

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.4170/MUM/2011
निर्धारण वर्ष / Assessment Year : 2006-07

M/s. S.C. Thakur & Brothers, Plot No.265/1, Om Sadanika, Panvel Uran Road, Panvel, Dist. Raigad PAN : AADCS8865K	Vs.	ACIT, Central Circle, Thane
Appellant		Respondent

आयकर अपील सं. / ITA No.5001/MUM/2011
निर्धारण वर्ष / Assessment Year : 2006-07

ACIT, Central Circle-2, Thane	Vs.	M/s. S.C. Thakur & Brothers, Plot No.265/1, Om Sadanika, Panvel Uran Road, Panvel, Dist. Raigad PAN : AADCS8865K
Appellant		Respondent

Assessee by Shri Hari Krishan
Revenue by Shri Pankaj Garg

Date of hearing 16-09-2019
Date of pronouncement 17-09-2019

आदेश / ORDER

PER R.S.SYAL, VP :

These two cross appeals – one by the assessee and the other by the Revenue arise out of the order passed by the Id. CIT(A) on 15.03.2011 in relation to the assessment year 2006-07.

2. The first issue raised in the assessee's appeal is against the confirmation of addition of Rs.1,05,18,217/- on account of disallowance u/s.40(a)(ia) of the Income-tax Act, 1961 (hereinafter called 'the Act').

3. Briefly stated, the facts of the case are that the assessee, at the material time, was a registered firm engaged in the business of Civil Construction, Infrastructure Development and undertakes Government projects, which was later on succeeded by a private limited company. A search and seizure action was taken u/s.132 of the Act at the premises of the assessee on 07-02-2008. In response to notice u/s.153A, the assessee filed return on 17-07-2008 declaring total income of Rs.6,32,46,370/- for the year under consideration. During the course of assessment proceedings, the AO observed that there was failure on the part of the assessee to deduct tax at source on payment to the tune of Rs.1,05,18,217/- towards Transportation receipts. Invoking the provisions of section 40(a)(ia) of the Act, he made disallowance for the said sum, which came to be affirmed in the first appeal.

4. We have both the sides and gone through the relevant material on record. The assessee was subjected to search on

07-02-2008. Prior to that, the assessee furnished its return of income u/s.139(1) of the Act on 31-10-2006 declaring total income of Rs.6,32,46,374/-. No notice u/s.143(2) was issued within the stipulated period which expired on six months from the end of the relevant assessment year, i.e. on 30-09-2007. Thus, when the search action was taken, the time limit for issuing notice u/s.143(2) had already expired and further no assessment order was passed u/s.143(3) in respect of the year under consideration.

5. At this juncture, it is significant to note that when a search is conducted, there can be two types of assessment years, namely, completed assessments and non-completed or pending assessments. Assessment years having completed assessments mean the years for which either the assessments stood completed by the AO u/s 143(3) or section 144 before the date of search or the years for which the regular assessments were not taken up after the filing of the returns by the assessee and further that the time limit for issuing notice u/s 143(2) stood expired on the date of search.

6. As per the scheme under the Act, a return filed by the assessee is first processed by the A.O. u/s 143(1)(a) of the Act in

which total income is computed after making the specified adjustments. As per clause (b), tax and interest, if any, is computed on the basis of the total income computed under clause (a). Clauses (d) and (e) of section 143(1) provide that an Intimation shall be sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee and the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee. Processing of the return u/s 143(1) and the consequential issuing of Intimation is construed as passing of the assessment order except where a notice u/s 143(2) is issued for a scrutiny assessment u/s 143(3) of the Act. In a case, where notice u/s 143(2) is issued, the processing of return u/s 143(1) and the consequential issuance of Intimation does not amount to passing of the assessment order because the assessment order, in such circumstances, is passed after due scrutiny u/s 143(3) of the Act. There can be only one assessment order for one year. The crux of the matter is that where no notice u/s 143(2) is issued within the permissible maximum time, the issuance of Intimation on processing the return u/s 143(1) of the Act, is construed as completion of assessment. However, where such notice is issued,

the intimation issued u/s 143(1)(a) loses the character of an assessment order, which in that case, is passed u/s 143(3) after thorough scrutiny. To sum up, an assessment is termed as completed on the passing of an order u/s 143(3) of the Act, but, in a case, where a return has been filed by the assessee, which is processed u/s 143(1), but no further notice u/s 143(2) is issued and the same cannot be issued because of the time limit setting in, the Intimation sent to the assessee u/s 143(1) is also treated as a completed assessment for this purpose.

