

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "Friday E": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

SA No. 987/Del/2019
(In ITA No. 8152/Del/2019)
(Assessment Year: 2016-17)

Brij Gopal Construction Company (P) Ltd, A-7/2, Shivaji Apartment Sector- 14, Rohini, New Delhi PAN: AADCB7702J (Appellant)	Vs.	ACIT, Special Range, New Delhi (Respondent)
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ITA No. 8152/Del/2019
(Assessment Year: 2016-17)

Brij Gopal Construction Company (P) Ltd, A-7/2, Shivaji Apartment Sector- 14, Rohini, New Delhi PAN: AADCB7702J (Appellant)	Vs.	ACIT, Special Range, New Delhi (Respondent)
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Assessee by :	Shri Gautam Jain, Adv Shri Lalit Mohan, Ca
Revenue by:	Ms. Rakhi Bimal, Sr. DR
Date of Hearing	18/10/2019
Date of pronouncement	20/11/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. Assessee, a private limited company, has preferred this stay petition number 987/Del/2019 in ITA number 8452/Del/2019 for assessment year 2016 - 17 seeking the direction to the learned assessing officer to keep the outstanding demand of INR 5,13,40,800/- in abeyance till the disposal of appeal.
2. The learned authorised representative extensively referred to the reasons seeking stay of the demand. He directed the nature of the business of the assessee, past history of assessments in case of the assessee, the overall net profit earned by the assessee in past years and in subsequent years, the

amount of outstanding labour wages payments in earlier years as well as in subsequent years and the amount of labour expenditure incurred by the assessee with respect to the total revenue/gross receipts shown by the assessee. He also referred to the order of the learned CIT – A, who according to him rejected the books of accounts of the assessee without even calling for the books of accounts and estimating the profits of the assessee as per last year.

3. At the time of hearing of the stay petition, at the consent of the parties and looking at the nature of the issue involved, the appeal was also heard.
4. The assessee has preferred this appeal against the order of the learned that Commissioner of income tax (appeals) – 2, New Delhi dated the 30/8/2019 for assessment year 2016 – 17 raising following grounds of appeal:-

- “1 *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in concluding that “it would be a better course to reject books of accounts under section 145 of the Act and make reasonable estimation of profits.” The said finding is not only without jurisdiction and beyond the scope of the appeal and in violation of section 251 of the Act but also factually incorrect, legally misconceived and wholly untenable*
- 1.1 *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the solitary issue involved in the appeal was adhoc addition made of 50% of the outstanding wages of Rs. 5,36,60,065/- and brought to tax under section 68 of the Act and therefore, there was no justification either in law or on fact to invoke section 145 of the Act and reject the audited books of accounts maintained by the appellant and accepted by the learned Assessing Officer in the order of assessment framed under section 143(3) of the Act. The said finding is patently erroneous and also without jurisdiction and beyond the scope of appeal.*
- 1.2 *That the finding of the learned Commissioner of Income Tax (Appeals) that no reason for defects in profit of the appellant was explained and there are various anomalies and deficiencies in the books of accounts and ledger vouchers produced by the appellant is also not based on correct appreciation of facts on record and facts relied upon by the appellant and therefore, untenable.*
- 1.3 *That each of the reasons or basis stated by the learned Commissioner of Income Tax (Appeals) to reject the books of accounts maintained by the appellant and also hold that appellant has not been able to prove the authenticity of ledger accounts, vouchers and books of accounts are without any opportunity to the appellant and therefore, even otherwise, in violation of principles of natural justice apart from being perverse, whimsical, erroneous and unsustainable.*
- 2 *That further, the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in concluding that net profit of 2.3%*

being earlier turnover should be adopted to compute the income of the appellant as against net profit of 1.23% declared by the appellant after invoking section 145 of the Act is also misconceived, misplaced and untenable.

