

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.5348/M/2016
Assessment Year: 2010-11**

Mrs. Sharda Jhabarmal Jangir, 1303-A, Lakshachandi Height, Gokuldham, Goregaon (East), Mumbai - 400063 PAN: ABSPJ 2647M	Vs.	The Income Tax Officer, Ward 24(3)(3), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vijay Singh, A.R.
Revenue by : Shri Chaudhary Arunkumar Singh, D.R.

Date of Hearing : 30.04.2019

Date of Pronouncement : 31.05.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 18.05.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The grounds raised by the assessee are as under:

- "1. The Ld. CIT(A) erred in confirming the action of A.O. and has erred in allowing only a part relief.
2. The Ld. CIT(A) has erred in confirming the addition of Rs.33,12,991/- on account of unexplained purchases.
3. The Ld. CIT(A) erred in confirming the disallowance of 20% of labour charges amounting to Rs.8,09,212/-.
4. The Ld. CIT(A) has erred in confirming the addition of Rs.19,39,836/- on account of long term capital gain and has further erred in denying the full benefit of exemption u/s 54 for purchase of new residential house."

3. The assessee has also raised additional ground which was not pressed by the counsel of the assessee at the time of hearing and is dismissed accordingly.

4. The first ground is general in nature and needs no adjudication.

5. The issue raised in 2nd ground of appeal is against the decision of Ld. CIT(A) confirming addition of Rs.33,12,991/- on account of unexplained purchases.

6. The facts in brief are that the assessee is carrying on the business of civil contractors under the name and style of AJ Construction. During the year, the gross receipt of the assessee was Rs.1,33,84,389/- and material and labour charges were Rs.69,49,340/- and Rs.40,46,056/- respectively. The AO in order to verify the genuineness of these expenses called upon the assessee to furnish the books of accounts, audit report, bills, vouchers etc. The assessee on 11.01.2013 submitted details of labour charges and purchases. Thereafter, AO issued notice under section 133(6) of the Act to major parties. After examining the responses from various suppliers, the AO found that there were discrepancies in the accounts of two major suppliers namely M/s. General Plumblines and M/s. General Tubes Pvt. Ltd. Both the proprietary concerns were having common proprietor. The purchases shown by the assessee from M/s. General Plumblines and M/s. The General Tubes Pvt. Ltd. were Rs.35,75,843/- and Rs.15,37,536/- respectively. However, as per the details submitted by these parties, the purchases were shown at Rs.17,95,387.73 and Rs.nil respectively. Accordingly, a show cause notice was issued as to why the

difference of Rs.17,75,455/- and Rs.15,37,536/- should not be added to the income of the assessee which was replied by the assessee by submitting that there is an exact purchase bill of Rs.17,75,455/- of M/s. General Plumblines which has been the reason of this variation in these purchases. The assessee also filed a copy of bill of Rs.15,37,536/- of M/s. The General Tubes Pvt. Ltd. The AO found that both these invoices were proforma invoices and the word proforma was deleted and therefore these invoices were not shown by both these suppliers. The AO finally treated the purchases of Rs.33,12,991/- as unexplained purchases and added the same to the income of the assessee. Similarly, as regards labour charges the AO asked the assessee to file the page wise analysis of outstanding expenses of Rs.36,94,933/- which was replied by the assessee vide letter dated 19.03.2013. The AO found on the basis of submissions of the assessee that all these payments were made in cash and signatures were obtained on the vouchers only. Thus AO came to the conclusion that since the assessee has failed to submit the complete details like person-wise payment, their outstandings and confirmations etc. and also found that there were no sufficient cash withdrawal to pay these labour charges and thus disbelieved the theory of the assessee that 90% of the total labour charges were remained unpaid. Finally AO came to the conclusion that said payments and labour expenses were not properly verified and thus disallowed and added a sum of Rs.8,09,212/- by applying 20% of labour charges to the total income of the assessee on adhoc basis.

7. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee so far as the purchase of material of

Rs.33,12,991/- is concerned by observing that assessee has no explanation for the purchases made to this extent and also observed that it is not a case of bogus bills that were acquired through from other sources by the assessee. The Ld. CIT(A) noted that there was no evidence of consumption of material also and moreover the suppliers had denied to have supplied any materials. The Ld. CIT(A) also dismissed the appeal of the assessee on labour charges on the ground that assessee did not explain the labour charges and no labour registers were produced. The Ld. CIT(A) noted that the assessee could not explain as to why the labour registers were not available for verification and finally dismissed the appeal on this ground also.

8. After hearing both the parties and perusing the material on record, we observe that in this case the purchases to the tune of Rs.33,12,991/- which were stated to be made from two parties namely M/s. General Plumblines of Rs.17,95,387/- and M/s. General Tubes Pvt. Ltd. of Rs.15,37,536/- were added to the income of the assessee for the reason that the said payments were not confirmed by the suppliers who specifically stated in reply to notice issued under section 133(6) of the Act that they have not supplied any such goods to the assessee. We also note that the assessee has filed the bills and vouchers before the authorities below. As regards the purchases, the allegations of the AO are that the purchases were booked on the basis of Performa invoices by cutting and striking off the word Performa by the suppliers and therefore the said bills can not be accepted. However, we note that in the said bill there was adjustment of Rs.1,00,000/- advance on behalf of M/s. The General Tubes Pvt. Ltd. which was duly accepted by the AO. We also find that no

cross examination was allowed to the assessee by the AO. Moreover, the invoice submitted by the assessee of Rs.33,12,991/- appears to be genuine as compared to the bills submitted by the suppliers as the bills submitted by the assessee bear the signature of the suppliers and the receipt of Rs.1,00,000/- on behalf of the M/s. The General Tubes Pvt. Ltd. duly signed by the supplier. However, the said supplier denied having supplied any material as per the bills which is inconsistent and contrary with the statement of the supplier as there is a receipt of Rs.1,00,000/- on behalf of M/s. The General Tubes Pvt. Ltd. which was accounted for by the assessee and accepted by the AO and even the supplier has admitted the same. Under these circumstances, we are not in agreement with the conclusion drawn by the Ld. CIT(A) that purchase bills submitted by the assessee are not genuine as any transaction can not be accepted in part. Moreover, the assessee is a civil contractor and in case of non maintenance of books by the assessee if the provisions of 448D of the Act are applied, the income is estimated @ 8% of the gross receipt whereas the AO estimated at 39% of the gross receipt, we also note that in the preceding three years namely A.Y. 2007-08, 2008-09 & 2009-10 the net profit rates of the assessee were Rs.7.9%, 8% and 8.3% and in the current year the GP rate is 9.22% as against 39% estimated by the AO. Therefore, even if we go by the theory of net profit and consistency over the years the case of the assessee appears to be reasonable. Accordingly, we are setting aside the order of Ld. CIT(A) on this issue and addition is ordered to be deleted.

9. Similarly, the AO has disallowed the labour charges of Rs.8,09,212/- on estimated basis on the ground that assessee has failed to submit complete details like person-wise payment and outstanding amount, confirmation for the outstanding balance etc. and there was no sufficient cash withdrawal to make the payment to the worker and thus made an adhoc disallowance of 20%. The Ld. CIT(A) affirmed the same on the ground that labour charges were not supported by the evidences.

10. After analyzing the facts on record and perusing the material available, we observe that an adhoc disallowance was made by the AO by ignoring the fact that assessee is a petty contractor having turnover of Rs.1,33,84,389/-. We observe from the records placed before us that the recipients have put their signatures on the vouchers and assessee is maintaining loose sheets to keep the labour records. We further find that the NP rate over the years have shown consistent growth and during the year the net profit rate is 9.22% which is showing upward trend. Therefore, we are not in agreement with the conclusion of the Ld. CIT(A) on the point of making adhoc disallowance. Accordingly, the order of Ld. CIT(A) is set aside and the AO is directed to delete the addition.

11. The issue in 4th ground of appeal raised by the assessee is against the confirmation of addition of Rs.19,39,836/- by Ld. CIT(A) as made by the AO on account of long term capital gain by denying the exemption under section 54 of the Act for purchase of new residential house.

12. The facts in brief are that assessee has sold residential flat for a consideration of Rs.70.00 crores on 27.11.2009 and has purchased another flat at Rs. 87,45,200/- on 14.07.2009. The AO during the course of assessment proceedings asked the assessee to furnish the computation of total income. The AO observed from the details furnished by the assessee that the purchase price of the old flat was Rs.13,93,000/- plus brokerage of Rs.40,000/-. The AO observed from the audited balance sheet that assessee has credited Rs.62,10,000/- to the capital account towards sale of flat and inferred that the cost of acquisition of the assessee was only Rs.7,90,000/- which was calculated by reducing Rs.62,10,000/- from total sale consideration of Rs.70,00,000/- and after indexing the resultant amount of Rs.7,90,000/-, the indexed cost of acquisition was calculated on Rs.14,22,450/-. The AO, accordingly, calculated the long term capital gain at Rs.55,75,550/-. The AO while calculating the exemption under section 54 came to the conclusion that the assessee has not used the long term capital gain entirely towards acquisition of new flat as the assessee has utilised bank loan to the tune of Rs.50,00,486/- to purchase the flat and thus calculated the investment in new house and taxable capital gain as under:

Investment in new house			
As per assessee's working		87,45,200	
Less : Disallowable			
Misc. Expenses	19,500		
Transfer fees	<u>87,500</u>	1,07,000	86,38,200
Less: Bank Loan			<u>50,00,486</u>
Net Investment eligible for Sec.54			36,37,714
Long Term Gain as calculated above			<u>55,77,550</u>
Taxable Long Term Capita Gains			<u>19,39,836</u>

13. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by upholding the order of AO by holding that the benefit of deduction under section 54 of the Act is available only to the extent of long term capital gain invested and not qua the borrowed funds used for the purchase of flat by relying on the decision in the case of Milan Sharad Reperal vs. ACIT (2009) 27 SOT 61 (Mum.), CIT vs. VR Desai (2011) 197 Taxmann.com 52 (Ker.) and Smt. V. Kumuda vs. DCIT (2012) 135 ITD 116 Hyd.

14. After hearing both the parties and perusing the material on record, we observe that the only issue on the basis of which the AO restricted the benefit under section 54 of the Act in the purchase of new house property is that the loan funds were used in the purchase of property to the tune of Rs.50,00,486/- and thus the long term capital gain remained unutilized to the tune of Rs.19,39,836/- which was assessed as long term capital gain. The AO and Ld. CIT(A) have relied on the three decisions as referred to hereinabove. However, now the assessee's case stood squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT vs. P.S. Pasricha ITA No.1825 of 2009 wherein it has been held that even if new house is purchased out of borrowed funds even then the deduction under section 54 of the Act is allowable. We, therefore, respectfully following the decision of the Hon'ble Bombay High Court (supra) set aside the order of Ld. CIT(A) and direct the AO to allow the benefit of section 54 to the assessee in respect of the entire capital gain.

16. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31.05.2019.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 31.05.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.