7. *Au contraire*, the assessment years having non-completed or pending assessments mean the years for which the assessments were pending on the date of search which are abated in terms of the express provisions of the second proviso to section 153A. This will also embrace the years in respect of which the time limit for issuing notice u/s 143(2) is still available with the AO as on the date of search.

8. Scope of income under sections u/s.153A/153C is different in both the above types of assessments. In case of non-completed or pending assessments, the entire assessment is thrown open before the AO and the pending assessment gets abated. The AO

can make addition in such an assessment whether or not there is any incriminating material found during the course of search. However, in case of completed assessments, the scope of addition u/s.153A gets restricted only *qua* some incriminating material found during the course of search. In such an assessment, addition can be made only on the basis of incriminating material found during the course of search as has been held by the Hon'ble jurisdictional High Court in *CIT & others Vs. Deepak Kumar Agarwal and others (2017) 398 ITR 586 (Bom.)* and *CIT vs. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom.)*.

9. The instant case falls under the completed assessment category, for which though the return was filed u/s.139(1) but the assessment was not taken up and further the time limit for issuing notice u/s.143(2) had already expired. The extant addition has been made by invoking the provisions of section 40(a)(ia) of the Act. The assessee debited its Profit and loss account with a sum of Rs.3,46,64,154/- on account of Earth moving charges. The AO found that the assessee did not deduct any tax at source on this amount u/s.194C of the Act. Following his order for the A.Y. 2005-06, he considered 25% of the payments made on Earth moving charges as towards transportation of sand etc. on which it

was opined that tax was liable to be deducted at source. Having not deducted tax at source, the AO held that the amount was disallowable u/s.40(a)(ia) of the Act. It is observed from the above discussion that the disallowance in question is not based on any incriminating material found during the course of search and assessment year under consideration is that of completed assessment, and not that of abated assessment. In our considered opinion and respectfully following the above precedents of the Hon'ble jurisdictional High Court, we hold that the disallowance in question cannot be sustained because no incriminating material was found on this score. We, therefore, order to delete the above disallowance.

10. The only other issue raised in the assessee's appeal is against the estimation of income at 10% of receipts. The Revenue in its appeal is aggrieved by the decision of the Id. CIT(A) in reducing the estimation of net profit to 10%.

11. The facts apropos these grounds are that a number of incriminating documents were found during the course of search, which were seized. Statement of the partner, namely, Sh. Paresh Ram Thakur was recorded u/s.132(4) of the Act on 8.2.2008. The

seized documents indicated recording of inflated expenses. Initially, the assessee made surrender of Rs.6.50 crore in its hands for the A.Y. 2007-08 and its successor, namely, Thakur Infra Projects Pvt. Ltd. for the A.Y. 2008-09. However, in the subsequent statement, the assessee revised surrender of Rs.6.50 crore only in the hands of Thakur Infra Projects Pvt. Ltd. and that too for the A.Y. 2008-09. The AO found that the assessee had maintained two sets of books of account for the year under consideration, namely, the one which was found recorded in computers at the time of search drawn up to February, 2006 and the other which was produced by the assessee during the course of assessment proceedings. He found difference between several items of profit and loss account and balance sheet recorded in two sets of accounts. The AO has made out a comparative tabulation on page 28 of his order indicating the amount of total receipts including contract receipts along with the direct and indirect expenses, as declared in the return of income and as found in the seized CD. On such analysis, the AO found a percentage of expenses to contract receipts as per the Profit and loss account filed by the assessee with the return of income at Rs.89.77% as against the similar percentage in the Profit and loss account as

found in seized CD at 75.04%. The difference between the two at 14.73% was added to the assessee's declared percentage of profit at 7.49%, which resulted into an addition of Rs.5,85,75,235/-.

When the matter came up before the Id. CIT(A), he observed that the assessee succeeded in reconciling the figures in two sets of accounts as discussed above. He has discussed such reconciliations on page 39 onwards of the impugned order. Thereafter, he held that the view point of the AO in making addition @14.73%, being, the difference in expenses in two sets of books of account, was not appropriate. Considering the order passed by the Mumbai Benches of the Tribunal in *ACIT Vs. Vijay Mhatre*, he estimated the income at 10% of the turnover at Rs.9.41 crore. Both the sides are in appeal on their respective stands. Whereas the claim of the assessee is that the entire addition ought to have been deleted, the Revenue has made out a case that the Id. CIT(A) was not justified in reducing the AO's estimation of net profit to 10% of the total receipts.