- 2.1 *That the learned Commissioner of Income Tax (Appeals) has even otherwise has also failed to appreciate that once the expenditure shown as payable at the instant assessment year stood paid during the succeeding assessment year which payment was not in dispute then mere fact that sum of creditors were outstanding at the close of the instant year could not be a ground to make an addition to the income declared in the instant assessment year or to reject books of accounts.*
- 2.2 *That the various findings recorded in the impugned order of learned Commissioner of Income Tax (Appeals) and also the order of assessment are devoid of factual basis, legally misplaced and have been arrived in disregard of the detailed replies and, documentary evidence furnished by the appellant in the course of assessment proceedings and appellate proceedings.*
- 2.3 *That the learned Commissioner of Income Tax (Appeals) has further erred in rejecting the books of accounts on assumption and presumption and thereby failing to appreciate that surmise, conjecture and suspicion can neither in law and nor on fact can be made a valid basis to reject books of Accounts u/s 145 of the Act.*
- 2.4 *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that no specific defect has been pointed out by the learned Assessing Officer in the books of accounts maintained by the appellant company*
- 2.5 *That while invoking such rate of profit @ 2.3%, the learned Commissioner of Income Tax (Appeals) has enhanced the assessment without granting any opportunity to the appellant and is in violation of section 251(2) of the Act and therefore, the same is not in accordance with law and unsustainable.*
- 3 *That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in upholding an order of assessment as the same being without jurisdiction and therefore deserves to be quashed as such.*
- 3.1 *That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that in absence of any valid order either u/s 124 or order u/s 127 of the Act the impugned order of assessment is without jurisdiction.*
4. *That the learned Commissioner of Income Tax (Appeals) is not correct in sustaining the decision of learned Assessing officer of not granting credit of TDS to the extent of Rs. 5,27,229/- deducted on mobilization advance on premise that the same has not been offered as income in the assessment year.*
5. *That both the authorities below have framed the impugned order without granting sufficient proper opportunity to the appellant company and therefore the same are contrary to principle of natural justice and hence vitiated.”*

5. Briefly stated the fact shows that assessee is a private limited company engaged in the business of civil construction and trading. It filed its return of income on 17 - 10 - 2016 declaring income of INR 147215710/-. Assessment u/s 143 (3) of the act was passed by the learned assessing officer on 23/12/2018 determining the total taxable income of the assessee at INR 2 00879665/-. In the assessment proceedings the major addition was made by the learned assessing officer of INR 5,36,60,065/- being 50% of the outstanding liability on account of the wages. Another small disallowance of INR 3890/- out of the interest expenditure under section 36 (1) (iii) of the act was made. Further, the grievance of the assessee is that the tax deduction at source of INR 527229/- was not considered as tax credit by the learned assessing officer. The above amount of tax deduction at source was on account of the mobilization advance.
6. The assessee challenged both these additions before the learned CIT - A. He passed an order wherein he rejected the books of accounts of the assessee u/s 145 of the income tax act with respect to his decision on the disallowance of the 50% of the outstanding wages. He after rejecting the books of accounts proceeded to make a reasonable estimation of the profit. He noted that in earlier year, the net profit of the assessee was 2.3 percentage of turnover and as the net profit in the current year is only 1.23 percentage for which no reasons are available, he directed the learned assessing officer to calculate the net profit at the rate of 2.3 percentage of the turnover for this year too. Consequently he sustained the addition to this extent. He deleted the interest disallowance of INR 3890/-. With respect to the grant of tax deduction at source of INR 5 27229/- the learned CIT - A did not allow the claim of the assessee on the premises that mobilization advance had not been offered for tax as income in the impugned assessment year. He further noted that the learned assessing officer has already examined the reconciliation of TDS with gross receipts and allowed the eligible credit of tax deduction at source on the income part, which was offered by the assessee during the year.
7. Thus, assessee aggrieved with the order of the learned CIT - A has preferred this appeal before us.

