

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER
AND
SHRI S.S.GODARA, JUDICIAL MEMBER**

I.T.A. No.939/HYD/2016

Assessment Year: 2011-12

M/s.Turbomachinery Engineering Industries Limited, HYDERABAD [PAN: AAAC7518D]	Vs	The Deputy Commissioner of Income Tax, Circle-2(3), HYDERABAD
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(Appellant)

(Respondent)

For Assessee : NONE

For Revenue : Shri Swapnil Patil, DR

Date of Hearing : 03-02-2022

Date of Pronouncement : 21-03-2022

ORDER

PER S.S.GODARA, J.M. :

This assessee's appeal for AY.2011-12 arises from the CIT(A)-2, Hyderabad's order dated 28-01-2016 passed in case No.0177/2014-15, involving proceedings u/s.143(3) of the Income Tax Act, 1961 [in short, 'the Act'].

Case called twice. None appears at the assessee's behest. It is accordingly proceeded *ex-parte*.

2. The assessee pleads the following substantive grounds in the instant appeal:

“1. The order of the learned Commissioner of Income Tax (Appeals), Hyderabad, is against the law, weight of evidence and probabilities of case.

2. The learned Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer, wherein, the amount paid to subcontractor amounting to Rs.2,23,69,143/- is disallowed.

3. The learned Commissioner of Income Tax (Appeals) ought to have appreciated that the assessee produced all the details of payments made to the subcontractor and also deducted TDS on such payment, therefore, should have deleted the addition made on account of payment made to subcontractor amounting to Rs.2,23,69,143/-.

4. The learned Commissioner of Income Tax (Appeals) ought to have appreciated that the amount of Rs.2,23,69,143/- is not the income of the assessee under the provisions of the IT Act.

5. The appellant craves leave to add to, amend or modify the above grounds of appeal either before or at the time of hearing of the appeal, if it is considered necessary”.

3. Learned departmental representative next takes us to the CIT(A)'s lower appellate discussion affirming the impugned disallowance of sub-contractor expenses as well as the corresponding service charges as under:

5.1. First issue relates to AO's action in disallowing an amount of Rs.2,23,69,413/- which represents sub-contract works stated to have been given to M/s.Euphoria Commerce Pvt.Ltd., Kolkatta. AO was of the view that the above transaction is not genuine and hence, added the same to the income returned. The AO's observations are as under:

"During the course of scrutiny proceedings, it was informed by the Income Tax Officer, Ward-9(2), Kolkata that the assessee company had credited an amount of Rs.2,23,69,143/- to M/s. Euphoria Commerce Pvt.Ltd, Kolkatta and deducted tax at source to the extent of Rs.4,47,383/- u/s.194C. Further, it was also informed that M/s.Euphoria Commerce Pvt. Ltd., has not recognized revenue of the said sum on the ground that no work was performed by M/s.Euphoria Commerce Pvt. Ltd during the year under consideration. Accordingly, a commission u/s.131 of the I.T. Act was issued by the ITO, Ward-9(2), Kolkata to the undersigned to conduct inquiries on the following issues:

1. Purpose for which payment was made to M/s.Euphoria Commerce Pvt. Ltd.;
2. Copy of contractual document, if any, executed between the two;
3. Whether any job was performed by M/s.Euphoria Commerce Pvt. Ltd for M/s. Turbcmachinery Engineering Industries Ltd., during the F< 2010-11;
4. Whether M/s.Turbomachinery Engineering Industries Ltd., had debited the amount into P&L account.

3.1 Accordingly, the assessee company was issued a detailed questionnaire wherein it was requested to furnish the above information and summons were also issued to the Managing Director of the assessee company to produce the above information before the undersigned.

3.2 In the meanwhile, the ITO, Ward-9(2) Kolkata vide his letter dated 12.03.2014 stated that his office was in receipt of confirmation from the assessee company through its letter dated 10.11.2013 wherein it was submitted as under:



i) Amount paid in the account of
M/s.Euphoria Commerce Pvt.
Ltd., for AY 2011-12 is Rs,2,34,43,866/-

ii) Amount of tax deducted on above is Rs.4,47,383/-

iii) We have paid the amount as advances to M/s.Euphoria
Commerce Pvt. Ltd.

iv) No contract was executed with the party during the fy 2010-
11;

v) Copy of ledger account of M/s.Euphoria Commerce Pvt. Ltd is
enclosed herewith.

3.3 During the course of assessment proceedings, the
assessee was asked to explain the same. In response, the
Managing Director of the assessee company vide his letter dated
22.03.2014 that

(a) M/s.Euphoria Commerce Ltd., was one of the sub
contractors of the assessee company to whom they have
entrusted subcontract work on back to back basis and during the
year under consideration the said company had executed works
to the tune of Rs. 2,23,69,143/-;

(b) we could not locate the copies of the bills and the
agreements entered into with the party and will be submitting
the same once we trace them out;

(c) The job work charges paid to them as detailed in the
ledger are debited to the profit and loss account for the year in
question in the ledger.

(d) With regard to the confirmation letter dated 10.11.2013
provided to us by you we submit that we are unable to trace out
who has issued the said confirmation letter. We wish to confirm
that what is stated to be as advance in the said letter and the
ledger abstract enclosed are incorrect and the ledger submitted
herewith is correct;

(e) We have given sub contract to the said company,
debited the bills to the profit and loss account for the year and
deducted TDS on the same.

3.4 The above contentions of the assessee are examined.
The arguments put forth by the assessee are general in nature
and cannot be considered for accepting that the assessee
company entered to agreement for sub contract of work to
M/s.Euphoria Commerce Pvt. Ltd.

3.5 In spite of giving several opportunities, the assessee
company has not brought on record any evidence to prove that
M/s.Euphoria Commerce Pvt. Ltd., has executed the sub contract



work on behalf of the assessee. The assessee company has not furnished copy of the agreement and bills to substantiate its claim that Euphoria Commerce Pvt. Ltd has executed the work for them as a sub contractor. It is relevant to mention that the assessee company has addressed a letter dated 10.11.2013 to the Income tax Officer, Ward-9(2), Kolkata wherein they have categorically stated that they paid the amounts as advances to M/s. Euphoria Commerce Pvt. Ltd and no contract was executed with party during the FY. 2010-11.

3.6 M/s. Euphoria Commerce Pvt. Ltd have confirmed before the Income tax Officer, Ward-9(2), Kolkata that it has not recognized revenue of the said sum on the ground that no work was performed by M/s.Euphoria Commerce Pvt. Ltd for the assessee company during the year under consideration.

3.7 Merely denying that the letter addressed by them to the ITO Kolkata and the ledger abstract enclosed to it are incorrect is not acceptable. The onus for proving that M/s.Euphoria Commerce Pvt. Ltd have executed sub contract works for the assessee company and that the letter purported to have been written by them to the Income tax Officer, Kolkata is not genuine squarely lies on the assessee.

3.8 It is for the assessee to prove that the M/s.Euphoria Commerce Pvt. Ltd have executed the works for them and the assessee has not proved the genuineness of the same. Hence, the expenditure debited towards sub contract works of Rs.2.,23,69,143/- said to be executed by is disallowed and added to the total income of the assessee."

5.2. On the other hand, the AR contends as under:

"As explained, the AO during the scrutiny proceedings notice u/s 131 issued separately and asked to submit the transactions with M/s Euphoria Commerce Pvt Ltd. The appellant submitted that, the company entered into many back to back contracts to support the order book, to get credentials and to facilitate financial arrangements during the year. The contracts were given on back to back basis to sub-contractors, including M/s Euphoria Commerce Pvt Ltd after retaining a certain percentage of margin.

The appellant has submitted that, they have neither executed, nor supervised the said back to back contract works. The payments were given through banking channels. The required TDS was also deducted on sub-contract amounts, duly remitted and TDS returns also filed. The relevant submissions of TDS deductions were also duly submitted to the assessing officer. However, we don't know, when, how this contract income was recognised in the books of M/s Euphoria Commerce Pvt Ltd to claim TDS given. These facts never disputed by the by AO, however, not conducted



any enquires in detailed in this approach. If the above enquires have been conducted relevant to the above said submissions, there will not be any addition to the appellant company.

Further, the Id. assessing officer while disallowing sub contract expenditure, assessed 100% turnover thereto as taxable total Income without allowing any matching expenditure. The assessing officer himself accepted that the contracts were back to back and in these works, without any back to back sub contract expenditure there can't be any contract income. Further, if the AO not accepted/ satisfied that the sub-contract expenses were not pertains/relates to the given customer/contract income, the profit estimation method would have been opted. But the AO without considering above facts, entire the back to back sub contract expenditure was disallowed. Thus Rs. 2,30,60,973/- turnover is brought to tax without allowing any expenditure. Hence, the addition in our case is unjustifiable need to be deleted.

Without prejudice to what is stated above and our earlier submissions, alternatively, we hereby request the Hon'ble Commissioner of Income Tax to kindly estimate the profit on the disputed transaction. This view expressed by Jurisdictional ITAT in case of DCIT-3, Hyderabad Vs. AMR India Ltd., and the Hon'ble Bombay High Court in the case of CIT v. Nikunj Eximp Enterprises (P) Ltd., The details of the disputed contracts given on back to back to M/s Euphoria Commerce Pvt Ltd by the appellant given hereunder.

Contract received from	Contract Nature	Invoice Total
ACB (India) Limited	Sub Contract	1,10,30,000
Associated Consulting Engineers	Sub Contract	8,21,735
Associated Consulting Engineers	Sub Contract	7,30,738
Mukund Ltd	Sub Contract	49,63,500
Mukund Ltd	Sub Contract	55,15,000
		2,30,60,973

4: Thus, based on the above facts and submissions, it is hereby prayed before the Hon'ble Commissioner of Income Tax (Appeals) to kindly allow the appeal and grant the relief accordingly."

(Signature)



5.3. I have gone through the above. It is clear from the facts that the assessee has failed to prove that M/s.Euphoria Commerce Pvt. Ltd., has executed the sub-contract works for the assessee. Even during appeal proceedings also, the assessee has failed to prove the same, since onus lies with the assessee and the same was not discharged with clinching evidence/material. It is also seen from the submissions filed by the AR that the concern M/s.Euphoria Commerce Pvt. Ltd., has categorically stated that it has not executed any works. Therefore, the case laws relied upon by the AR are not applicable, as the facts of the assessee's case are distinguishable. In the instant case, the works were not executed.

5.4. In the absence of any material to show that the sub-contract works were executed, the expenditure of Rs.2,23,69,143/- debited on this score is rightly disallowed by the AO. Hence, the AO's action in this regard is confirmed. As a result, the grounds raised are **dismissed**.

6. Second issue relates to AO's action in making an addition of Rs. 17,72,075/- towards 'Service charges'. AO's observations are as under:

"On verification of the information submitted by the assessee, it is observed that the assessee has received contracts on its own and by way of sub-contract, executed certain works on its own and sub-contracted certain works to various parties. When, the assessee was asked to furnish the details of sub contract works taken and sub contract works given, the Managing Director the assessee company during the course of assessment proceedings vide his letter dated 22.03.2014 submitted as under:

During the year the company has taken back to back contracts to support order book and to enable us to get credentials and to facilitate financial arrangements etc. The contracts were received and given on back to back basis to sub contractors by retaining the certain percentage of margin and the company has neither executed the works nor has supervised. We are herewith enclosing the list of back to back contractors and sub contractors

thereon for your information along with the relevant ledger abstracts.

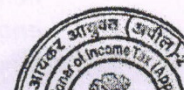
These contracts are generally received through some agents and at times through sub-contractors. We have to pay certain charges for getting these contracts to agents ranging from 0.25% to 1% of the value. But however, because of our financial crisis we did not pay any commission during the year in question or even in the past.

Further, with regard to the copies of the agreements we submit that we could not locate the agreements as our operations were shifted during the recent past we will submit the same once we locate them. Further though the company has not paid any service charges for the back to back contracts during the year, we hereby offer 1% of the contract value of back to back contract of Rs. 17,72,07,500/- as income for the year and pay tax accordingly.

4. From the above submissions of the assessee it is clear that the following sub contracts taken and sub contracts given on back to back basis are bogus.

Invoicing	
Customer	Amount
ACB (India) Ltd	1,00,00,000
Associated Consulting Engineers	14,07,500
Mukund Ltd	95,00,000
Bajaj Infrastructure Development Company Ltd.	10,00,00,000
Gayatri Corporation	83,00,000
Tecnimont SPA India Project Office	2,40,00,000
Gayathri Dimension	90,00,000
Super Smelters Ltd	1,50,00,000
Total	17,72,07,500

Job works	
Customer	Amount
Euphoria Commerce Pvt Ltd	97,00,000
Euphoria Commerce Pvt Ltd	7,22,650
Euphoria Commerce Pvt Ltd	6,42,625
Euphoria Commerce Pvt Ltd	43,65,000
Euphoria Commerce Pvt Ltd	48,50,000
Sakshi Tradelink Pvt. Ltd	1,94,00,000
Sakshi Tradelink Pvt. Ltd	1,94,00,000
Silcon Real Estate Pvt. Ltd	1,94,00,000
Vertex Vlnytrade (P) Ltd	1,94,00,000
ZIP Tradecom Pvt, Ltd	1,94,00,000



<i>Solid Infracon Pvt. Ltd</i>	<i>80,51,000</i>
<i>Spring Vincom P Lted</i>	<i>2,32,80,000</i>
<i>Vertex Vitrade P ltd</i>	<i>43,65,000</i>
<i>Vertex Vitrade P ltd</i>	<i>43,65,000</i>
<i>ZIP Tradecom P Ltd</i>	<i>1,45,50,000</i>

The assessee itself has agreed that those contracts were taken back to back to support order book and to enable the assessee to get credentials and to facilitate financial arrangements etc.

Hence, both the income and expenditure in relation to the above contracts is bogus. However, the assessee must have paid service charges to get these contracts. As the assessee agreed 1% of the total sub contracts taken by the assessee on back to back basis i.e Rs. 17,72,075/- is treated as services charges paid by the assessee out of the books and the same is treated as unexplained income in the hands of the assessee."

6.1. On the other hand, during the appeal proceedings the AR submitted as under:

"During the year under consideration the appellant had taken up back to back contract amounting to Rs. 17,72,07,500/-. It was submitted that the back to back contracts are received either from contractors directly or through agents. The contracts acquired from agents requires payment of certain charges ranging from 0.25% to 1% of contract value. However the company hasn't paid any such charges due to the financial crisis and the majority of these contracts were obtained from contractors directly.

It was agreed that since the company is not able to locate the copy of agreements required by the assessing officer, additional 1 % of profit on the value of back to back contract was offered as income voluntarily over and above the profit margin already admitted. Therefore, as can be seen from the above table, the existing profit margin was 3% and after the above voluntary admission of income it will be 4%. Sir, the additional income was offered in order to buy peace, avoid further litigation with the department and under an impression that penalty proceedings will not be initiated.

In this regard, we hereby submit that the addition of service charges as expenditure out of books is made only on the surmises of Id. assessing officer. The Id. assessing officer has not brought any material evidence on record to support the addition.



Such an addition is against the natural justice and is liable to be deleted.

The above proposition of the appellant is also supported by the judgement of ITAT - Mumbai in case of Asstt. CIT v. Shahzad Lookman Qadir, wherein it was held that "Burden is always on revenue to show that expenditure had been actually incurred. While assessee had given reasonable explanation, AO failed to produce any evidence to show that assessee had actually incurred any expenditure which had not been accounted for. There is no infirmity in Commissioner (Appeals) \ s order in deleting addition" - Annexure 4.

Further, It was specifically claimed that no service charges were paid since the said contracts were obtained from contractors directly. However, the AO assessed 1% of the back to back contracts amounting to Rs. 17,72,075/- on the ground that the service charges must have been paid outside the books of accounts, invoking the provisions of Sec.69 C. We also wish to bring to your notice that any such payment is allowable expenditure under the Income Tax Act and had the appellant incurred such expenditure, it would have claimed it while computing its income. As no such expenditure was incurred, it wasn't claimed in the books. This proposition of the appellant is also supported by the Ahmedabad - ITAT in case of S.F Wadia v. ITO, wherein it was held that "The assessee makes payments from time to time to contractors, vjho submit their bills regarding labour charges, etc. The account is, however, subsequently adjusted from time to time on raising the necessary bills or signing the necessary vouchers, etc., on the basis of which appropriate amounts are credited in the accounts of respective contractors. Neither any evidence was brought on record nor any specific finding was given to show that the amount sought to be added under section 69C was an expenditure only. Even if the impugned amount is assumed to be an expenditure, same will be allowable while computing business income inasmuch as it consisted of payments made by persons under consideration is respect of jobs carried out by them or materials supplied to the assessee. The addition made under section 69C was not, therefore, called for'. - Annexure 5

Without prejudice to the above submissions we would like to further submit that, on perusal of the assessment order, the AO did not mention Sec.69 C of the Act, But in para 4.4 of Assessment order it was mentioned that - "As the assessee agreed 1% of the total sub-contracts taken by the assessee on back to back basis, 1% is treated as service charges paid the expenditure of Rs. 17,72,075/- (1% towards service charges) was



paid by the assessee outside the books of accounts which was treated as unexplained income of the assessee". Hence, the addition was made in the same lines as in u/s.69 C of the Act.

Sir, Here, the observations of the AO in para 4.4 of the assessment order are factually incorrect. The appellant never stated that it paid service charges at 1%. It was only said that as per general practice, service charges were paid between 0.25% to 1% and categorically mentioned that no service charges were paid. However, an amount of 1% was already admitted as additional income. The AO presumed that the appellant paid 1% towards service charges. The AO had not brought in any evidence in the form of any material on record, but solely relied on presumptions and surmises. Further, the AO presumed that the alleged payment of service charges might have been made outside the books of accounts from out of unaccounted for income. It was already held on various judicial platforms that one cannot presume things on a presumed thing.

Further, a perusal of Sec.69 C specifically states that - "where in any financial year, an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year."

The provisions of Sec.69 C are deeming provisions. As was held by judicial forum, while invoking the 'deeming provisions', they must be applied only in a strict - sense, for which they were intended. In order to invoke the provisions of Sec.69 C, there must be a factual finding about the incurring of expenditure and then only the sources and explanation follows. In the appellant's case, the very basis for invoking the provisions of sec.69 C is absent, since the AO's acted on surmises and presumptions, without having any material evidence, to the effect that the expenditure towards 'service charges' was actually incurred. Thus, the addition on this count deserves to be deleted."

6.2. I have considered the above and I find that the action of the AO is justified, as the assessee has agreed before the AO with regard to addition of Rs.17,72,075/- made towards 'Service charges'. However, the AR is contesting before the undersigned, on the addition which was voluntarily accepted before the AO. This

approach of the assessee/AR is not maintainable in view of the ratio laid down in the following case laws.

"

- No appeal lies against agreed additions unless assessee proves coercion or malafide.

Rameshchandra & Co. Vs. CIT (Bom) 158 ITR 375

Ramanlal Kamdar Vs. CIT (Mad) 108 ITR 73

Mahesh B. Shah Vs CIT (Ker) 238 ITR 130

- Authorised Representative having powers of attorney making agreement with Assessing Officer - Binding on assessee.

Jayasree Chit Funds & Services (P) Ltd Vs. CIT (Kar) 127 ITR 740

Tuner Morrison & Co. Ltd. Vs Hungerford Investment Trust Ltd (SC) 85 ITR 607 pp.609 - principle laid down."

4. We have given our thoughtful consideration to Revenue's vehement contentions and find due merit therein. It is admittedly a case wherein the assessee had claimed the impugned sub-contractor works payment to M/s. Euphoria Commerce Pvt. Ltd., followed by TDS deduction thereupon as well. The fact however remains that the said payments have turned out to be bogus in nature as per the CIT(A)'s detailed discussion. It is sufficiently clear that the assessee had merely passed accommodation entry amount without having proved the impugned sub-contracts to have been awarded to the payee herein. We thus quote hon'ble apex court's landmark decision in CIT Vs. Durga Prasad More (1972) [82 ITR 540] (SC) and Sumati Dayal Vs. CIT (1995) [214 ITR 801] (SC) that the evidence filed in income tax proceedings has to be appreciated by removing all blinkers in light of human probabilities.

Coupled with this, it is already an instance of admitted additions as discussed in the CIT(A)'s order. We therefore affirm the learned lower authorities' action under challenge.

5. This assessee's appeal is dismissed in above terms.

Order pronounced in the open court on 21st March, 2022

Sd/-
(A. MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

Hyderabad,
Dated: 21-03-2022

TNMM

Copy to :

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*2.The Deputy Commissioner of Income Tax, Circle-2(3),
Hyderabad.*

3.CIT(Appeals)-2, Hyderabad.

4.Pr.CIT-2, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.