12. Having heard both the sides and gone through the relevant material on record, it is seen that the search and seizure action conducted on the assessee revealed the evidence of the assessee having inflated expenses under the heads Transport charges,

Machinery hire charges, Labour charges and Sub-contract expenses. It was further seen that the assessee had maintained two sets of books of account for the A.Ys. 2006-07 and next assessment year. Various blank signed letter heads were also found and seized from the office of the assessee. When asked to explain, Sh. Paresh Thakur in his statement recorded u/s 131 on March, 2008 stated that : `These are blank letter heads of sub contractors, some of which are signed. These sub-contractors left the letter head in our office in the course of working.' When the same question was asked to Sh. Anil Bhagat, he stated the reason of the same on behalf of his wife, proprietor of Rohit Construction, whose blank signed letter heads were seized. He explained that : `These signed letter heads have been provided by us to them as per their instructions for preparation of our contract bills to be prepared by M/s S.C. Thakur & Bros/SC Thakur Infraproject, Panvel.' It was further revealed during the course of search that the vouchers of expenses under the above heads were prepared in the office computer only but the original records containing signature of supervisor and engineering person were destroyed. This fact was also confirmed by the partner in his statement u/s 132(4) of the Act. The above discussion indicates

that the Department came across several instances of inflation of expenses and unsubstantiated expenses along with difference in receipts and expenses in the sets of accounts as found in the course of search in the computer of the assessee and the one that was actually produced for the purposes of assessment. This indicates that evidence of the assessee having inflated expenses for the year under consideration was actually found during the course of search. In that view of the matter, the manner in which the disallowance made by the AO u/s 40(a)(ia) has been deleted by us *supra*, cannot be applied in so far as the instant addition on account of profit rate is concerned.

13. Now we take up the merits of addition. It is seen that the AO simply proceeded to find out the difference between the expenses as recorded in the Profit and loss account filed along with the return of income and the Profit and loss account found in the seized CD at 14.73% and made addition for the same. The Id. CIT(A) found reconciliation between the figures. He, however, restricted the addition to 10%. We have noted above that the discrepancies were actually observed in the recording of expenses during the course of search but their magnitude is not precisely ascertainable from the orders of the authorities below. The AO

made one estimate about a particular percentage of net profit and the Id. CIT(A) went ahead with another estimate. In the given circumstances, we need to find out the amount of addition liable to be made. Ordinarily, we would have gone with the evidence actually found at the time of search for making addition, but, the position as instantly prevails is that albeit there is evidence of inflation of expenses, but its precise quantification is not available.

14. Section 44AD of the Act, at the material time, with the caption "*Special provisions for computing profits and gains of business of Civil Construction etc.*" starts with a non-obstinate clause and provides that in the case of an assessee engaged in the business of Civil Construction etc. a sum equal to 8% of the gross receipts or a sum higher than that declared in the return of income shall be deemed to be profits and gains of such business chargeable to tax under the head 'Profit and gains from business or profession'. Though the section strictly applied only where the gross receipts did not exceed an amount of Rs.40.00 lakh, but at any rate, it gave hint about the appropriate percentage of profit in the business of Civil Construction. Even though this section technically does not apply to the assessee because of the amount

of gross receipts exceeding Rs.40.00 lakh, still we can find out a reasonable net profit percentage to be applied in the given circumstances at 8%. We, therefore, hold that a net profit rate of 8% be applied to the Total receipts as against 7.49% declared by the assessee and 10% estimated by the Id. CIT(A).

15. However, in applying this percentage, income in the nature of interest received on income-tax amounting to Rs.6,994/- and office rent received amounting to Rs.1,75,500/- which are items of subject matter of Ground No.1 of the Revenue's appeal, should be excluded. Interest received on income-tax should be separately included in the total income of the assessee under the head 'Income from other sources'. Office rent of Rs.1,75,500/- should be considered for the purposes of computation of income under the head 'Income from house property'. These two amounts of receipts, however, are directed to be excluded while applying the percentage of net profit at 8% on the gross contract receipts. The other two items in Ground No.1 of the Revenue's appeal, namely, Discount received amounting to Rs.2,59,815/- and Miscellaneous receipts of Rs.1,05,043/- are related to the contract receipts of the assessee which cannot be separately excluded.

16. To sum up, we set aside the impugned order on this issue and send the matter to the AO to decide this issue in accordance with our above observations. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

17. No other ground or additional ground was argued by the ld. AR, which hereby stand dismissed.

18. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 17th September, 2019.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

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

पुणे Pune; दिनांक Dated : 17th September, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Thane
4. The CIT Central, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“B” / DR ‘B’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	16-09-2019	Sr.PS
2.	Draft placed before author	17-09-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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