8. The first disallowance/addition is with respect to 50% of the outstanding liability of Rs 107320130/- because of the wages amounting to INR 5 3660065/- made by the learned assessing officer. During the course of assessment proceedings the learned assessing officer noted that main reason for selection of the case in scrutiny is large increase in sundry creditors and reduction in business income as compared to preceding year. Another reason was the large current liability in comparison to total assets in the balance sheet. He noted that assessee has shown outstanding liability because of expenses payable INR 4 114117488/- out of which wages payable are INR 107320130/-. Therefore the assessee was asked to furnish the details about the wages outstanding. The assessee submitted muster roll for the month of April 2015 giving the details of payment of lump-sum in advance and the balance at the end of the month. Assessee produced 17 sheets of payment. The learned AO found that the muster roll as been maintained in English and none of the recipients has signed the same and all of them have put their thumb impression. He therefore found that it is not plausible to commonsense that a laborer which was paid only once in a month because according to him the wages are normally being paid on weekly basis but here the assessee is showing the payment on monthly basis. He further found that the advance payments of wages as well as regular wage paid are acknowledged by the workers at the same time. He also expressed the doubt that the wages sheets have not been prepared on day-to-day basis but has been prepared in one sitting. He therefore held that this is not the primary document and thus is without any evidentiary value. He also found that in the various Ledger accounts of the 'labour expenses payable' there is no voucher number in the ledger. He also noted that in all the Ledger of 'labour payable' expenditure there are only three entries 1 of outstanding balance, and others of the payment on 2 different dates. He further examined the summary of the labour payment which was produced by the assessee for the month of February and March 2016 with the breakup of such payment. He further referred to the provisions of contract Labour (Regulation and Abolition) Central Rules 1971 and noted that the genuineness of the attendance register and the payment vouchers are not established and it is not prepared in accordance with the

rule number 73 of that section. He therefore noted that evidence in the form of attendance register, muster rolls, ledgers et cetera in themselves do not certify the claim of the assessee that INR 1 07320130/- was actually payable by the assessee at the end of the assessment year. He further noted that as assessee is the civil contractor profit of the contract is generally assumed at 10% which is not in the case of the assessee. Therefore, the learned assessing officer also noted that assessee has hired subcontractors for carrying out the work. Therefore in the end, the learned assessing officer noted that the claim of the assessee that it had INR 1 07320130/- on account of the outstanding wages payable as at the end of the year is not correct as the same is also not supported by the books of accounts maintained by the assessee. He also noted that the outstanding wages are for the month of February and March 2016, which is feasible and not correct. Therefore he made an addition to the extent of 50% of the outstanding liability because of the wages amounting to INR 5 3660065/-.

9. On appeal before the learned CIT – A, he rejected the books of accounts of the assessee and determined net profit by adopting the net profit of the previous year at the rate of 2.3% of the turnover where the assessee's net profit for the current year was only 1.23 percentage. Thus, he sustained the addition to that extent. Thus assessee is in appeal.
10. The learned authorised representative submitted that the order of the learned assessing officer is incorrect with respect to the lower gross profit for the reason that during the year the assessee has earned the net profit of 1.23 percentage whereas from assessment year 2010 – 11 assessee is being assessed under the provisions of section 143 (3) of the income tax act and the net profit ratio for all these years is in the range of 1.14 percentage to 1.58 percentage. Only in the assessment year 2015 – 16, the assessee earned the profit of 2.13 percentages. He otherwise submitted that the gross profit and net profit ratio of the assessee is comparable with the earlier years. With respect to the wages outstanding he submitted that for assessment year 2015 – 16 the outstanding wages at the end of the year was INR 22.01 crores which is accepted by the learned assessing officer in the assessment proceedings u/s 143 (3) of the act. He further submitted a chart with respect to each and every year starting from assessment year

2010 – 11 to assessment year 2018 – 19 wherein the assessee has outstanding wages which are being paid in the subsequent month. He submitted that in none of the years such kind of addition has been made. He submitted that assessee is a contractor who is engaged in the business of civil construction work and therefore is following all the prescribed rules and regulation applicable to a contractor including act which has been stated by the learned assessing officer. He further submitted that the books of accounts of the assessee are audited and also subject to review by the Labor Department. In none of the cases, the assessee was found violating any of the provisions of these Acts. He otherwise submitted that when the assessing officer is allowing the total wages expenditure incurred by the assessee for the year of INR 593332683/- on various contract works, the addition of INR 107320130/- out of the outstanding payable does not conform the requirement of the law. He stated that assessing officer has only made the addition of 50% of such expenditure therefore the learned assessing officer himself has accepted that the 50% of such expenditure is payable in the subsequent year as genuine payments. He submitted that the disallowance made by the learned assessing officer is on ad hoc basis. Coming to the order of the learned CIT – A, he submitted that the learned CIT – A has rejected the books of accounts of the assessee without even looking at the books of accounts. He submitted that before the learned CIT – A the books of accounts were not at all produced as he never demanded the same. He otherwise stated that the profits of the assessee are comparable with respect to the earlier years. On the merits of the addition he submitted that the outstanding wages have been paid in the subsequent month which the learned assessing officer as well as the learned CIT – A has not verified. He further submitted that in the Ledger account of the outstanding wages payable, only 2 entries can logically appear, 1 of the outstanding amount and 2nd of the payment of this liability in the subsequent month. He submitted that the learned assessing officer has failed to appreciate the accounting entries. With respect to the thumb impression of the labourers, he submitted that most of the labourers are uneducated and may not sign, which cannot be harped on for making any disallowance. He further stated that assessee has produced the muster roll,

the Ledger account, the attendance register et cetera before the learned assessing officer and none of these evidences were found to be false or any infirmities were shown but has been rejected without any reasons. He stated that in the payment of wages these are the only evidences which assessee can produce. Thus he submitted that the addition made by the learned assessing officer and modified by the learned CIT – A by rejecting the books of accounts and adopting the net profit rate of the earlier years is devoid of any merit and same should be deleted.

11. The learned departmental representative vehemently supported the order of the learned assessing officer and reiterated all the reasons given by them for making disallowance of 50% of the outstanding wages.
12. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, the assessee is engaged in the business of the civil construction work and therefore it engages the labour for its various works. Assessee has a history of assessment u/s 143 (3) of the income tax act since 2010 – 11 as produced by the assessee which can be described as under :-

Assessment Year	Total Turnover	G.P. (in Rs.)	N.P. (inRs.)	N.P. (in %)	Books rejected (if any) u/s 145	Assessment u/s	Remarks
2010-11	141,32,34,036	4,22,55,698	1,61,55,046	1.14	No	143(3)	NIL
2011-12	204,66,89,492	5,23,95,251	2,47,37,074	1.21	No	143(3)	NIL
2012-13	255,73,35,265	9,35,98,471	4,29,05,390	1.68	No	143(3)	NIL
2013-14	370,57,22,247	16,45,40,066	7,08,93,972	1.91	No	143(3)	NIL
2014-15	528,91,87,874	19,99,50,619	8,33,89,733	1.58	No	143(3)	NIL
2015-16	840,05,86,960	37,23,65,516	17,93,00,815	2.13	No	143(3)	NIL
2016-17	1009,02,73,917	28,21,85,576	12,39,26,080	1.23	YES (Only by CIT(A) and, accepting by AO)	143(3)	Rs. 10,81,50,220
2017-18	1047,91,99,131	23,50,29,004	9,45,54,226	0.90	No	Assessment Proceedings pending	
2018-19	1256,36,05,226	59,02,76,112	37,33,84,597	2.97	No		

For all these years, the assessee was assessed under scrutiny assessment and in none of the years the outstanding wages of the assessee has been doubted by the learned assessing officer. On the careful analysis of the details submitted by the assessee it was found that, the turnover of the

assessee was INR 141.32 lakhs, which for assessment year 2016 – 17 was 1,009 Crores. The net profit ratio of the assessee is ranging from 1.14 percentages in 2010 – 11 at the lowest to 2.13% for assessment year 2015 – 16. For the assessment year 2016 – 17, the assessee has earned the gross profit ratio of 1.23 percentages. Therefore, the net profit percentage shown by the assessee, which is supported by the audited books of accounts, is comparable with the earlier years.

On the issue of outstanding wages, the ld AR submitted a chart as under:-

	Turnover (I)	Wages				% of Wages incurred and claimed i.r.o Turnover (VI=III/I)	% of Wages Outstanding i.r.o. Turnover (VII=VI/III)
		Opening Balance (II)	Wages incurred and claimed (III)	Wages paid during the year (IV)	Closing balance (V=II+III-IV)		
2010-11	141,32,34,036	7,71,19,588	18,73,08,588	21,96,92,020	4,47,36,156	13.25	3.16
2011-12	204,66,89,492	4,47,36,156	13,92,70,014	17,24,07,713	1,15,98,457	6.92	0.5
2012-13	255,73,35,265	1,15,98,457	27,28,25,745	22,19,07,468	6,25,16,734	10.74	2.44
2013-14	370,57,22,247	6,25,16,734	24,51,58,738	21,24,44,949	9,52,30,522	6.57	2.57
2014-15	528,91,87,874	9,52,30,522	24,86,42,126	26,68,80,349	7,69,92,299	4.70	1.46
2015-16	840,05,86,960	7,69,92,299	35,22,66,785	20,90,80,351	22,01,78,733	4.19	2.62
2016-17	1009,02,73,917	22,01,78,733	59,33,32,683	70,61,91,286	10,73,20,130	5.88	1.06
2017-18	1047,91,99,131	10,73,20,130	44,41,76,698	44,52,39,471	10,62,57,357	4.24	1.01
2018-19	1256,36,05,226	10,62,57,357	60,73,62,850	48,39,79,147	22,96,41,060	4.83	1.82

From the above chart, looking to the nature of the business of the assessee constantly at the end of the every year we found that assessee has an outstanding closing balance of the wages payable and the wages expenditure. According to the chart submitted by the learned authorised representative it is apparent that such percentages 13.25 percentage of the total labour expenses incurred at the highest level to 4.19 percentage of the total labour expenses incurred by the assessee over this period. For the current year, such percentage is only 5.88 percentages. Therefore, it is apparent that percentage of wages compared to turnover of the assessee is also comparable with the history of the assessee. Further with respect to the percentage of outstanding wages expenses compared to the turnover of the assessee is also in consonance with the earlier years' percentage shown by the assessee. Further, the learned assessing officer could not show that how the assessee has not complied with the contract (regulation and abolition) act, without finding any fault by the respective authority under that act. The learned assessing officer also did not find any fault with the name of the labourers, the rate of wages paid to them, the amount of advances paid to them. The learned assessing officer has the complete

information of such muster was produced before him along with the attendance register. Merely because there is a thumb impression on the labour wages payment acknowledgement receipt it cannot be said that it is not evidence. Further, the learned assessing officer also did not show that what is the evidences assessee could have produced before him to prove the genuineness of outstanding labour expenditure wherein AO himself has allowed the labour wages for this year. Further, the AO did not give any reason that why he is considering only 50% of the outstanding wages payable as disallowable. It is not the case of the learned assessing officer that subsequently these amounts have not been paid, as he has not verified this fact. He has merely gone on the ledger entries. The reason given by him for making addition/ disallowances if that details of wages were filed after a long delay of more than a month. This is unusual. Ultimately assessee has filed the complete details before the learned assessing officer who has examined the muster roll in attendance register therefore this cannot be reason for making the addition. The learned AO further noted that Muster roll for the HUDA Gurgaon produced before the AO shows all payments to labour are made on monthly basis which is not the common business practice. Details have been prepared on monthly basis at one go. The details do not have evidentiary value as a primary document. The learned assessing officer also did not show that in the ld similar line of the business, the duration of the payment of wages is not on monthly basis. It is also not shown that how he has come to know about the common business practice without putting such evidences before the assessee and confronting him. Further more the assessee is carrying this business for a fairly long time and assessing officer himself has assessed it under section 143 (3) of the income tax act. When he has accepted this practice in earlier years, without putting on record substantial evidences and confronting the assessee with those evidences, the learned assessing officer cannot use it to make this disallowance. Further, the learned AO noted that Ledger account of CWD wages shows labour payable but has no voucher number and no signature of any person. This is a serious anomaly. We do not find that there is an anomaly in the books of accounts as what kind of voucher number and signature in the ledger the AO can find. Such signature was already

available in the muster roll and in the attendance register as well as the wages sheets on which the payment has been made. If AO carries any doubt about such evidences then he should have further examined the issue. Further with respect to the violation of some different act stated by the learned assessing officer we are of the view that assessing officer is not the authority who can say that assessee has violated a particular provision of the particular act, which is not administered by him. This is also precisely true when such administering authority of that act has not found any fault with the records of the assessee. Further, we are not in a position to approve the action of the learned CIT – A in rejecting the books of accounts and estimating the net profit of the assessee adopting the net profit percentage disclosed by the assessee in earlier year. It is apparent that in this case the learned CIT – A did not look at the books of accounts as it were not produced before him or neither had he asked assessee to produce them. For the purpose of rejection of the books of accounts, the assessing officer/CIT A is required to show some latent, patent and glaring defects in the books of accounts. When the books of accounts produced before the learned assessing officer, even he did not mention any defects in the books of accounts and accepted the book results and made ad hoc addition of 50% of the outstanding wages, then we fail to understand that how the learned CIT – A estimated the net profit of the assessee rejecting the books of accounts. Even otherwise looking to the facts of the case assessee has produced the complete muster roll, attendance register and the Ledger accounts before the assessing officer. However, the learned AO has not seen details of discharge of the above liability on account of the outstanding labour wages in subsequent year. According to us to decide about the allowability of the outstanding the wages payable it is necessary for the learned assessing officer to examine whether this liability exist or not, as the learned assessing officer himself has allowed the labour expenditure debited to the profit and loss account, this option is now not available with him. Therefore, only option left with the learned assessing officer is to verify whether such liability has been discharged by the assessee in subsequent year or not. As the learned assessing officer has not given his comments on this aspect, then questioned by the bench to the learned authorised

representative, he readily agreed that such an evidences can be produced before the assessing officer. The learned departmental representative also agreed that if such outstanding wages is paid in subsequent year, it could not be disallowed. Therefore, to determine the allowability with respect to the genuineness of the outstanding wages it is necessary to verify whether such expenditure have been paid in the subsequent month or not. For this reason, we set aside the whole issue back to the file of the learned assessing officer to examine payment of such wages in the subsequent month. The assessee is directed to produce the relevant information before the learned assessing officer. The AO may examine such detail and if found in accordance with the law, to delete the addition. If such payments are not made in the subsequent year, he may give an adequate opportunity to the assessee to prove its case. After that, the AO may decide in accordance with the law. Accordingly, ground number 1 – 3 of the appeal of the assessee is allowed for statistical purposes with above direction.

13. Ground number 4 is with respect to the grant of credit of tax deduction at source to the extent of INR 5 27229/- on mobilization advances. On careful consideration of the above issue it is apparent that the amount of tax deduction at source is eligible for credit to the assessee in the year in which the income pertaining to such tax deduction at source is offered for taxation. Admittedly mobilization advances not been shown by the assessee as its income therefore we do not find any infirmity in the order of the learned CIT – A to that extent.
14. Accordingly ground number 4 of the appeal is dismissed.
15. The appeal of the assessee is partly allowed for statistical purposes. The stay petition filed by the assessee has also become infructuous in view of our decision in the appeal itself.
16. Order pronounced in the open court on 20/11/2019.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 20/11/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi