, the Director of M/s. Marathe Builders & Developers Pvt. Ltd. in his statement recorded on 21-02-2008 admitted that the entire work was actually carried out by Yog Cement Pvt. Ltd. (new Yog Industries Ltd.) i.e. the assessee and they were not involved in any activities of sub-contract nor they have invested any amount for the work. He further admitted that he had issued blank cheque of M/s. Marathe Builders & Developers Pvt. Ltd. to Yog Industries, the bank account was opened on the instruction of Yog Industries and he never personally operated the said bank account.

Similarly, other sub-contractors Shri Vilas C. Autade, Smt. Varsha Hedau in their statement admitted that no sub-contract work was executed by them. They have not maintained any bills of material etc. The Assessing Officer during course of assessment proceedings found that the assessee had made payments to 30 sub-contractors. The Assessing Officer issued notices to all the sub-contractors. However, summons could be served to 11 parties. The remaining notices could not be served either because of wrong postal address or incomplete postal address. After examining the sub-contractors who had appeared before the Assessing Officer, the Assessing Officer rejected books of account of assessee and made addition of 4.5% of the total contract receipts credited to the profit and loss account for the respective impugned assessment years. The

Commissioner of Income Tax (Appeals) granted part relief to the assessee by restricting the addition to 3% of the contract receipts by observing as under :

“As regards the undisclosed income on account of inflation of expenditure estimated by the A.O. at 4.5% of the gross contract business receipts it has been noticed that the A.O. has not given proper basis for estimating undisclosed income at 4.5% of gross contract business receipts. The contention of the appellant that the said addition on estimate basis is fully unjustified cannot be accepted in view of evidence found in search action. However, considering the totality of the facts to meet ends of justice the said addition is restricted to 3% of the gross contract receipts for A.Ys. 2005-06 to 2008-09, particularly in view of the fact that the appellant has claimed before the search party and also thereafter that the fact that the work allotted to sub contractors has been completed as can be seen from physical verification of the respective sites. In my opinion it is likely that the payments to some of the sub contractors which has been found to be immediately withdrawn might have been used by the appellant for completion of the work allotted to sub-contractors. The addition by the A.O. in A.Y. 2005-06 to 2008-09 is therefore confirmed to the extent of 3% of the contract business receipts or inflated expenditure disclosed by the director of the appellant company in statement u/s. 132(4) whichever is higher.”

9. Against the aforesaid findings of Commissioner of Income Tax (Appeals) the Revenue is in appeal for assessment years 2005-06 to 2008-09 assailing the restriction of addition to 3%. The assessee has filed cross appeals for assessment years 2005-06 to 2008-09 against confirming the addition of 3%.

10. The ld. DR submitted that during the course of assessment proceedings statements of various sub-contractors were recorded. All of them were unanimous in stating that they were not awarded any sub-contract work. The entire work was carried out by the assessee. The amounts were deposited in the bank accounts of sub-contractors and after withdrawing cash the amount flowed back to the assessee. In fact, it was the assessee who was managing the bank accounts of sham sub-contractors. Majority of the sub-contractors could not produce bills or any other supporting documents to substantiate purchase of material, hiring of

vehicles, payment to labour, etc. No books of account or supporting documents were maintained by the said sub-contractors. They only produced copy of work order, bill raised and copies of bank statements. Thus, it is evident from the statements made by sub-contractors that the assessee inflated the expenditure by debiting the expenditure on account of payments to sub-contractors. Consequently, the Assessing Officer rejected the books of account of assessee. During the assessment proceedings, it was noticed that the assessee had produced bogus bills for purchase of material such as sand, murum, rubble and metal from M/s. Marathe Builders and Developers Pvt. Ltd. The Assessing Officer after taking into statements of sub-contractors and documents on record came to the conclusion that 4.5% of the total contract receipts should be disallowed for the assessment years 2005-06 to 2008-09 being non-genuine payments to the sub-contractors. However, the Commissioner of Income Tax (Appeals) in the absence of any contrary material restricted the addition to 3%.

11. We have heard the submissions made by Id. DR and have perused the documents on record. The books of account of assessee were rejected by the Assessing Officer as during the course of assessment proceedings the Assessing Officer found that the assessee has indulged in inflating expenditure by showing the payments to sub-contractors. The Assessing Officer made addition of 4.5% of the gross contract receipts for the assessment years 2005-06 and 2006-07. In so far as assessment years 2007-08 and 2008-09 are concerned the addition of 4.5% of contract receipt was made on account of non-genuine payments to sub-contractors. The Commissioner of Income Tax (Appeals) restricted the addition to 3%. A perusal of documents on record reveal that the addition has been made by Assessing Officer, as well as, by the Commissioner of Income Tax (Appeals)

on mere estimations. However, the finding of fact that the assessee has indulged in suppression profits by inflating expenditure remains un-rebutted. After taking into consideration entirety of facts, we do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in restricting the addition to 3%. No material has been placed before us either by assessee or by Department controverting the findings of Commissioner of Income Tax (Appeals). Accordingly, grounds raised by the assessee as well as the Department against restricting/confirming the addition of 3% on account of inflated expenditure in the impugned assessment years are rejected. Consequently, the solitary issue raised in the appeals by the Department in grounds of appeal Nos. 1 to 6 in assessment years 2005-06 and 2006-07 and grounds of appeal Nos. 1 to 4 for assessment years 2007-08 and 2008-09 are dismissed.

12. The solitary ground in appeals of assessee in ITA Nos. 997 & 998/PUN/2011 assailing confirming the addition of 3% are also dismissed.

13. In appeals for assessment years 2007-08 and 2008-09 there is another issue with regard to classification of expenditure i.e. Whether the expenditure incurred towards the construction of building is on revenue account or is capital in nature. The Assessing Officer after examining the facts and documents on record held that the assessee has erred in claiming Rs.1,67,28,932/- in assessment year 2007-08 and Rs.4,05,24,448/- in assessment year 2008-09 under the head revenue expenditure. In First Appellate proceedings, the Commissioner of Income Tax (Appeals) granted part relief to the assessee by holding that the expenditure to the tune of Rs.1,34,40,970/- in assessment year 2007-08 and Rs.1,31,20,385/- in assessment year 2008-09 is on revenue account. The Revenue in its appeals for assessment years 2007-08 and 2008-09 in

ground No. 5 has assailed the findings of Commissioner of Income Tax (Appeals) on the issue. The assessee has filed cross appeals for assessment years 2007-08 and 2008-09 assailing the part of addition confirmed by the Commissioner of Income Tax (Appeals).

14. The ld. DR submitted that the assessee in return of income filed in response to notice u/s. 153A had claimed deduction of Rs.1,67,28,932/- in assessment year 2007-08 on account of revenue expenditure debited to capital work-in-progress in Balance Sheet. Similarly, in return of income for assessment year 2008-09 the assessee declared Rs.4,33,70,594/- on account of capital work-in-progress. In revised return, the assessee claimed the said expenditure as revenue. The Assessing Officer disallowed the same and held the expenditure as capital in nature. The Commissioner of Income Tax (Appeals) granted part relief to the assessee without appreciating the fact that the alleged new business set up by the assessee is expansion of existing business or it is setting up of complete new business. When the assessee has maintained separate accounts for expenditure incurred on new unit and the assessee has accepted all these expenses are related with the new unit then such expenditure cannot be considered as revenue in nature. The expenditure was not incurred for day to day running of business activities but was for setting up of new unit.

15. After examining the impugned orders we find that the assessee has set up two units viz. Vishwa Newsprint and Gayatri Energy. The contention of the assessee is that the expenditure incurred was for the expansion and improvement of the existing business and not in connection with setting up of new units. Whereas, the findings of Assessing Officer are contrary holding that the expenditure was incurred by the assessee for

setting up of new units and hence, has to be capitalized. Undisputedly, the assessee in original return of income has claimed the expenditure as capital work-in-progress. However, in the returns filed in response to notice u/s. 153A the assessee claimed expenditure as deduction stating it to be on revenue account. The Commissioner of Income Tax (Appeals) has granted part relief to the assessee by observing as under :

“6.5.3 As regards the contention of the appellant that the said expenditure of Rs1,67,28,932/- and Rs4,05,24,448/- incurred in the financial years relevant to Assessment Years 2007-08 & 2008-09 have not created any capital asset and the nature of expenditure is purely revenue expenditure, it has been clarified in para-6.5.2 above that as, per the provisions of section 36(1)(iii), interest expenditure incurred by the appellant to the extent of Rs.32,87,962/- and Rs.2,74,04,063/- are not allowable as revenue expenditure. As regards the remaining expenditure of Rs.1,34,40,970/- and Rs.1,31,20,385/- for A.Ys.2007-08 & 2008-09 respectively, it has been noticed that the nature of expenditure is hotel expense, professional fees, license fees, conveyance expenses, printing & stationery, postage, office' expenses, testing fees, repairs & maintenance, legal expenses, presentation of articles, salary expenses, travelling expenses, vehicle expenses etc. The said expenditure has been undisputedly incurred for the two projects undertaken by the appellant company. It is also undisputed fact that the appellant company has acquired assets such as land, building under construction, machinery having substantial value and has shown the same in its balance sheets for the year ended 31/03/2008, 31/03/2009 & 31/03/2010. Though the nature of heads of expenditure other than interest expenditure amounting to Rs.1,34,40,970/- and Rs.1,31,20,385/- for A.Ys.2007-08 & 2008-09 respectively appears to be revenue in nature, some of the expenditure out of the same is directly attributable to the assets acquired by the appellant company such as land, building under construction, machinery etc. Considering the totality of the facts, such expenditure is estimated at 10% of the said expenditure and balance 90% expenditure is to be considered as revenue expenditure. Therefore, the claim of the appellant about revenue expenditure incurred on the said two projects is accepted to the extent of Rs.1,20,96,873/- and Rs.1,18,08,346/- for A.Ys.2007-08 & 2008-09 respectively.”

16. No material has been placed on record by either side to controvert the findings of Commissioner of Income Tax (Appeals). In the absence of any contrary material we find no reason to interfere with the findings of First Appellate Authority. Accordingly, grounds raised by the Revenue and assessee in appeals for assessment years 2007-08 and 2008-09 on this issue are dismissed.

17. In the result, the appeals by the Revenue as well as assessee for assessment years 2005-06 to 2008-09 are dismissed.

18. To sum up, ITA Nos. 1155 to 1161/PUN/2011 by the Revenue and ITA Nos. 997 to 1000/PUN/2011 by the assessee are dismissed.

Order pronounced on Wednesday, the 27th day of February, 2019.

Sd/-
(R.S. Syal)
VICE PRESIDENT

Sd/-
(Vikas Awasthy)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 27th February, 2019.
RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A), Aurangabad
4. The Commissioner of Income Tax, Central, Nagpur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune